IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S ECI 2014 00146

CARGILL AUSTRALIA LIMITED (ACN 004 684 173) Plaintiff

v

VITERRA MALT PTY LTD (ACN 096 519 658) AND OTHERS Defendants

and

CARGILL, INCORPORATED AND OTHERS Third parties

JUDGE:	Elliott J
WHERE HELD:	Melbourne
DATES OF HEARING:	18-21, 25-28 June, 2-5, 9, 10, 16-19, 23-26, 30, 31 July, 1, 2, 6-9, 13-16, 20-23, 27-30 August, 3-7, 10-14, 19-20, 24-27 September, 1, 8-11, 15, 23, 24 October, 19, 21, 22 November, 4, 6, 12, 20 December 2018; 1, 11, February, 15, 18, 21, 29 March, 2, 5, 23 April, 1-3, 6-9, 20, 21, 27, 31 May, 5, 14, 27 June, 15, 16 July, 5-9, 12-16, 19-21 August, 8, 22 November 2019; 26 March, 16 April 2020; 4 March, 14 April, 6, 11 May, 4 June 2021
DATE OF JUDGMENT:	28 January 2022
CASE MAY BE CITED AS:	Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28)
MEDIUM NEUTRAL CITATION:	[2022] VSC 13

MISLEADING OR DECEPTIVE CONDUCT – Sale of malt business – Whether business engaged in inappropriate operational practices before sale agreement and completion of sale – Laboratory analyses of malt sold – Misreporting results – Company policies – Procedures concealed from customers and auditors – Undisclosed misreporting of barley varieties used in malting – Undisclosed use of gibberellic acid in malt production when prohibited by customers – Whether practices engaged in routinely – Statistical analyses – Whether practices underpinned financial and operational performance – Whether practices standard within malting industry – Whether practices not disclosed to buyer – Blind auction sale process – 2 stage process established to create competitive tension between bidders – Confidentiality deed – Information memorandum – Imposed requirements of phase 1 – Indicative bid – Preferred bidders selected for phase 2 – Management presentation – Due diligence – Information provided in data room – Question and answer process – Whether representations made relating to financial and operational information – Whether misleading – Representations after phase 2 concerning bids from competing prospective buyers – Whether misleading – Whether conduct in trade or commerce within Australia or between Australia and places outside Australia – Increase in bid – Acquisition agreement – Whether representations made in same terms as warranties given – Whether misleading – Further representations made after agreement and before completion – Whether misleading.

MISLEADING OR DECEPTIVE CONDUCT – Causation – Representations calculated to induce entry into contract – Counterfactual based on absence of misleading or deceptive conduct – Whether buyer would have entered into contract – Whether buyer would have increased bid – Whether buyer would have completed sale – Whether buyer deprived of opportunity to obtain properly informed legal advice on right to terminate acquisition agreement – Whether buyer would have terminated.

MISLEADING OR DECEPTIVE CONDUCT – Whether conduct deemed to be conduct of corporation – Conduct on behalf of a corporation – Actual or apparent authority – Scope of authority – Whether certain persons acted on behalf of sellers during sale process – Attribution of knowledge – *Competition and Consumer Act 2010* (Cth), s 139B(2).

MISLEADING OR DECEPTIVE CONDUCT – Engaging in conduct – Refraining from doing an act – Whether intention required where conduct constituted by silence – Conduct engaged in – *Competition and Consumer Act 2010* (Cth), s 4(2).

MISLEADING OR DECEPTIVE CONDUCT – Release given before substantive dealings commenced – Effect of disclaimers – Disclaimers including as to accuracy and reliance – Sophisticated, well-advised commercial parties – Large commercial transaction – Freedom of contract – Consideration of English authorities – Whether terms of contract contrary to public policy – Australian Consumer Law – Deceit.

CONTRACT – Breach of warranties – Contractually agreed deemed knowledge – Reasonable enquiries – Effect of limitation clause – Whether warranties to be read down or qualified – Whether records as warranted – Whether data room documentation as warranted – Whether defaults under material contracts – Whether facts capable of giving rise to a claim – Whether business conducted in the ordinary course in a proper and efficient manner – Whether compliance with laws.

CONTRACT – Clauses limiting liability – Sellers not liable for claims if business sold – Proper construction – Effect of clause on contractual claims for breach of warranty – Effect of clause on claims for misleading conduct and deceit.

DECEIT – Whether corporations knew representations untrue, did not genuinely believe representations true, or reckless as to whether representations true or false – Knowledge of a corporation – Attribution of knowledge – Whether knowledge of individual could be attributed to corporation – Aggregation of knowledge.

DECEIT – Further misrepresentations before completion – Whether corporations knew representations untrue, did not genuinely believe representations true, or reckless as to whether representations true or false – Knowledge of a corporation – Attribution of knowledge – Whether knowledge of individual could be attributed to corporation – Whether knowledge of representations made by person with relevant knowledge – Aggregation of knowledge.

LOSS – Applicable principles – Assessment of loss suffered by misleading or deceptive conduct inducing a transaction – Buyer would not have entered into transaction absent misleading or deceptive conduct – Difference between purchase price and "true value" – "Left in hands" approach – Expert evidence – Hypothetical purchaser – Discounted cash flow – Capitalisation of future maintainable earnings – Reasonableness of assumptions underpinning experts' valuation – Relevance of events after sale completed – Australian Consumer Law, s 236.

LOSS – Whether failure to take reasonable care – *Competition and Consumer Act 2010* (Cth), s 137B – Applicability – Whether failure to mitigate loss – Concurrent wrongdoers – Whether loss apportionable – Whether defendants excluded concurrent wrongdoers – *Competition and Consumer Act 2010* (Cth), ss 87CB(1), 87CC(1) – Applicability.

MISLEADING OR DECEPTIVE CONDUCT – Counterclaim – Third party claim – Whether buyer or buyer's parent company made representations by entering into confidentiality deed – Whether buyer made no reliance representations by entering into acquisition agreement – Whether representations relied on by sellers – Whether misleading – Whether loss suffered – Whether sellers to be indemnified by buyer's parent company pursuant to acquisition agreement.

CONTRACT – Enforceability of confidentiality deed – By whom – Against whom.

CONTRACT – Counterclaim – Third party claim – Confidentiality deed – Whether bringing or instituting proceeding in breach – Whether proceeding caused or permitted by buyer's parent company – Whether buyer's reliance on representations in breach – Proper construction of deed of release – Interaction between deed of release and confidentiality deed – Accrued rights, obligations, claims or liabilities – Effect of liability terms in acquisition agreement – Whether certain clauses void or unenforceable as contrary to public policy – Australian Consumer Law – Deceit.

MISLEADING OR DECEPTIVE CONDUCT – Third party claim by sellers against company the subject of the sale – Whether company engaged in relevant conduct – Third party claim by sellers against employees comprising senior management of business sold – Whether representations made by employees to sellers – Whether conduct in trade or commerce – Warranty verification process – Adequacy – Reliance – Whether if informed of existence of certain matters sellers would have taken steps to prevent or mitigate loss.

CONTRACT – Whether employees breached contractual obligations to act ethically and in best interest of employer – Proper construction – Relevance of code of conduct – Whether senior executive breached contractual obligation to act honestly – Causation – Whether loss suffered.

DECLARATORY RELIEF – Whether relief sought beyond issues raised in the proceeding – Whether ought to be granted.

EVIDENCE – Whether failure to call witnesses – Inferences – Plaintiff's employees – Former and current employees engaged in business sold some of whom also third parties to the proceeding – Customers of business sold – Defendants' employees.

EXPERT EVIDENCE – Laboratory analysis of organic product – Limitations of analytical methods – Variability and uncertainty in laboratory analysis – Error – Whether procedure scientifically justifiable decision rule – Whether procedures for reporting results ought to be transparent.

EXPERT EVIDENCE – Whether certain practices standard in malt industry – Expert's misstatement of expertise – Whether opinions expressed based on specialised knowledge – Whether grounds for opinions properly disclosed – *Evidence Act 2008* (Vic), s 79(1).

PRACTICE AND PROCEDURE – Application for parts of statement of claim to be struck out – Whether interference with due administration of justice – *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 23.02 – *Civil Procedure Act 2010* (Vic), ss 16, 19 – Court's inherent jurisdiction.

APPEARANCES:	Counsel	Solicitors
For the plaintiff and the 1st and 2nd third parties	Mr P Anastassiou QC (until 22 November 2018) Mr P Solomon QC (from 18 March 2019) Ms L Nichols QC (until 22 October 2019) Ms C Button QC (from 18 July 2018 to 11 February 2019) Dr C Parkinson (from 1 May 2019) Ms K Foley (14 June 2019) Ms K Burke Ms H Tiplady (until 14 August 2018) Ms P Thiagarajan (20, 21 August 2018) Mr C Tran (until 11 September 2018) Mr T Barry Mr M Tennant Ms J Whiting (solicitor) (10, 30, 31 July, 7, 14, 28 August 2018) Ms C McCudden (solicitor) (29 August, 20 December 2018, 4 March, 11 May, 4 June 2021)	Gilbert + Tobin
For the defendants	Mr A Myers QC Mr G Nell SC (14, 21, 28 August, 11-13 September 2018) Mr D McLure SC (10, 18 July, 7 August 2018) Mr S Senathirajah QC Mr S Parmenter QC Mr K Wolahan Mr J Carter (14, 21, 28 August, 11-14 September, 23-24 October 2018, 16, 19 August 2019) Ms K O'Gorman (21 August 2018) Mr S Prendergast Ms K Dovey Mr O Wolahan	King & Wood Mallesons (until 12 March 2020) Johnson Winter & Slattery (from 13 March 2020)
For the 3rd third party	Mr J Peters QC Mr S Rosewarne Ms K Styles (solicitor) (4 March, 4 June 2021) Ms G Wilson (solicitor) (14 April, 6, 11 May 2021)	Maddocks
For the 4th third party	Mr M Galvin QC Mr D Bongiorno Ms N Younan (solicitor) (4 March, 14 April, 6, 11 May, 4 June 2021)	Brian Ward & Partners (until 10 July 2017) Ward Lawyers (from 11 July 2017 to 28 February 2019) DWF (Australia) (from 1 March

		2019 to 13 May 2019) Gilchrist Connell (from 14 May 2019)
For the 5th third party	Mr R Attiwill QC Ms M Szydzik Ms N Younan (solicitor) (4 March, 14 April, 6, 11 May, 4 June 2021)	Brian Ward & Partners (until 10 July 2017) Ward Lawyers (from 11 July 2017 to 28 February 2019) DWF (Australia) (from 1 March 2019 to 13 May 2019) Gilchrist Connell (from 14 May 2019)
For the 6th third party	Ms W Harris QC Mr C Archibald QC Mr T Jeffrie Ms K Brandon (solicitor) (4 March, 14 April, 6, 11 May, 4 June 2021)	HWL Ebsworth
For the 7th third party	Mr S Pitt Ms C Alden Ms N Younan (solicitor) (4 March, 14 April, 6, 11 May, 4 June 2021)	Brian Ward & Partners (until 10 July 2017) Ward Lawyers (from 11 July 2017 to 28 February 2019) DWF (Australia) (from 1 March 2019 to 13 May 2019) Gilchrist Connell (from 14 May 2019)

TABLE OF CONTENTS

effects of error and uncertainty including by the application of the subjective experience or expertise of the laboratory professionals conducting the measurements?

(5) Recognising the matters set out in (3) and (4) above, a supplier/producer's process for determining whether or not a product complied with contractual specifications such that it can be released to its customer, can include a set of decision-making rules or policies ("a decision rule")?

(6) Uncertainty in laboratory test measurement can be addressed by the application of subjective experience/expertise of a suitably qualified person?

(7) A decision rule can take into account:

(a) inherent limitations on the precision of testing equipment and testing procedures; and

(b) random effects, including natural variability of the material, by reference to industry accepted objective quantification of the magnitude of such uncertainty?

(8) One such objective quantification accepted within the commercial malting industry and the brewing industry is that derived from continuing (corroborative) programs such as the American Society of Brewing Chemists Laboratory Proficiency Testing Scheme and the Maltsters of Great Britain Malt Analytes Proficiency Testing Scheme to incorporate a tolerance of 2 standard deviations to the measurement of measurands in respect of malt?

(9) The Viterra Certificate of Analysis Procedure is an example of a decision rule?

.....715

X.10 Was it the fact that:

(1) Joe White routinely, and without informing customers:

(a) supplied malt to customers that did not comply with contractual requirements and specifications;

(b) supplied Certificates of Analysis to customers that misstated the results of analytical testing on the malt, so that the Certificates of Analysis reported that the malt complied with contractual requirements and specifications when it did not?

(2) The Viterra Practices were partly recorded in and endorsed by the Viterra Policies (being the Viterra Certificate of Analysis Procedure and the Malt Blend Parameters Procedure)?

(3) Joe White's financial and operational performance for the financial year 2010 to part of the financial year 2013 was substantially underpinned by Joe White's practice of supplying malt to customers pursuant to the Viterra Practices and the Viterra Policies that did not comply with the relevant contracts?

(4) But for the Viterra Practices, Joe White could not produce and sell malt in the volumes and to the specifications required by customers and in the volumes and for the returns reflected in the Financial and Operational Information disclosed in the Information Memorandum and during the

DEFINITIONS[1]

DEFINED TERM[2]	**MEANING**[3]	**PAR (OR FN) DEFINED**[4]
15 October Meeting	Meeting held on 15 October 2013	1102
25 October Reply Letter	Letter from Mattiske to Purser dated 25 October 2013	1405
30 October Reply Letter	Letter from Mattiske to Savona dated 30 October 2013	1524
ABB Grain	ABB Grain Ltd	88
Abbot*	Nicholas Abbot, information technology manager at Cargill	2312
Accumulation and Position Margin	Estimated margin available to Joe White if it undertook all barley procurement functions	526
Acquisition	Acquisition under the Acquisition Agreement completed on 31 October 2013	8
Acquisition Agreement	The acquisition agreement between Viterra Malt, Viterra Operations, and Viterra Ltd as Sellers and Cargill Australia as Buyer and Cargill, Inc as Buyer Guarantor	5
Acquisition Agreement Liability Terms	Clauses of the Acquisition Agreement relied upon by the Viterra Parties on questions of liability	2829
Acquisition Integration Review	Document entitled "[Joe White] Acquisition Integration Review" and dated 30 May 2014	1750
Action	Defined in the Acquisition Agreement	1022
Adelaide Malting	Adelaide Malting Co Pty Ltd	87
Administration System	Joe White's accounting software package, which connected with the Laboratory Information System	260
Allan	Max Allan, senior associate, Mallesons	923
Alleged Industry Practices	Practices the Viterra Parties alleged were engaged in by commercial malthouses throughout the world	1860
Alleged Steps	Steps the Viterra Parties alleged they would have taken if they had known of the Viterra Practices	5128
Allens Letter of Advice	Letter of advice from Clark and O'Donahoo dated 17 October 2013	1170
Approved Purpose	Defined in the Confidentiality Deed	586

1 An asterisk after a person's name indicates that person was a witness at the trial.

2 There were also various defined terms in agreements and other documents referred to in these reasons that are not set out here. Further, there are a small number of defined terms that appear in some headings of the issues for determination that are not included in this table as the issues in question were ultimately not raised for adjudication.

3 With respect to individuals, the parties provided an agreed list of persons and descriptions of their positions.

4 If a term is used before it is defined, on the first occasion this occurs a reference to the definition is given, but not otherwise.

Argent	Scott Argent, seventh third party in the proceeding; financial controller, Viterra Feed New Zealand and Joe White; and controller – processing (Australia and New Zealand), Viterra	51
Argent Representations	Representations alleged to have been made by Argent prior to entry into the Acquisition Agreement	4792
Arndt	Brenda Arndt, senior attorney – mergers and acquisitions, Cargill, Inc	471
Asahi	Sumitomo Corporation Asahi	150
Asia Pacific Breweries	Asia Pacific Breweries Group	150
Assumption	Cargill, Inc's assumption that it was entitled to rely upon the accuracy of the financial and operation performance information of the Joe White Business provided by Glencore or Viterra, or both, in the sale process and the Other Bidders Representations	4692
Aubertin*	Jacques Aubertin, partner of Stibbe law firm, called as expert on Belgian law	2030
AusBulk	AusBulk Ltd	87
Australian Consumer Law	*Competition and Consumer Act 2010* (Cth), Schedule 2	1849
Barley Analysis	Analysis of Barley Data undertaken by Ryan	2317
Barley Data	Data extracted from the Laboratory Information System by Abbot relating to barley varieties used by Joe White	2316
Barley Inventory Call	Telephone call on 23 July 2013 between Argent, Viers, Merrill Lynch, Goldman Sachs and others	925
Beer Thai	Beer Thai 1991 Public Co Ltd	1675
Beer Thip	Beer Thip Brewery 1991 Co Ltd	3635
Bias Correction Standard	A standard requiring bias correction to be made uniformly	2211
Bickmore*	Alicia Bickmore, legal counsel, Viterra Ltd	157
Boon Rawd	Boon Rawd Brewery Co Ltd	789
Bowe*	Patrick Bowe Jr, summer associate, strategy & business development, Cargill, Inc	554
Breszee*	Aimee Breszee, Cargill, Inc's technical accounting director	Fn 494
Buyer	Cargill Australia under the Acquisition Agreement	5
Buyer Guarantor	Cargill, Inc under the Acquisition Agreement	5
Cargill	Cargill Australia and Cargill, Inc	5
Cargill 22 October Letter	Letter from Cargill Australia to Viterra dated 22 October 2013	1236
Cargill 29 October Letter	Letter from Cargill Australia to Mattiske dated 29 October 2013	1451

Cargill Australia	Cargill Australia Ltd, the plaintiff and defendant by counterclaim	5[5]
Cargill Blending and Certificate of Analysis Procedure	Cargill, Inc's combined malt blending and certificate of analysis procedure	302
Cargill Code	Cargill, Inc's code of conduct	56
Cargill Covenant	Covenant in Hughes Letter	1868
Cargill, Inc	Cargill, Incorporated, the first third party	5
Cargill Indicative Bid	7 June 2013 non-binding indicative bid of $330–$360 million to acquire Joe White	622
Cargill Japan	Cargill Japan Ltd	2493
Cargill Malt	Cargill, Inc's malt business unit	297
Cargill Parties	Collectively, Cargill Australia, Cargill, Inc and Joe White	5
Certificates of Analysis	Certificates stating the results of analytical testing accompanying malt	24
Christianson	Joseph Christianson, global merchandising & risk manager, Cargill Malt	563
Chubb	Vern Chubb, property services manager, Viterra	4964
Claim	Defined in the Acquisition Agreement and the Deed of Release (see context for relevant meaning)	1022, 1553
Clark*	(Matthew) Marcus Clark, partner – mergers and acquisitions, Allens	952
Commercial Call	Telephone call on 19 July 2013 between Hughes, Eden, Merrill Lynch, Goldman Sachs and others	910
Commercial Call Statements	Statements made by Glencore and Viterra during the Commercial Call	2165
Common Synergies	Synergies available to all market participants	4165
Competitiveness Representation	Representation to Cargill that there were other bids close to the First Final Bid	3777
Complete	Defined in the Acquisition Agreement	1022
Completion	Defined in the Acquisition Agreement	1022
Completion Date	Defined in the Acquisition Agreement	1022
Confidential Information	Defined in the Confidentiality Deed	586
Confidentiality Deed	Deed of confidentiality between Cargill, Inc and Glencore	459, 462, 585, 1022
Confidentiality Deed Representations	The alleged representations by Cargill to Glencore and Viterra that Cargill would rely solely on its own investigations and analysis and not rely on Confidential Information in evaluating a possible Joe White acquisition	4730
Confidentiality Deed Terms	Various terms contained in the Confidentiality Deed alleged by the Viterra	2187

5 But see also par 1880 below.

	Parties to form part of the Sale Process Disclaimers	
Confidentiality Obligations	The obligations of confidentiality set out in the Hughes/Cargill Agreement in clauses 5 and 6	1890
Conformity Assessment Criteria	The 4 criteria, as set out by Hibbert, outlining best practice when applying a Decision Rule	2227
Control	Defined in the Acquisition Agreement	1022
Conway*	Paul Conway, corporate vice president, Cargill, Inc; and member of Cargill leadership team	300
Co-Operative Bulk	Co-Operative Bulk Handling Pty Ltd	89
Co-Operative Bulk Agreement	The agreement between Joe White and Co-Operative Bulk for grain storage and handling services in Western Australia	89
Coopers	Coopers Brewery Ltd	50
Customer Review Spreadsheet	The spreadsheet detailing Joe White's ability to fully meet all customer requirements prepared by Stewart	1211
Data Books	Financial data books containing historical information concerning the Joe White Business	678
Data Room	Virtual data room created for the sale of the Joe White Business	465
Data Room Documentation	Defined in the Acquisition Agreement	1022
Data Room Protocol	Protocol for access to the Data Room	650
Data Room Protocol Terms	Various terms contained in the Data Room Protocol alleged by the Viterra Parties to form part of the Sale Process Disclaimers	2198
Data Room Statements	Statements identified in the Statement of Claim, to the general effect that Joe White's historical and forecast future operational and financial performance was as set out in the Information Memorandum, and that Joe White's earnings platform was supported by its long-term customer contracts	3577
Decision Rule	A tool used in assessing whether or not a product or material complied with specifications	2208
Deed of Release	Deed of release relating to the Confidentiality Deed	1552
Defence	The Viterra Parties' defence and further amended counterclaim	1850
De Gelder	Ronald de Gelder, trader, Glencore	363
Deloitte	Deloitte Financial Advisory Services LLP	367
De Samblanx*	Steven De Samblanx, head of malt operations manager Europe, Cargill Malt; and Project Hawk team member	302

Deviation Analysis	Further analysis undertaken by Ryan to ascertain the extent to which the adjustments identified in the Parameter Analysis were within or beyond 2 standard deviations of the customer's specification	2360
Dickie	Robert Dickie, marketing manager, Joe White	1210
Discloser	Defined in the Confidentiality Deed (but also defined in the Information Memorandum and the Management Presentation Memorandum)	585 (475, 711)
Disclosure Material	Defined in the Acquisition Agreement	1022
Disputed Issues	Issues raised with Independent Experts	3908
Doderer	Dr Albert Doderer, Heineken's principal scientist	1585
Dom Box Seller	Viterra Ltd under the Acquisition Agreement	1020
Dom Boxes	Defined in the Acquisition Agreement	1022
Due Diligence	Defined in the Acquisition Agreement	1022
Eden*	Doug Eden, president, business unit leader, malt, Cargill, Inc; and Prairie Malt Ltd board member	212
Engle*	Ryan Engle, assistant vice president, strategy & business development, Cargill, Inc; and Project Hawk team member	471
Equal to or Better Bids Representation	Representation that bids had been received equal to or higher than the First Final Bid	3777
Eurachem/International Guide	A document referred to and endorsed by Hibbert, outlining measurement uncertainty practices in the field of chemistry	2226
Eurachem/International Standards	The 4 recommendations endorsed by Hibbert in respect of measurement uncertainty as set out in the Eurachem/International Guide	2226
Evans*	Jonathon Evans, barley trader, Glencore Grain	377
Evers*	Matthew Evers, reliability excellence leader, Cargill, Inc	1611
Existing Deed	Confidentiality Deed as defined in the Deed of Release	1553
Financial and Operational Information	Information regarding Joe White's financial and operations performance for the financial year 2010 to 2013 as disclosed in the Information Memorandum and during the Due Diligence	1851
Financial and Operational Performance Representations	Representations made about the financial and operational performance of Joe White	2826
First Confidentiality Deed Representation	Alleged representation that Cargill, Inc and Cargill Australia would rely solely on their own investigations and analysis in evaluating a possible Joe White acquisition	4730(1)

First Final Bid	Cargill's bid for Joe White of $405 million dated 29 July 2013	976
First Further Bid Call	Phone call between Mahoney and Koenig on 2 August 2013	1004
Fitzgerald	Damian Fitzgerald, director legal (Australia and New Zealand), Viterra and Glencore Grain; secretary, Glencore Grain Holdings Australia Pty Ltd (now Glencore Agriculture Pty Ltd), Glencore Grain Pty Ltd, Viterra Ltd, Viterra Malt, Viterra Operations, former company secretary of Viterra and Joe White	114
Forsythe	Matthew Forsythe, safety, health and environment business partner, processing malt division, Viterra and Joe White	669
French*	Bruce French, witness called as malting industry expert	2748
Further Bid Calls	Collectively, the First Further Bid Call and the Second Further Bid Call	3778
Further Payment	A further payment under the Hughes/Cargill Agreement	1885
Gibberellic Acid Practice	The practice of using gibberellic acid in the production of malt despite it being prohibited by a customer, and not disclosing the fact to the customer	42
Glasenberg	Ivan Glasenberg, Glencore's chief executive officer	766
Glencore	Glencore International AG, the fourth defendant	9
Glencore Agriculture	Glencore Agriculture BV	100
Glencore Grain	Glencore Grain Pty Ltd	97
Gordon	Robert Gordon, president for Southeast Asia and senior vice president, Viterra Ltd; managing director, Viterra Ltd; chief executive officer, Viterra Ltd; and former director, Viterra Ltd and Viterra Operations	108
HABECO	Hanoi Beer Alcohol and Beverage Joint Stock Corporation	1681
Hannon*	Andrew Hannon, country operations manager of storage and handling, Viterra Ltd	125
Hawthorne*	Peter Hawthorne, vice president, corporate strategy & development, Cargill, Inc; and Project Hawk team member	431
Hermus	Ruud Hermus, quality manager, Cargill, Inc	302
Hertrich*	Joseph Hertrich, witness called as an expert brewer	2135
Hibbert*	Professor David Brynn Hibbert, emeritus professor in analytical chemistry called as an expert on analytical chemistry	2201

Hibbert Report	Expert report produced by Hibbert, dated 3 May 2019, and relied upon by the Viterra Parties	2201
Hite	Hite Brewery Co Ltd	1676
Hughes	Gary Hughes, third third party in the proceeding; executive manager, Viterra Malt; and director and executive manager, Joe White; and former director, Viterra Ltd, Viterra Malt, Viterra Operations, Joe White	47
Hughes/Cargill Agreement	The agreement entitled "Separation and Release" between Cargill Australia and Hughes on 25 June 2014	1867
Hughes Letter	Letter sent by Eden, on behalf of Cargill Australia, to Hughes on 9 July 2014	1868
Hughes Representations	Representations alleged to have been made by Hughes prior to entry into the Acquisition Agreement	4792
Hughes/Viterra Contract	The contract of service between Viterra Ltd and Hughes effective from 1 November 2009	188
Independent Expert	Expert appointed to determine Disputed Issues	3908
Independent Expert's Determination	Determination of Disputed Issues	3908
Information	Defined in the Confidentiality Deed	586
Information Memorandum	The document entitled "Joe White Maltings Information Presentation May 2013"	470
Information Memorandum Disclaimers	Disclaimers made by Glencore and Viterra in the Information Memorandum alleged by the Viterra Parties to form part of the Sale Process Disclaimers	2147
Information Memorandum Statements	Statements made by Glencore and Viterra in the Information Memorandum	2146
ISO Standards	Defined in the Acquisition Agreement	1034
Jewison*	Lisa Jewison, business unit controller, malt, Cargill, Inc; and Project Hawk team member	441
Joe White	Joe White Maltings Pty Ltd[6]	4
Joe White Business	The business conducted by Joe White	8
Joe White Executives' Representations	The Hughes Representations, the Youil Representations, the Wicks Representations, the Stewart Representations and the Argent Representations collectively	4792
Jones*	Lucas Jones, production plant & barley manager, Joe White	129
Key Recommendations Memorandum	Memorandum dated 21 October 2013 from Stewart	1210
King*	Ian King, corporate finance director, business analyst, Glencore	109

6 But see also fn 13 below.

Kirin	Kirin Brewery Company Ltd	1224
Klaeijsen	Bram Klaeijsen, regional director, corporate centre, Cargill	710
Klein*	Gordon Klein, 1 of the 2 loss experts called by Cargill Australia	3946
Koenig*	Emery Koenig, chief risk officer and board member, Cargill, Inc; member of the Cargill leadership team	343
Laboratory Information System	Joe White's laboratory information and management system	255
Land Seller	Viterra Operations under the Acquisition Agreement	1020
Last Balance Sheet Date	Defined in the Acquisition Agreement	1022
Law	Defined in the Acquisition Agreement	1022
Le Binh*	Khai Le Binh, project team leader, strategy & business development, Cargill, Inc; and Project Hawk team member	472
Leave Payment	Hughes' entitlement to payment under the Hughes/Cargill Agreement	1885
Liabilities	Defined in the Acquisition Agreement	1022
Liability	Defined in the Acquisition Agreement	1022
Lindner*	Kate Lindner, senior associate, Mallesons	616
Loss	Defined in the Confidentiality Deed and the Acquisition Agreement (see context for relevant meaning)	588, 1022
Lotte	Lotte Chilsung Beverage Co Ltd	1811
MacLennan	David MacLennan, chairman and chief executive officer, Cargill, Inc; member of the Cargill leadership team	963
Mahoney	Chris Mahoney, chief executive officer, Glencore Agriculture, director of agricultural products division, Glencore	100
Malecha	Fran Malecha, Viterra's chief operating officer	142
Mallesons	King & Wood Mallesons	367
Malt Assets	Defined in the Acquisition Agreement	1022
Malt Blend Parameters Procedure	Procedure developed by Joe White in around 2006, updated from time to time and formed part of Viterra's records	90, 227, 229, 249, 277
Malt Cost Reduction Transformation Project	The formalised business plan for the transformation project recorded in the Viterra presentation dated 5 August 2010 and entitled "[Australia New Zealand] Transformation Project – Malt Cost Reduction"	136
Malt Operations Update Presentation	The presentation prepared by Youil and delivered to Van Lierde on or around 22 May 2014	1722

Malt Proficiency Scheme	The malt analysis proficiency testing scheme to assess proficiency of laboratories	175
Management Presentation	Oral presentation delivered on 26 June 2013	708
Management Presentation Memorandum	Written presentation entitled "Joe White Maltings Management Presentation" delivered on 26 June 2013	711
Management Presentation Memorandum Disclaimers	Disclaimers made by Glencore and Viterra in the Management Presentation Memorandum alleged by the Viterra Parties to form part of the Sale Process Disclaimers	2186
Management Presentation Statements	Statements made by Glencore and Viterra during the Management Presentation	2168
Mann	Matthew Mann, general manager of safety, health and the environment, Viterra and Glencore Grain	942
MaPPS	Cargill's malt plant production system	304
Material Contract	Defined in the Acquisition Agreement	1022
Mattiske*	David Mattiske, regional director, Glencore Agriculture; former managing director (Australia and New Zealand), Glencore Grain; and former director, Viterra Ltd, Viterra Malt, Viterra Operations and Joe White	97
Maw	James Maw, head of the grain trading business, Glencore; and managing director, Glencore Agriculture UK Ltd	375
McIntyre*	Laura McIntyre, customer service administrator, Joe White	74
McMeekin	Peter McMeekin, Viterra barley trader	Fn 115
Meredith*	Greg Meredith, 1 of the 2 loss experts called by Cargill Australia	3946
Merrill Lynch	Bank of America Merrill Lynch	103
Moller	Naomi Moller, technical centre chemist, Viterra Ltd (and Joe White)	160
Mostert	Ernest Mostert, chief financial officer, Glencore Agriculture; director, Glencore Grain Holdings Australia Pty Ltd, Glencore Grain, Viterra Ltd, Viterra Malt, Viterra Operations; and former director, Glencore Australia Holdings Pty Ltd and Joe White	363
Necessity Representation	Representation Cargill needed to pay extra $15 million	3777
Nestlé	Nestlé Singapore Pte Ltd	252
No Discretion Standard	Standard involving acceptance and rejection zones with no discretion	2218
Non-Disparagement Obligation	The non-disparagement obligation set out in clause 7 of the Hughes/Cargill Agreement	1895

Norman	Benjamin Norman, director of human resources Australia and New Zealand, Glencore Grain and Viterra	359
October 2013 Responses	Responses to Cargill's queries concerning the Operational Practices	3283
O'Donahoo	Peter O'Donahoo, partner, Allens	1170
Okoroegbe	Chris Okoroegbe, senior lawyer, Cargill, Inc	1170
Operational Practices	Collectively, the Reporting Practice, the Varieties Practice, and the Gibberellic Acid Practice	43
Operations Call	Telephone call on 18 July 2013 between Hughes, Youil, De Samblanx, Merrill Lynch and Goldman Sachs	865
Operations Call Statements	Statements made by Glencore and Viterra during the Operations Call	2149
Operations Spreadsheet	Spreadsheet created by De Samblanx as part of the Due Diligence	771
Oriental Brewery	Oriental Brewery Co Ltd	79
Other Bidders Representations	Collectively, the Equal to or Better Bids Representation, the Competitiveness Representation and the Necessity Representation	3777
Page	Gregory Page, Cargill, Inc chief executive officer and board chairperson	963
Pappas	Nicholas Pappas, partner, Mallesons	369
Parameters Analysis	Analysis of Parameters Data undertaken by Ryan	2317
Parameters Data	Data extracted from the Laboratory Information System by Abbot relating to malt parameters and Certificates of Analysis produced by Joe White	2316
Phase 1	First phase of sale process	464
Phase 1 Process Letter	Letter from Merrill Lynch dated 14 May 2013 and entitled "Joe White – Phase 1 of the Proposed Transaction"	461
Phase 1 Process Letter Statements	Various statements made in the Phase 1 Process Letter alleged by the Viterra Parties to form part of the Sale Process Disclaimers	2196
Phase 2	Second phase of sale process	464
Phase 2 Process Letter	Letter from Merrill Lynch dated 14 June 2013 inviting Cargill, Inc to participate in Phase 2 of the proposed transaction	639
Phase 2 Process Letter Statements	Various statements made in the Phase 2 Process Letter alleged by the Viterra Parties to form part of the Sale Process Disclaimers	2197
Phoenix	Phoenix Beverages Limited	1231
Plus 2 Affected Result	A recorded test result that is outside specification by more than 2 standard	2364

	deviations where the reported test result is within specification	
Potter*	Michael Potter, the loss expert called by the Viterra Parties	3946
Prazak	Miroslav Prazak, plant manager Sydney, Joe White	284
Pre-Completion Representations	Representations made by Glencore and Viterra as a result of the October 2013 Responses	3299
Pre-Execution Statements	Collectively, the Information Memorandum Statements, the Financial and Operational Information, the Management Presentation Statements, the Operations Call Statements and the Commercial Call Statements	2830
Project Hawk	Project name given by Cargill for the Acquisition	341
Pulse	Viterra's internal intranet and information sharing platform	191
Purser*	Philippa Purser, managing director, Cargill Australia	559
Q&A Process[7]	Question and answer process established under the Data Room Protocol; defined also in the Acquisition Agreement	657, 1022
Recipient	Defined in the Confidentiality Deed	585
Records	Defined in the Acquisition Agreement	1022
Records System (known internally as TRIM)	Viterra's total records and information management system	191
Rees	Jason Rees, director of finance (Australia and New Zealand), Viterra Ltd; director, Viterra Operations and Viterra Malt; and corporate controller (Australia and New Zealand), Viterra Ltd; former chief financial officer (Australia and New Zealand), Viterra	359
Refusal of Certain Terms	The Viterra Parties' refusal of certain suggested amendments to drafts of the Acquisition Agreement	979, 989, 992
Render Assistance Obligation	Obligation under the Hughes/Cargill Agreement	1889
Reply	Cargill Australia's reply to the Defence	2187
Reply Letters	The 25 October Reply Letter and the 30 October Reply Letter	1545
Reporting Practice	The practice of reporting results in Certificates of Analysis in accordance with the pencilled results to comply or substantially comply with specifications, without disclosing the process to customers	37

[7] To assist the reader, the use of acronyms has been generally avoided. However, as "Q&A" was referred to in numerous documents, it is convenient to adopt this definition.

Representative	Defined in the Confidentiality Deed and the Acquisition Agreement (see context for relevant meaning)	588, 1022
Roelfs	Maarten Roelfs, business development, finance and trade at Glencore Grain	362
Ross	Karen Ross, director of human resources and transformation, Viterra	157
Ryan*	Liam Ryan, director of KordaMentha Forensic and a non-independent expert witness of the Cargill Parties	2311
SABECO	Saigon Alcohol Beer and Beverage Joint Stock Corporation	1681
SAB Miller	SAB Miller Plc	874
Sagaert*	Sabine Sagaert, general manager Europe, malt, Cargill, Inc	441
Sale Process Disclaimers	Disclaimers given during the sale process by reason of the Phase 1 Process Letter Statements, the Information Memorandum Disclaimers, the Confidentiality Deed Terms, the Phase 2 Process Letter Statements, the Data Room Protocol Terms and the Management Presentation Memorandum Disclaimers	2828
Sapporo	Sapporo Breweries Ltd	150
Savona	Tina Savona, legal counsel, Cargill Australia	1161
Scaife*	Jody Scaife, regional general manager Asia Pacific, Cargill Malt	1041
Second Confidentiality Deed Representation	Alleged representation that Cargill, Inc and Cargill Australia would not rely on Confidential Information in evaluating a possible Joe White acquisition	4730(2)
Second Further Bid Call	Phone call between Mahoney and Koenig on 2 August 2013	1005
Seller	Defined in the Acquisition Agreement	1022
Sellers	Viterra under the Acquisition Agreement	5, 1022
Shares	Defined in the Acquisition Agreement	1022
Share Seller	Viterra Malt	1020
Sheehy	Dr Megan Sheehy, technical service manager, Viterra Ltd and Joe White	160
Sidley	Peter Sidley, barley relationship manager, Glencore Grain	414
Sign-Out Report	Report prepared for recording test results of malt for internal purposes only	36
Statement of Claim	Cargill Australia's fifth further amended statement of claim	1849
Stewart*	Dr Douglas Stewart, sixth third party in the proceeding; and general manager technical, malt, Viterra Ltd and Joe White	50

Stewart Representations	Representations alleged to have been made by Stewart prior to entry into the Acquisition Agreement	4792
Stuart	Mont Stuart, marketing manager, Joe White	252
Tan	Chik Liang Tan, associate, strategy & business development, Cargill Asia Pacific	1103
Teaser	The document entitled "Joe White Maltings Teaser" provided to Cargill, Inc by Merrill Lynch on 1 May 2013	457
Testi*	Julie Testi, quality manager, Joe White	92
Thai Beverages	Thai Beverage Public Company Limited	150
Thai Duyen	Thai Duyen Trading and Transpo	2522
Third Party Claim	Third party statement of claim filed by the Viterra Parties	1850
Third Party Individuals	Executives of Joe White at the time of the Acquisition against whom the Viterra Parties have issued third party claims	46
Tilleman*	Filip Tilleman, partner of Tilleman van Hoogenbemt, called as expert on Belgian law	2014
Tracking Sheet	The spreadsheet entitled "Project Hawk … Due Diligence Tracking Sheet: Questions and Issues (cannot be solved by additional questions)" used for logging Cargill's queries during the Due Diligence	931
Transaction	Defined in the Confidentiality Deed	588
Transaction Documents	Defined in the Acquisition Agreement	1022
Turnbull	Trevor Turnbull, general manager – engineering, Joe White	789
Unadjusted Earnings	Earnings before interest, tax, depreciation and amortisation (unless stated to be earnings before interest and tax only)	492
Undisclosed Matters	Matters that Cargill Australia alleged were not disclosed in the Information Memorandum or during the Due Diligence	1851
Unique Synergies	Synergies available to a specific or only some market participants	4165
Van Lierde*	Frank Van Lierde, executive vice president, Cargill, Inc	300
Varieties Practice	The practice of using barley varieties other than the required barley varieties without disclosing the fact to the customer	39
Viers*	Marc Viers, enterprise risk manager (food ingredient and bio-industrial enterprise), Cargill, Inc; global commercial manager, Cargill Malt; Project Hawk team member; Prairie Malt Ltd board member; and former integration manager, Joe White	332

Vinken*	Steven Vinken, Cargill, Inc's human resources market leader for Belgium and France	2014
Viterra	Collectively, Viterra Malt, Viterra Operations and Viterra Ltd	9
Viterra Certificate of Analysis Procedure	Certificate of Analysis procedure which formed part of Viterra's records	199, 280
Viterra Code	Viterra Inc's code of business conduct	58
Viterra Ltd	Viterra Ltd, the third defendant	5
Viterra Malt	Viterra Malt Pty Ltd, the first defendant	5
Viterra Operations	Viterra Operations Ltd, the second defendant	5
Viterra Parties	Collectively, Viterra Malt, Viterra Operations, Viterra Ltd and Glencore	9
Viterra Policies	The Viterra Certificate of Analysis Procedure and the Malt Blend Parameters Procedure	1851
Viterra Practices	Practices of routinely, and without informing customers, supplying: malt to customers, which was not compliant with contractual requirements and specifications; and Certificates of Analysis to customers that misstated results of analytical testing on malt such that the certificates reported incorrectly that the malt was compliant with contractual requirements and specifications	1851
Walt	Markus Walt, head of business development, Glencore; and former corporate finance team member, Glencore	112
Warranties	Defined in the Acquisition Agreement	1022
Warranty	Defined in the Acquisition Agreement	1022
Warranty Representations	Representations made and forming part of the Warranties (as defined)	3739
Wicks	Robert Wicks, fifth third party in the proceeding; and general manager – commercial, Viterra Malt	49
Wicks Representations	Representations alleged to have been made by Wicks prior to entry into the Acquisition Agreement	4792
Wilson*	Jonathan Wilson, general manager – logistics and commercial relations, Viterra Operations; and manager of barley and oilseeds, Viterra Merchandising	118
Wilson-Smith*	Joshua Wilson-Smith, legal counsel, Viterra Ltd	615
Woodburn	Kim Woodburn, general plant operations lead, grain and oilseeds supply chain Australia	744

Youil	Peter Youil, fourth third party in the proceeding; and general manager operations, malt, Viterra Ltd and Joe White	48
Youil Representations	Representations alleged to have been made by Youil prior to entry into the Acquisition Agreement	4792
Zampin	Cheryl Zampin, client human resource manager, Cargill Australia	1903

HIS HONOUR:

A. Introduction

A.1 A precious stone?

1 A popular song of the early 1990s referred to fields of barley as fields of gold. This case concerned a business producing malt from Australian barley fields. The business was acquired by a well-established malting industry participant. Based on its assessment of the value of the business and its ability to perform, it was anticipated ownership of the business would result in substantial benefits being reaped, including as part of an existing global operation. Indeed, leading up to the purchase of the business, it was referred to prospectively as the crown jewel in a string of pearls.

2 Very broadly, this litigation arose because the business fell short of the purchaser's assessment of its value and capacity. It claimed it was misled in making the assessment that it did. The misleading conduct was denied by the defendants, who alleged that their conduct was not causative of any loss in any event. It has been found they were wrong on both counts.

3 Further, shortly before completing the sale, the defendants were invited to disclose the true state of affairs concerning the business. In response, they chose to take the risk of not providing relevant information, fully appreciating that such an approach may give rise to claims against them. In essence, these reasons address the consequences of that approach.[8]

A.2 The main transaction and the main parties

4 The second third party, Joe White Maltings Pty Ltd ("Joe White"),[9] was founded in Ballarat, Victoria, in 1858. Its operations expanded over time until it became the largest maltster in the Asia-Pacific region. In 2013, Joe White's head office was in Adelaide.

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8 For a more detailed summary, see pars 5332-5342 below.

9 Joe White subsequently became known as Cargill Malt Asia Pacific Pty Ltd.

5 On 4 August 2013, the plaintiff, Cargill Australia Ltd ("Cargill Australia"), agreed to purchase all the shares in Joe White and some additional assets used by Joe White for the sum of $420 million.[10] This was done pursuant to an agreement ("the Acquisition Agreement") between 3 of the defendants, Viterra Malt Pty Ltd ("Viterra Malt"), Viterra Operations Ltd ("Viterra Operations") and Viterra Ltd[11] (as "Sellers"), and Cargill Australia (as "Buyer") and the first third party, Cargill, Incorporated ("Cargill, Inc") (as "Buyer Guarantor").

6 Cargill, Inc is the ultimate holding company of Cargill Australia. It was established in 1865. Cargill, Inc is based in Minneapolis, Minnesota. It is a global supplier of food products. As at 31 August 2012, it had approximately 142,000 employees located in 65 countries.

7 In this judgment, Cargill Australia, Cargill, Inc and Joe White are referred to collectively as "the Cargill Parties". Cargill Australia and Cargill, Inc are referred to collectively as "Cargill".[12]

8 The Acquisition Agreement was completed on 31 October 2013 ("the Acquisition"), and Cargill Australia purchased all the issued shares in Joe White from Viterra Malt, together with assets used by Joe White from Viterra Operations and Viterra Ltd. The following day it took over control of the operations of the malt business ("the Joe White Business").[13]

9 The defendants (collectively, "the Viterra Parties") are related companies. Viterra Malt is wholly owned by Viterra Operations, which is wholly owned by Viterra Ltd

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10 All references to dollar amounts in these reasons by means of the symbol "$" are references to Australian dollars unless expressly indicated otherwise.

11 Viterra Ltd is now known as Viterra Pty Ltd.

12 In some documents as referred to below, "Cargill" is used, and may have a different meaning depending on the context. Further, "Cargill" is used in these reasons where it was unclear as to whether the evidence was referring to Cargill Australia or Cargill, Inc, or both.

13 For the avoidance of doubt, the use of the term "the Joe White Business" encompasses the malt business that was also referred to as "Viterra Malt" while owned by Viterra. Equally, when "Joe White" is used to describe matters related to the Joe White Business (such as Joe White executives or Joe White general manager), the use of "Joe White" encompasses "Viterra Malt" to the extent the evidence reflected both descriptions were applicable (which was almost invariably the position from late 2009 to 31 October 2013).

(collectively, "Viterra" or "the Sellers"). Viterra Ltd is wholly owned by the fourth defendant, Glencore International AG ("Glencore"). Glencore acquired the "Viterra Group", and thereby each of the Sellers and Joe White, on 17 December 2012.[14] Viterra's core business in Australia was the logistics of the storage and handling of grain, including a trading division. Broadly, Viterra in Australia and New Zealand consisted of 4 business units: operations; agriproducts; malt, being the Joe White Business; and "New Zealand". Each business unit had an executive manager and a financial controller.[15]

10 There are many issues for determination. Most of them stem from conduct engaged in before 1 November 2013, in relation to the manner in which the Joe White Business produced and sold malt.

A.3 The production of malt from barley

11 Malt is germinated grain. It is necessary to understand a little about barley and the production of malt to comprehend the nature of some of the key issues in this proceeding.

12 Essentially there are 3 steps to be taken in producing malt: steeping, germination and kilning.[16] Steeping involves introducing moisture to cleaned barley over the period of approximately 1 day to get the hydration up from its natural level (in Australia around 11 percent) to around 40 to 45 percent.[17] This allows the barley to germinate. Germination occurs much as it would naturally, giving rise to a biochemical transformation and allowing enzymes to develop.[18] Kilning introduces heat to stop

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14 To be clear, Glencore holds the shares in Viterra Ltd, which holds the shares in Viterra Operations, which holds the shares in Viterra Malt. Viterra Malt held the shares in Joe White immediately before the Acquisition.

15 Viterra and Joe White shared the same address in Adelaide, though they operated out of separate adjacent buildings.

16 A Cargill document referred more extensively to the steps involved in the following terms: barley origination, receiving, steeping, germination, kilning, blending and shipping. With respect to receiving, this usually involved inspecting and testing the barley, including for levels of protein, moisture, foreign matter, chemical odours and fungal infections.

17 Barley is submerged in water under aeration, air-rested, and then resubmerged.

18 There are 3 types of modifications in this transformation, proteolytical modification (concerned with modification of proteins), cytolytic modification (concerned with the physical modification of the cell

the germination process from continuing. By this process, the malt is dried, further modification of the grain ceases and a stable product is created.[19] By the means of germination and kilning, enzymes are developed and proteins are broken down to the desired levels. These steps may involve constant adjustments according to the natural variations in each batch of barley and the prevailing conditions. During the kilning stage, moisture content is reduced to about 5 percent, resulting in the development of malt flavour and colour. The malt is then cleaned and stored.

13 Purchasers of malt often stipulate that malt supplied have certain characteristics, which may be rigid and mandatory, or have a level of tolerance (depending on the terms of the particular supply contract). The characteristics stipulated, usually referred to as specifications, may refer to various attributes of the malt, and may or may not include the variety or varieties of barley to be used, or whether particular additives are permitted.[20] If required to meet a customer's specifications, the malt is blended with other batches to produce the product as ordered.[21] In order to successfully blend 2 or more batches, the batches must not be too divergent in characteristics, otherwise problems can arise subsequently in the customer's process.

14 Barley is not homogenous, and is subject to variation from year to year and also within the same crop. Further, there are numerous varieties of barley, possessing different qualities and characteristics. For some brewers a particular barley variety or specific blend of barley varieties is important.

15 The approval regime for accreditation of barley as malting barley is overseen by Barley Australia. Barley Australia is an industry body, being an association of member companies. Industry accreditation of new malting varieties may take up to 2 years.

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walls in the grain) and amylolytical modification (which relates to starch). Beyond referring to a model that was tendered setting out the relationship between these modifications and how customer specifications are sought to be achieved, it is unnecessary to go into further detail.

19 Relative to its previous state; malt will deteriorate after an extended period of time. See further pars 21, 34 below.

20 This is discussed in more detail below: see pars 14-24 below.

21 This is usually required, as it is rare that a particular batch will meet a customer's specifications without some blending.

Securing customer specifications for any approved new varieties may take even longer.[22] In contrast to malting barley, feed barley is generally considered less suitable for malt production, and it is usually used to feed livestock. It is ordinarily stored differently by grain traders; in bunkers on the ground covered by tarpaulins instead of the vertical silos used for malting barley. However, feed barley can, of itself, or in combination with malt grade barley, be used to produce malt.[23] Further, feed barley is cheaper than malt grade barley; how much cheaper varies from time to time, depending on market forces.

16 Furthermore, malting barley is classified into grades, from malt 1, being the highest grade, to malt 2 and malt 3. These grades are considered superior to feed grade barley.[24] Each of the malt 1, 2 and 3 grades of barley are approved as being of a quality appropriate for producing malt. When compared with malt 1, producing malt using malt 2 barley usually results in greater processing time and loss of end volume.[25]

17 There are at least 20 varieties of barley grown in Australia,[26] and more elsewhere. With very limited exceptions,[27] barley varieties are specific to location and varieties grown differ between geographical locations. Australian barley varieties are unique to Australia. Common varieties in Australia in 2013 included Gairdner, Buloke and Commander. Further varieties are developed on an ongoing basis, with the varieties grown determined by individual growers. The differing characteristics of barley varieties include growing strengths, harvest volumes, grain size, germination vigour, and protein and enzyme levels. Each barley variety has unique attributes after

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22 Growers may choose to adopt new varieties before or after accreditation, which may affect the supply and prices of older accredited varieties.

23 Indeed, the evidence of Douglas Stewart (see par 50 below) was that around 2.5 million tonnes of feed grade barley was exported from Australia every year to China (the biggest beer producing nation in the world) to make beer. The evidence suggested any barley was capable of producing malt as long as it was "alive".

24 Grain Trade Australia publishes a set of standards that are used as guidelines to determine how a particular load of barley is graded. Grain traders have developed their own classifications and names, which are in addition to the Grain Trade Australia classifications and do not replace them.

25 As a matter of practice, Viterra generally graded barley as malt 1 or malt 2, and if the barley did not achieve those standards it was segregated as feed barley.

26 There was some evidence that, in 2013, there were around a dozen varieties. Some barley varieties had different names depending on which State they were grown in, even though they were the same variety.

27 These related to Europe and North America and were not relevant.

malting. Further, most barley varieties accredited for malting are highly fermentable.

18 This is particularly important for overseas brewers, who generally prefer malt with high enzyme levels and fermentability, because they use rice or maize in the brewing process (both of which have their own starch that needs to be broken down into sugars for fermenting). In contrast, domestic brewers prefer malt from barley with low enzyme levels and fermentability (because they use cane sugar in the brewing process). In any event, the barley variety or blends of barley varieties chosen by a brewer are generally considered important to the brewer.[28] Further, some brewers select barley varieties for reasons not always obvious to the malt supplier, including flavour. That said, there are some brewers who place a higher value on specification compliance than on the precise barley variety used.

19 Parcels of barley are graded according to quality. Grading is undertaken at the time a grower delivers grain. Some barley may be accorded a lower grade while still having desirable performance characteristics. Lower grades attract lower prices. Further, not only will higher grades command higher prices, but premium varieties may also attract higher prices.

20 The terms "off-grade" and "off-spec" are commonly used in the barley industry. Any malt that is not malt 1 is generally referred to as off-grade. The term off-spec may include off-grade barley and the terms are sometimes used interchangeably.[29] However, the terms are not synonyms. Barley may be off-grade but still within specification. Further, barley may be malt 1 (that is, not off-grade), but be out of specification.[30] The terms off-grade or off-spec are not used to refer to feed barley.

21 As for malt, it is an organic substance that is in a constant state of flux. Testing the various characteristics of the same malt at different times, or even different samples

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28 This was 1 of a number of propositions agreed to by the industry experts called to give evidence. Most brewers "test brew" barley varieties prior to adding to a specification for a malt supply contract.

29 In the grain trade, it seems they are often used interchangeably. According to 1 witness, in grain trading both terms are used to describe barley that is not malt 1. But this use of the terms did not reflect how those terms were used by other witnesses.

30 See further par 23 below.

of the same malt at the same time and within the same batch, can produce different test results. When tested, each characteristic or substance the subject of such testing is referred to as an analyte.[31]

22 Purchasers usually require the specifications of the malt supplied to be reported by the producer. In identifying the specifications they require to be met, customers may stipulate a specific figure for a specific result, or may impose their requirements by means of figures which identify the range within which the result must be achieved.

23 The specifications identified by any given customer may be numerous. Specifications may include both analytical parameters and processing details. They may include the type of barley to be used or even the crop year of the barley. However, the evidence suggested that usually a customer's specifications do not include the particular grade of barley to be used.[32] In other words, ordinarily the obligation on Joe White was to meet the specifications regardless of whether malt 1 grade barley was used or some lesser grade. That said, the lower the grade of barley used in producing the malt, the more difficult it may be to achieve the required specifications. Equally, the mere fact that malt 1 barley is used does not ensure the particular specifications in question may be met.

24 The specifications of the malt are recorded on a certificate ("Certificate of Analysis"), which is provided to the customer around the time the malt is supplied. Joe White's customers typically identified specifications for around 15 to 25 parameters.[33] In

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31 Throughout the trial the words analyte and parameter were used interchangeably.

32 But see par 156 below, and the reference to Joe White inaccurately reporting that malt-grade barley was being used.

33 The parameters that Joe White's customers overall required to be reported included the following: moisture; colour; protein (both soluble and total protein); extract percentage (being the percentage of fermentable sugars that are available in the malt); viscosity; diastatic power (being the enzymatic power of the malt reflecting its ability to break down starches into simpler fermentable sugars); wort betaglucan (being enzymes available to break down the cell walls); friability; speed of filtration; fermentability; alpha and beta amylase; clarity; Carlsberg plate (involving using a fluorescent light to review a cross-section of the malt to determine the extent to which enzymes have broken down); free amino nitrogen; assortment of size; dimethyl sulphide; broken and burnt kernels percentage; dust percentage; foreign seeds; hectolitre weight; insects; mould; acrospire length (being the root of the barley, which germinates and increases in length during the malting process); nitrosodimethylamine (which is a carcinogen); pH; saccharification time (being the time it took starch to be converted to simple sugars); and betaglucanase.

addition to some customers having specifications which identified a specific numerical result to be met and others including a range,[34] others still would have schemes for tolerances and compensation for non-compliance with some parameters. That said, many of Joe White's customers took the more strict approach.[35] Further, customers often specified the variety to be used, or more typically several acceptable varieties. Some Joe White customers analysed malt upon its receipt; many did not.[36]

B. The difference between theoretical blend analysis and actual analysis

25 There are different means of testing and reporting the malt delivered. Much was made in this case of the contrast between 2 different approaches adopted.

26 Cargill, Inc and its subsidiaries often, but not always,[37] used a principal method of analysis known as theoretical blend. It was the results from this analysis that were generally reported to Cargill, Inc's customers. Up to 31 October 2013, Joe White tested for the actual results of the malt specifications, as well as using the theoretical blend method.

27 To elaborate, the theoretical blend approach involves analysis of the constituent batches used in the blending of different batches of malt. As each separate batch is produced, it is sampled when transferred to a silo. The representative sample is fully analysed for all analytical specifications.[38] When malt is delivered to a customer from 2 or more batches, the weighted average for the analytical parameters is calculated.

28 By way of simple example, if a delivery consists of a blend of 2 batches of malt in equal amounts, the first with a moisture content of 4.1 and the second with a moisture content of 4.5, the weighted average of the moisture would be 4.3; this would then be reported in the Certificate of Analysis as the moisture content. In other words, what is reported in the Certificate of Analysis is the result of a mathematical calculation

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34 Thereby incorporating tolerance levels, rather than requiring a single specified result.

35 The Cargill Parties tendered 178 customer contracts for export customers for the period from 1 January 2010 to 31 October 2013. Only Thai Beverages made provision in some of its contracts permitting tolerances for specifications.

36 This is discussed in more detail at pars 150-153 below.

37 See par 313 below.

38 But see par 261 below with respect to Joe White's process before 1 November 2013.

from the previous separate analyses, rather than the actual result from a test of the batch as delivered.

29 A theoretical blend may include not only the blend of individual production batches, but also the blending of malt that has already been blended, effectively producing a blend upon a blend.

30 Further, as part of Cargill's theoretical blend process, adjustments could be made to reported results in accordance with any deviation between a customer's laboratory and Cargill's laboratory,[39] but "only in transparency with the customer". If this arrangement was agreed to, then it was a requirement that such adjustments for the relevant parameter or parameters should take place for all theoretical blends made for that particular customer.

31 If there was a single component of a blend to be delivered to a customer where the analytical parameter was unknown, then it could not be used as part of the theoretical blend process.[40]

32 Cargill considered the theoretical blend approach to be satisfactory. A contrary view was expressed by a witness (who was a former Joe White employee) who described it as a very inaccurate approach.[41] Expert evidence was led on the issue of its efficacy.

33 Broadly speaking, the alternative approach to theoretical blend is to test the malt actually produced (sometimes referred to as "wet chemistry") to ascertain the specifications after production, but before delivery to the customer. In adopting this approach, a sample or samples are taken from the malt, analysed in a laboratory promptly and then the results of those tests are available to be recorded on a Certificate of Analysis.[42] This approach is not mutually exclusive of the theoretical

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39 In other words, if the customer indicated it was reporting a different result to Cargill, Cargill might then agree with the customer to adjust its recording of results to accord with the customer's readings.

40 See further pars 302-309 below.

41 But also see par 1587 below.

42 Joe White had laboratories at each of its plants, except Devonport in Tasmania and Cavan in South Australia. In addition, Joe White had a central laboratory in Adelaide, which was also used for research and development as well as more complicated testing. For a more detailed discussion of the testing

blend approach.[43] On the contrary, in seeking to arrive at the correct specifications, a theoretical blend calculation may precede any actual analysis after production.[44]

34 This method is also not without difficulty. The analysis involved testing the malt itself, rather than seeking to identify the specifications based on a mathematical calculation from earlier batches. Therefore it would seem more likely to produce results that would reflect a truer position of the characteristic as represented by the analyte when compared to the results ascertained from the theoretical blend analysis.[45] However, there could be real issues about the analyte's composition when compared with the rest of the batch.[46] Results could differ, depending on the parameter being tested and from where in the malt a sample was taken. Further, taking multiple representative samples did not eradicate the inherent uncertainty in this method as the results of samples may vary.[47] Furthermore, the results may not be static, in the sense that the qualities of the malt could vary with time. Moreover, some parameters were able to be tested with more certainty than others. Naturally, the aim of a reliable testing regime was to establish processes that enabled repeatability and reproducibility of tests. In other words, enabling the same test to be undertaken numerous times, by the same or a different laboratory, and to produce the same result each time.

35 The Viterra Parties' position was that the wet chemistry approach was far superior to the theoretical blend approach. There was evidence that supported this. However, there was also evidence that the theoretical blend approach was better, and that this could be established statistically.[48] For the purpose of determining the issues in this

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process, see pars 257-264 below.

43 A hybrid of the 2 approaches may be used.

44 See further fn 710 below.

45 This observation does not take into account the various levels of reliability in the testing procedures and equipment used at the plants and the laboratories.

46 Stewart gave evidence that a sample of 200 grams, representing a handful, was used for batches as large as 300 tonnes (which would fill 17 shipping containers).

47 Stewart gave evidence of the use of an "auto-sampler" taking small samples from a batch or a shipment on a regular basis. He suggested that this resulted in a combined sample being very representative. However, there remains a level of uncertainty, which Stewart and other witnesses acknowledged.

48 See par 1139 below.

case, it is not necessary to make a finding in this regard.

C. The key allegations and the remaining parties to the proceeding

36 In this case, the impugned conduct included Joe White's manner of reporting the results of analytical testing in Certificates of Analysis provided to its customers. This was done by physically altering the printed results of the analysis by hand on a sign-out report ("Sign-Out Report");[49] a practice known at Joe White, and in the industry more generally, as "pencilling". If pencilling had occurred with respect to a particular batch of malt, the results recorded in the Certificates of Analysis were the pencilled "results", rather than the original test results as recorded on the printed Sign-Out Report.

37 By this conduct, generally speaking, Joe White represented that malt was being supplied in accordance, or substantially in accordance, with all required specifications ("the Reporting Practice").[50] The nature and extent of and the reasons underlying this conduct are matters for determination.

38 The Certificate of Analysis as issued by Joe White was a relatively straightforward document. The top of the document contained Joe White's name, the heading "Certificate of Analysis", the customer name and the estimated time of dispatch. Next, there were a series of items, including the laboratory number with respect to the laboratory that conducted the tests. Under this, there were 2 columns headed "PARAMETER" and "RESULT", with the various parameters listed and the "result" reported with respect to each parameter. Most of the "results" reported were numerical. Underneath the parameters and the reported results additional information was provided, which sometimes, but not always, listed the barley variety or varieties that were said to have been used. There was nothing on the face of the Certificates of Analysis to indicate whether there had been any analysis performed beyond that of the laboratory in producing the test results.

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49 These were not provided to Joe White's customers.

50 Usually Joe White's customers set out the required specifications in their contracts, but sometimes they would also be identified in emails or as a result of discussions. See further par 257 below.

39 Further, with respect to some customers who specified that particular varieties of barley were required to be used in producing the malt, on occasions Joe White represented the required barley varieties had been used when they had not ("the Varieties Practice"). The fact that the Varieties Practice was engaged in from time to time up to 31 October 2013 was not in controversy. Broadly, the issues between the parties were the nature and extent of such conduct; and whether the evidence of such conduct gave rise to misleading or deceptive conduct in the sale of Joe White.

40 In addition, some of Joe White's customers expressly prohibited the use of gibberellic acid in the production of the malt to be supplied to them. Gibberellic acid is a naturally occurring hormone found in barley. Additional gibberellic acid speeds up the process of germination of malt. Its use is common in the Australian malting industry, and it is routinely used either when approved by a customer or when a supply contract is silent on its use. The addition of exogenous gibberellic acid is relatively inexpensive and may reduce total germination time by as much as a day, thereby reducing production and storage costs. Its common use was well-known by Cargill long before it started considering acquiring Joe White.

41 Some brewers prohibit exogenous gibberellic acid in order to be able to market their beer as a natural product. For example, some beers are marketed as being made only with malt, yeast, hops and water with no additives.[51] With respect to Joe White, there was uncontroverted evidence that a number of its customers usually had supply contracts which provided for malt not to include exogenous gibberellic acid.[52]

42 On occasion, contrary to this contractual obligation or instruction, Joe White used gibberellic acid as part of the germination process, to accelerate the malt production time or to assist in purporting to meet specifications, and failed to disclose that fact

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51 For example, in Germany, longstanding laws regulating such beer are referred to as Reinheitsgebot, which translates to "purity order".

52 These customers were Asahi, Asia Pacific Breweries (Heineken), Kirin, SAB Miller and Sapporo: see par 150 below. There were disputed allegations with respect to San Miguel and the Viterra Parties also made submissions with respect to Sapporo despite the uncontroverted evidence: see pars 272, 281-282, 888, 1215, 1224, 1308, 1564, 1689 below.

("the Gibberellic Acid Practice").

43 The Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice, and related conduct, are referred to collectively as "the Operational Practices".[53]

44 Essentially, Cargill Australia claims that if it had known of the existence of the Operational Practices, it would not have entered into the Acquisition Agreement. Further, Cargill Australia claims that when, belatedly in mid October 2013, there was some disclosure of the Operational Practices, if it had learnt of the extent to which Joe White engaged in the Operational Practices, it would have terminated the Acquisition Agreement and would not have completed the Acquisition. Alternatively, claims are made for breach of Warranties[54] contained in the Acquisition Agreement, and by way of deceit. There are some other not insignificant claims.

45 The Viterra Parties, being represented by the same counsel and solicitors, took a united approach to their defence. They did so notwithstanding their different, or potentially different, positions with respect to some of the key events.[55] Broadly speaking, for much of the duration of the proceeding, both before and during the trial, the Viterra Parties did not admit the Operational Practices (despite much of them being documented, including in formal policies and practices). Further, despite extensive evidence referred to during openings and the early stages of the trial, the Viterra Parties expressly refused to concede the Operational Practices had occurred before the Acquisition.[56] Belatedly, the Viterra Parties amended their defence to make

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53 See also par 1852 below.

54 See the definition in par 1022 below.

55 This matter was raised with the Viterra Parties' senior counsel, who informed the court this approach had been taken advisedly. As each of the Sellers were wholly owned by the ultimate holding company, Glencore, the court permitted the Viterra Parties to proceed on this basis.

56 During the course of the trial, on an interlocutory application, 1 of the Viterra Parties' senior counsel conceded the Operational Practices had been engaged in prior to the Acquisition Agreement on a "not insignificant" basis: *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 12)* [2018] VSC 454, [16]. I observed at the time that the adoption of this position on the evidence was quite properly taken: ibid. For completeness, the precise position adopted was: "The core which is common ground at this stage is that the [Operational Practices] were occurring to a not insignificant extent". However, lead senior counsel for the Viterra Parties soon after stated that if such a statement by his fellow senior counsel amounted to a concession, it was withdrawn: *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 15)* [2018] VSC 523, fn 7. After the concession was withdrawn, the following exchange took place with lead senior counsel for the Viterra Parties: "You will recall my comments yesterday about narrowing the issues

certain limited admissions.[57]

46 Further, the Viterra Parties claimed, perhaps somewhat paradoxically, that even if the Operational Practices occurred prior to the Acquisition, Cargill Australia and Cargill, Inc were on notice of their existence. Furthermore, they alleged that any such conduct was the conduct of Joe White and its executives, but not of the Viterra Parties. Consistent with this approach, the Viterra Parties issued third party claims against a number of persons who were executives of Joe White at the time of the Acquisition ("the Third Party Individuals"). The Viterra Parties sought to be indemnified by the Third Party Individuals in the event they were held to be liable to Cargill Australia.

47 The third third party was Gary Hughes ("Hughes"). He worked at Joe White for many years. At the time Glencore purchased Viterra, Hughes held the titles of director and executive manager – malt at Joe White and executive manager for Viterra Malt. He was also a director of each of the Sellers and Joe White, but resigned from those directorships on 17 December 2012; he was reappointed as a director of Joe White on 2 November 2013 and resigned again on 23 June 2014. In addition, while Viterra owned Joe White, and owned some of the assets used by the Joe White Business, Hughes was a member of Viterra's Australian and New Zealand executive. In this position, Hughes was included in the affairs of Viterra beyond those concerned with Joe White.[58] Hughes was described as very hands-on in his managerial approach. He

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and having the real issues to be determined. Some of the cross-examination by you and your other senior counsel … has proceeded on the basis that there were Viterra Practices (as to which see par 1851 below). So I want to emphasise the obligations - and I say this with the greatest of respect of course - under the *Civil Procedure Act* requiring counsel and solicitors to only put before the court the real issues. I understand the extent to which [the Operational Practices were engaged in] is very, very much a live issue. But the existence of, based on the evidence I have heard, I am not going to say anything absolute of course, my mind is still open, but ---". Mr Myers: "Of course, your Honour. If I may say this. I hear what your Honour says. I don't want to debate it. I put it as exactly and carefully as I was constrained to put it and have done so …". After I referred to the documents that were already in evidence, I enquired as to the extent to which the concession was withdrawn, and was told in response that it was "withdrawn wholly" on the basis that: "That's my instruction". However, see pars 1854, 3425 below.

57 See par 1854 below.

58 For example, on 14 May 2010 Hughes was sent an email along with other members of Viterra's Australia and New Zealand executive attaching the April 2010 monthly management report for Australia and New Zealand. That email sent by Viterra's corporate controller invited the recipients to consider and review the report in preparation "for the Executive meeting" the following week. See further par 52 below.

maintained a detailed familiarity with all aspects of the Joe White Business. Following the Acquisition, Hughes was employed by Cargill Australia as regional general manager, Asia Pacific until June 2014.[59]

48 The fourth third party, Peter Youil ("Youil"), was an employee of Joe White at the time of the trial.[60] Youil was the strategic project manager, a position he had held since October 2016. Youil had been an employee of Joe White for over 3 decades, having commenced employment at Joe White in 1988. In 2013, Youil was the general manager operations – malt at Joe White and reported directly to Hughes.

49 The fifth third party, Robert Wicks ("Wicks"), was also a long-term employee. He commenced work at Joe White in 1983. In 2009, Wicks was appointed general manager, commercial, for Viterra Malt. In 2013, Wicks undertook Joe White's procurement of barley, in consultation with Hughes, to whom he reported. He was also in charge of customer sales. Wicks remained employed as the general manager, commercial, at Joe White until late January 2016.

50 The sixth third party, Douglas Stewart ("Stewart"), is a biochemist who has worked in the malting industry since January 2000 and reported to Hughes from that time.[61] As a result of acquisitions of Joe White in 2002 and 2003, Stewart then worked for Joe White. In around March 2010, he was appointed by Viterra Ltd as general manager technical – malt.[62] In that role, Stewart was responsible for the quality of malt produced by Joe White.[63] Although he dealt with customers directly, he did not deal

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59 For further details concerning Hughes, see pars 1870-1878 below.

60 This was the position at the time the trial concluded. There was no evidence as to what has occurred after the further sale of Joe White in more recent times: see par 1845 below.

61 Stewart obtained a PhD in bio-chemistry from the University of Sydney, having already majored in food and environmental science as part of a bachelor of agriculture degree. Stewart has also engaged in post-doctoral research, including regarding the effect of malt quality on brewing performance at Michigan State University and then at the University of Adelaide. He gave evidence that he has expertise to offer others in the barley industry, and that he holds himself out as a technical expert in fields associated with the connection between barley and malt.

62 In this capacity, Stewart was the person most concerned with the execution of procedures relating to Certificates of Analysis that were issued by Joe White up to 31 October 2013.

63 Stewart's primary responsibility was described in his Viterra position description as being: thorough input into the sale process; barley acquisition; every step of the malt manufacturing process and customer relationship management; and overall responsibility to ensure that the quality of malt met the expectations of customers.

with commercial matters. Stewart also reported to Hughes. Stewart remained with Joe White until September 2014. At the time he gave his evidence he was employed by Coopers Brewery Ltd ("Coopers"). Amongst other industry positions, at this time Stewart was chairperson of the Malting and Brewing Industry Barley Technical Committee, which is a subcommittee of the board of Barley Australia.

51 The seventh third party, Scott Argent ("Argent"), at the time of trial was the financial controller of Joe White.[64] Argent commenced employment with Joe White in February 2003 as an accountant. In February 2012, Argent was appointed to the position of controller, processing, for Joe White and Viterra's New Zealand feed business. He reported directly to the finance director of Viterra for Australia and New Zealand (who told Argent the parameters in which he needed to operate), as well as to Hughes.[65]

52 Evidence was led by the Viterra Parties that each of these executives' duties were limited to the functions related to Joe White, and that they had no other function within the business of Viterra or Glencore.[66] However, there were many aspects of the Joe White Business that were run or assisted by Viterra. In addition to all persons involved in conducting the Joe White Business being employees of Viterra,[67] in Viterra's desire to be different and achieve synergies some things were done at a group level. These included use of the same computer and information systems, and the same legal and human relations departments. Further, Viterra owned some land, intellectual property and certain tangible assets used by the Joe White Business. Furthermore, Hughes was on the Australia and New Zealand executive committee and attended regular meetings in that capacity. Although he resigned from his directorships of Viterra on 17 December 2012, he continued on as a member of this executive committee until completion of the Acquisition.[68] Moreover, he was the

64 See fn 60 above.

65 This was the substance of David Mattiske's evidence (see par 97 below), but also see fn 4387 below.

66 This was the position generally, but, as set out below (see esp par 2655), there were some notable exceptions, particularly in relation to the sale of the Joe White Business.

67 The evidence suggested they were all employees of Viterra Ltd: see fn 71 below.

68 Mattiske gave evidence that towards the completion (no date was given), Hughes only attended the meetings to deal with the malt division and the safety section: see further par 359 below.

director of a company in which Viterra was engaged with Cargill in a joint venture in Canada.[69]

53 The Viterra Parties claimed that the Third Party Individuals made certain representations concerning the accuracy of information and certain Warranties provided to Cargill Australia. The Viterra Parties sought to "pass through" any liability to which they might be exposed by reason of the existence of the Operational Practices. The Viterra Parties further alleged that the Third Party Individuals have not acted in the best interest of Viterra or have not acted ethically, contrary to their contracts of service with Viterra Ltd.

54 With respect to the "pass through" approach, the Viterra Parties contended that Glencore acquired Viterra with no intention of retaining Joe White, a subsidiary that it necessarily acquired as part of a larger transaction. It was alleged that Joe White was "passed" to Cargill Australia prior to Glencore having any real involvement in, or understanding of, the business conducted by Joe White. Broadly, the Viterra Parties, therefore, sought to pass through any liability for a number of the claims made by Cargill Australia against them to the Third Party Individuals. The Viterra Parties were substantially unsuccessful in this aspect of the case.

D. Overview of the key parties' stated approach to business conduct

D.1 Cargill

55 Numerous issues in this case concerned allegations and counter-allegations of unethical conduct. Further, extensive evidence was given about the manner in which business was conducted in the malting industry, and why certain approaches were or were not adopted. Accordingly, it is necessary to identify the codes of conduct that were said to underlie the approaches to certain operations and decisions.

56 Cargill, Inc had a code of conduct ("the Cargill Code") which was provided to every Cargill employee. The Cargill Code contained what were referred to as "Cargill's

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69 See further par 345 below.

Guiding Principles", which were as follows:

1 We obey the law.
2 We conduct our business with integrity.
3 We keep accurate and honest records.
4 We honour our business obligations.
5 We treat people with dignity and respect.
6 We protect Cargill's information, assets and interests.
7 We are committed to being a responsible global citizen.

In a 30 page document, each of these 7 principles was further explained, and was the subject of examples as to how they ought to be applied. With respect to the third principle, it was stated that all business records Cargill, Inc created, in whatever form, were required to reflect the true nature of the transactions and events in question. In that regard, the following was stated:

> Never deliberately falsify a record or try to disguise what really happened and avoid exaggeration, colourful language and legal conclusions in your communications.

57 A number of witnesses called by the Cargill Parties gave evidence about the Cargill Code. The evidence was to the effect that it was something that was "drilled into" all employees and had to be strictly adhered to. The Cargill Code was applied without flexibility. Relevantly, the applicability of the Cargill Code meant that Cargill, Inc would not acquire a business unless it could conduct the business successfully in a manner consistent with the Cargill Code. Evidence was given to the effect that this position would prevail no matter how strategically advantageous the proposed purchase might be. Naturally, such a position did not require any business the subject of a proposed purchase to comply with the Cargill Code before it was purchased. Rather, it would need to be able to be conducted profitably in such a manner after purchase if it were to be capable of efficaciously being incorporated into Cargill, Inc's global enterprise.

D.2 Viterra

58 Viterra Inc, the parent company of Viterra Ltd up until December 2012, also had a

code of business conduct ("the Viterra Code"), which was in place from at least 2008. The Viterra Code applied to Viterra and its subsidiaries, including sometime after to Joe White up until the Acquisition.

59 The Viterra Code, as issued on 2 September 2008, and revised on 22 September 2010[70] and again in or around November 2011, required all subsidiaries to conduct their business with integrity in accordance with high ethical standards and in compliance with all applicable laws, rules and regulations. To this end, the Viterra Code provided that employees were to strive to provide a high level of customer-oriented service, including maintaining superior standards of honesty, fairness and integrity in business relationships. Further, the Viterra Code required fostering high standards of ethical conduct among employees, including rejecting any improper or illegal business practices. Furthermore, employees were encouraged to speak out when they observed unethical behaviour or activity.

60 The Viterra Code addressed the provision of products and services. It required all employees to be accurate and truthful in all dealings, including accurately representing the quality, features and availability of Viterra's products and services.

61 With respect to books and records, the Viterra Code required that no director or employee create, or condone the creation of, a false record. Employees were expected to record and report financial and operating information "fully, accurately and honestly". In that regard, it was stated:

> That means no relevant information should be omitted or concealed, and no secret or unrecorded funds or assets should be created for any purpose. Making false or fictitious entries in Viterra Inc's books or records is prohibited.

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70 On 9 July 2010, all Australian and New Zealand Viterra employees were sent an email introducing a "new Global Code of Conduct" which was said to be updated and "now includes all Viterra employees". The email's attachments were entitled "Global Code of Business Conduct – June 2010" and "Disclosure Policy – June 2010 FINAL". An email sent to all staff in November 2011 confirmed the Viterra Code had been updated again, and continued to form part of the mandatory online training. It further stated that an online version of the annual certification form had been created and would be automatically assigned to all new employees. In addition, existing employees were required to complete the form by 15 January 2012, except for operations employees who had until February 2012 "due to Harvest constraints".

62 A form was annexed to, and formed part of, the Viterra Code. All new employees were required to complete this form at the time their employment commenced. Further, the form was required to be completed annually by, amongst others, all Joe White employees during their performance review.[71]

63 The form required each employee to state that she or he had read and understood the Viterra Code. In addition, a Joe White employee was required to acknowledge:

> I do not know of any unreported violations or possible violations of the [Viterra] Code. I agree to abide by the [Viterra] Code in my dealings with or on behalf of Viterra, and agree to disclose any violations or possible violations of the [Viterra] Code as soon as I become aware of them.

64 The introduction of this regime to Joe White's employees gave rise to resistance in light of the Operational Practices. In short, some disquiet was expressed about the tension between what was stated in the form and the manner in which Joe White was conducting its business.[72] Despite this, the practice of requiring the form to be signed was implemented on an ongoing basis.[73]

D.3 Glencore

65 Glencore had its own ethical code of conduct. The document containing it was tendered, but it was otherwise not the subject of evidence.

E. Joe White before September 2009

E.1 Operations and reporting

66 In order to conduct the Joe White Business of producing malt, Joe White was required

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71 In these reasons, a reference to "Joe White employees" is a reference to Viterra employees up to 31 October 2013 who were employees specifically engaged in the Joe White Business. Although the evidence was not entirely clear, it appeared all such employees were, in fact, Viterra Ltd employees from around September 2009 until 31 October 2013 and Cargill Australia employees thereafter (until more recently). Cargill was informed by the Viterra Parties on 9 July 2013 that all staff within Joe White were employed by Viterra Ltd, and that had been the position since July 2009.

72 See further par 156 below.

73 As late as 28 May 2013, all employees were emailed by Viterra's legal department, stipulating that the Viterra Code form was required to be signed by each of them by 28 June 2013. The email expressly noted each employee was required to acknowledge that she or he had no knowledge of any unreported violations or suspected violations of the Viterra Code. The email was sent by Damian Fitzgerald as "Director Legal": see par 114 below. This email followed immediately after the Viterra Code had been reissued on 27 May 2013.

to engage in various steps. These included acquiring different varieties and grades of barley, segregating and storing barley, operating plants that could perform the malting process, blending batches of malt, laboratory testing samples of barley and malt at numerous stages during the process, and then delivering malt to its customers.

67 To perform the testing and technical aspects of the Joe White Business, a chief chemist, a technical centre chemist, a research and development chemist, a quality assurance and business improvement manager and a customer services administrator were employed. Each of these roles was performed under the supervision and coordination of Stewart. In addition, Hughes, Wicks and Youil had scientific training and experience in the technical production aspects of the Joe White Business.

68 In Australia, barley crops are usually planted in May or June, and harvested around November or December. Joe White's production operated on the basis of "harvest years" for the 12 months from April. In the northern hemisphere, barley is generally harvested in August. European suppliers may compete with Australia, and may affect the timing of Australian supply contracts, as well as pricing. Accordingly, Australian malt supply contracts to international customers are often struck in around August.[74] Ordinarily, barley procurement contracts would then follow.

69 Malting barley is stored in silos or stacks for up to 15 months. As time passes, its vigour peaks then reduces. Grain from each new harvest was delivered to Joe White around March each year, and then was supplemented as the barley was used. If Joe White was required to use external storage facilities,[75] the barley was delivered to its plants as required. Naturally, in these circumstances operating costs were increased.

70 After malt was produced, it could also be stored awaiting blending. Malt is usable for around 2 years, but Joe White would only store malt for shorter periods of time.

71 Historically, Joe White's storage facilities were generally adequate for both barley and

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74 Contracts to supply malt were usually for a year or longer. Ordinarily, they would provide for a total volume of malt which would be shipped over the duration of the contract.

75 Grain storage facilities are predominantly owned by large grain trading companies, including Glencore (and formerly Viterra).

malt at most of its plant sites. However, some sites did not have substantial storage. Sydney, which was constructed in 2012, and Cavan operated on a just-in-time production basis because of this. Further, Port Adelaide's malt storage became strained at times because the plant did not have good process control, which resulted in a need for greater segregation of batches.

72 In a poor harvest year, when there were lower volumes of malt 1 barley, storage providers tended to open segregations for malt 2 barley, and, more rarely, malt 3 barley, which was also referred to as "malt industrial" barley. These inferior grades were "discreetly" captured into the barley production process without being relegated into feed.

73 Precisely when Joe White first engaged in pencilling or other conduct forming part of the Operational Practices was not clear on the evidence. Stewart said at the time he commenced working with Hughes, he was informed by Hughes that it was necessary to engage in pencilling for Joe White to operate in the malting industry. In around 2000, when producing some of his first malt shipments that could not be brought within the customer's specifications, Hughes told Stewart that it was difficult to get malt perfectly within specification. Hughes said it was acceptable to despatch the out-of-specification malt because the malt would be suitable for the customer. Hughes also said to do so was common practice in the malting industry.[76]

74 Laura McIntyre ("McIntyre"), from the technical department of Joe White,[77] deposed that pencilling was in place when she commenced her employment at Joe White in 2005 and, although the practice was not formally recorded, it was standard practice. Her evidence was that actual results of the analysis of both the blended and the packed

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76 Stewart gave evidence that he was troubled by this approach after spending years in academic research. He said he came to learn from working with others that "this was how it worked in the industry". (This evidence was admitted on the limited basis that it reflected Stewart's state of mind, pursuant to s 136 of the *Evidence Act 2008* (Vic).)

77 McIntyre commenced working at Joe White in 2005, when she was 23 years old. She had completed high school, but had no tertiary qualifications when first employed at Joe White. She obtained a diploma of business with Technical and Further Education in South Australia in 2011, but never obtained any qualifications as a maltster. Her employment with Joe White ceased on 30 June 2018. She was employed in the technical department as a laboratory information management system administrator. See further pars 255-260 below.

malt frequently differed from customers' specifications.

75 As the person generally responsible for the preparation of Certificates of Analysis, McIntyre changed results for most Certificates of Analysis as almost every Sign-Out Report was the subject of amendment. The Sign-Out Report recorded the original result and the changes, but was for internal use only and was not shown to customers.[78]

76 McIntyre was originally informed when she started at Joe White that it was part of her role to ensure that all of the reported results in Certificates of Analysis were within customer specifications. McIntyre explained that she would sit down with hard copies of the Sign-Out Reports and go through them line by line. McIntyre said that if any results were out of specification "we" would strike through them and mark them within specification. She further said that if any of the things that had been changed affected other parameters "we" would ensure that the calculations were correct as some parameters interlinked with others.[79] McIntyre gave evidence that, generally, if results were within specification, no pencilling would occur. However, she said that there were not many Certificates of Analysis that fell into this category. That said, McIntyre was unable to state or even estimate how often the pencilling would only involve 1 or 2 parameters, or a greater number of parameters.

77 McIntyre further explained that when pencilling results to bring them within specification, the alterations were usually towards the outer limits of a customer's specification or at a value close enough to the specification that it would pass as legitimate. Sometimes pencilling was engaged in even if the result was within specification. Some customers had targets which were higher than the specifications and alterations were made to make the result look closer to the target than what it was.[80] Her evidence was that "we" did not usually amend the results to be right on

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78 For further details on Sign-Out Reports, see par 2248(1) below.

79 In her witness statement, McIntyre used "we" to identify the staff at the technical centre who were performing the pencilling. McIntyre was unable to quantify how many Certificates of Analysis she saw the other members of the technical centre change.

80 This was also explained on the basis that it was done, for example, to more likely accord with what the customer tests would result in or to match a pre-shipment Certificate of Analysis if 1 had been sent.

the specification as such reporting would look suspicious. Some results were the product of calculations from other test results. Therefore, if an alteration was made to these results, the results for other parameters would also have to be changed so the calculated result was consistent with the other relevant reported results.

78 Paradoxically, sometimes the pencilling occurred to make the results worse than they actually were. McIntyre's evidence was that this was done so as to not heighten expectations that Joe White could consistently achieve the results in question. In addition, McIntyre attested that she inserted "results" when, in fact, there had been no testing for the particular parameter. McIntyre said this happened frequently and that the results reported were fabricated, but not with respect to key parameters.

79 Examples of pencilled Sign-Out Reports were tendered. It is unnecessary to go through them. To illustrate the extent to which pencilling occurred on occasion, reference to a Sign-Out Report in February 2013 to Oriental Brewery Co Ltd ("Oriental Brewery") will suffice. That Sign-Out Report showed pencilled changes to 22 of the 36 parameters tested. McIntyre made these changes herself in order to achieve consistency with a pre-shipment report that had already been forwarded to the customer. Once amended, a hard copy of the pencilled Sign-Out Report was given to Stewart for his approval.

80 Stewart also had a role in dealing with any fallout from the quality of malt delivered. McIntyre was the person initially responsible for dealing with customers' technical complaints.[81] However, Stewart took responsibility for responding to more complex complaints that it was thought might expose the procedures in place. There was a considerable volume of correspondence between Stewart and Joe White's customers, examples of which were tendered. In that correspondence Stewart referred to things such as typical variations, analytical and laboratory variations, results being at the bottom or top end of a specification and the focus on seeking to provide malt that allowed the breweries to meet their specifications for the beer they produced.

[81] As already noted, McIntyre had no technical qualifications or training in relation to the production of malt.

However, no mention was made of pencilling.[82]

81 On occasion when Stewart was not available, McIntyre or another member of the technical centre was given authority to proceed without Stewart signing off on the Certificate of Analysis. Ordinarily, 60 to 80 Sign-Out Reports would be generated in a month, but some months more than 100 were created. When it was suggested to McIntyre that on average 110 Sign-Out Reports were issued a month between January 2010 and October 2013 she could not be certain but she did not take issue with it.

82 Also with respect to altered Certificates of Analysis, McIntyre gave evidence that, before the generation of Certificates of Analysis was formalised,[83] at times "we" inserted the names of barley varieties used in the malt production by specifying the variety stated in the customer's contract regardless of whether or not that was the variety used to create the malt.[84] Her evidence was that a lot of the time the plant and production managers would not report the barley variety used and the name of the barley variety or varieties requested in the customer's contract would simply be inserted. But even if the relevant information was provided, it was "standard practice" to record whatever was in the customer's contract.

83 Finally on the issue of altering Certificates of Analysis, McIntyre swore that the practices referred to above continued after the formalisation of procedures for the generation of Certificates of Analysis at Joe White.

84 Under cross-examination, McIntyre agreed with the proposition that she changed Certificates of Analysis because she understood that the changes were made because of certain factors, including differences in analytical accuracy of, or variability as between, Joe White test results and customer test results. She also agreed with the proposition that, when she changed results, she considered there were legitimate

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82 In the Viterra Parties' closing submissions, they focused on McIntyre's evidence having only referred to 8 individual enquiries from customers (that is, if a particular customer was excluded from the spreadsheets), over a period from April 2010 to August 2013.

83 See par 199 below.

84 McIntyre obtained a certificate pursuant to s 128 of the *Evidence Act* with respect to her evidence that related to the Operational Practices. Some other witnesses did likewise: see pars 178-180 below.

reasons for doing so. It was not immediately apparent how McIntyre's agreement with these propositions sat comfortably with the position she adopted in 2010 when she took some exception to having to sign the Viterra Code if the practices referred to above were to continue.[85]

85 Further, McIntyre's witness statement contained the following:

> The standard response for dealing with complaints regarding inaccurate Certificates of Analysis was to put discrepancies down to analytical variation, acceptable variation or an unrepresentative sample. In some cases apparent inaccuracies in Certificates of Analysis may have been legitimately attributable to those factors, but those reasons were given regardless of whether they in fact applied to the particular case.

When taken to this passage in cross-examination, McIntyre agreed that "often apparent inaccuracies" were legitimately attributable to the factors she identified in the passage. McIntyre further referred to other reasons given to customers,[86] which she said were frequently legitimate reasons for variation.

86 Also when dealing with complaints, sometimes Joe White customers would be told that Joe White would re-analyse the malt batch. McIntyre explained that on some occasions this would occur and re-analysed results would be produced. However, on other occasions no re-analysis would take place, but the customer was told different results which were simply the subject of pencilling.

E.2 Ownership changes and other arrangements

87 Joe White has been the subject of a number of mergers and acquisitions. A company engaged in grain marketing and trading, AusBulk Ltd ("AusBulk"), acquired Joe White in 2003. AusBulk had previously acquired Adelaide Malting Co Pty Ltd ("Adelaide Malting") in 2002. These malting businesses were amalgamated, and

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85 See par 160 below. Further, under cross-examination, when it was put to McIntyre that the Malt Proficiency Scheme (see par 175 below) provided a scientific rationale for what was occurring, McIntyre appeared very uncomfortable in giving her answers and although she accepted some scientific rationale existed, she said she did not necessarily agree with the fact that Joe White should be applying the Malt Proficiency Scheme altogether to change the results.

86 For example, that the customer received a "small sample that was not necessarily representative of the whole shipment".

conducted by Joe White from that time.

88 In September 2004, an Australian company, ABB Grain Ltd ("ABB Grain"), purchased AusBulk and its subsidiaries, including Joe White. Up until 24 September 2009, ABB Grain was a listed public company.[87]

89 On 2 May 2005, Joe White entered into an agreement with Co-Operative Bulk Handling Pty Ltd ("Co-Operative Bulk"), a grain collective in Western Australia, for the provision of grain storage and handling in Western Australia ("the Co-Operative Bulk Agreement"). During the trial, there was an issue as to whether the Co-Operative Bulk Agreement remained on foot leading up to, and at the time of, the Acquisition Agreement being executed.[88]

90 In either 2005 or 2006,[89] a document was created within Joe White concerning malt blending procedure. The document created at this time was not in evidence. The evidence before the court from a number of witnesses suggested that the form of procedure created was substantially the same as subsequent versions (together "the Malt Blend Parameters Procedure").[90] The Malt Blend Parameters Procedure established an approved guideline to proceed with the supply of malt outside customer specifications. It was reviewed 2 or 3 times a year by Stewart, in consultation with others at Joe White, based on information obtained from customers. Hughes instructed that the Malt Blend Parameters Procedure be stored separately from Joe White's quality procedure manuals and that it not be accessible by the International Organisation for Standardisation auditors or the auditors of Joe White's customers.

91 The Malt Blend Parameters Procedure was not exhaustive in setting out the procedure

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87 For clarity, ABB Grain changed its name to Viterra Ltd on 12 February 2010, but it is convenient to define ABB Grain separately to signify the company's existence before being acquired in September 2009: see par 121 below.

88 During closing submissions, Cargill Australia abandoned a claim for damages arising from this issue, however the Co-Operative Bulk Agreement remains relevant to some other matters that require determination.

89 Stewart suggested 2005 as the relevant year. The Viterra records note the date of issue as 11 December 2006: see fn 235 below.

90 See further pars 228-249, 277-278 below.

for malt production and customer specifications. In short, it said nothing about pencilling or the suitability or otherwise of altering Sign-Out Reports or Certificates of Analysis.

92 Regular meetings were held, generally on a quarterly or half yearly basis, to discuss customers' parameters. Ordinarily, these meetings were attended by McIntyre, Julie Testi ("Testi"),[91] formerly Joe White's national quality systems coordinator, Wicks and Stewart, and occasionally by Hughes and Youil. No minutes were ever kept of these meetings.

93 Stewart gave evidence that, up until Viterra's acquisition of it, Joe White generally used malt 1 barley in the production of malt. The times when lower grades were used were largely as a reaction to exceptional circumstances, such as droughts or floods, which resulted in insufficient malt 1 barley being available.

94 Domestically, Joe White was Viterra's biggest purchaser of barley. Joe White purchased hundreds of thousands of tonnes of barley per annum. Further, every year, prior to the Australian harvest, Stewart sent Wicks and Viterra grain traders details of the barley varieties required to meet Joe White's supply contracts.

95 For example, on 9 September 2008, Stewart emailed Joe White's barley requirements for the 2009/2010 year to Wicks, copied to Hughes and others including a Viterra grain trader, and asked for regular updates on the purchases of the listed varieties. Each year, Stewart personally met with brewers so he could properly understand and agree upon what malt Joe White could supply. During these visits, Stewart was informed of brewers' technical needs, and would occasionally negotiate variations or tolerances

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91 Testi holds a bachelor of applied science in chemistry and microbiology from the University of South Australia. Having spent approximately 9 years working in the wine industry, she commenced at Joe White in May 2009 as a plant chemist at the Port Adelaide plant. In September 2010, she was appointed to the position of national quality systems coordinator. In February 2013, she was made business improvement manager and no longer had direct responsibility for food safety and quality at the Port Adelaide and Cavan plants. In this role she managed food safety and quality for all Joe White's plants nationally. She continued at Joe White after 1 November 2013. In February 2018, Cargill appointed her to the position of global food safety quality and regulatory adviser, which required her to manage this area for Cargill's 4 regions, namely, North America, South America, Asia Pacific and Europe.

with respect to customer specifications. Stewart's evidence was that usually Joe White did not receive all barley varieties listed so that, over time, his specified requirements became known as a "wish list".[92] Ultimately, it was Viterra that made the decision as to what barley varieties would be delivered to Joe White, though Joe White was not confined to purchasing all of its barley from Viterra.[93]

F. Some key persons of the Viterra Parties

96 It is convenient to introduce some persons at this point.

97 David Mattiske ("Mattiske") wore several hats. Relevantly, he was managing director of Glencore Grain Pty Ltd ("Glencore Grain"), a subsidiary of Glencore,[94] for Australia and New Zealand from August 2010 to August 2014. He was appointed a director of Viterra Malt, Viterra Operations, Viterra Ltd and Joe White on 17 December 2012. He ceased his directorship with Joe White on 31 October 2013, being the date of the Acquisition. He continued as a director of the other 3 companies until 2014.

98 Mattiske gave evidence that, upon becoming a director of Viterra Malt and Joe White, Hughes was required to report directly to him. He said nothing changed in relation to the operation of these companies, and that he fulfilled his duties as a director by relying on Hughes. Mattiske's evidence was that Hughes reported that Joe White's customers were happy, that he had a good relationship with them, and that Joe White had an excellent reputation.

99 Hughes worked independently and did not receive any instructions from Mattiske. Mattiske believed Hughes had the ability to run the Joe White Business autonomously. As a result, Mattiske only spent a small amount of his time attending to Joe White's affairs. Mattiske accepted that, in his role as a director, it was his responsibility to be

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92 This position was confirmed by a witness called on behalf of the Viterra Parties (see par 118 below), who gave evidence that a list dated 2 November 2011 stating "Barley Variety Requirements 2011/2012" was a wish list of what he considered Joe White "desired", but was "not necessarily what they need[ed]". Another witness referred to it as Stewart's "shopping list".

93 After Viterra acquired Joe White, an arrangement was in place whereby Joe White was required to report to Viterra if it purchased more than 5,000 tonnes of barley from another supplier. But also see fn 287 below. There was also further evidence about how Joe White and Viterra interacted with respect to barley trading before 2013, but it is unnecessary to go into the detail.

94 Glencore Grain became known as Glencore Agriculture Pty Ltd.

informed of any routine practice of supplying malt in breach of customers' contracts. Further, Mattiske considered that Hughes was required to report to him any material issues within the Viterra Malt division.

100 In August 2014, Mattiske was appointed regional director of Glencore Agriculture BV ("Glencore Agriculture") for all regions other than North and South America, a role held at the time he gave evidence. He reported to Chris Mahoney ("Mahoney"), Glencore Agriculture's chief executive officer.[95] Glencore Agriculture is owned as to 50 percent by Glencore plc.[96] Glencore Agriculture has its own management and, as at September 2018, earned profits in the range of 5 percent or less of Glencore's total profitability. Glencore Agriculture operates in approximately 35 countries.

101 Before being employed by Glencore Grain, Mattiske's background was in accounting and finance, including in grain marketing and trading. After spending approximately 3 years at an accounting firm in its audit division,[97] Mattiske was employed by AusBulk from January 2002 as its financial controller. He was not involved in AusBulk's acquisition of Adelaide Malting or Joe White. Upon ABB Grain's acquisition of AusBulk in September 2004, Mattiske was the financial manager for the trading division of ABB Grain, based in Adelaide.[98]

102 In January 2006, Mattiske was appointed chief financial officer of Glencore Grain, a position he held until his elevation to managing director in August 2010. From Mattiske's time at Glencore Grain up until Glencore's acquisition of Viterra, he had limited experience with malting barley. In 2006, Glencore Grain's core business was wheat, feed barley and canola. Glencore Grain also supplied malting barley to 1 domestic customer and, from around 2008, in small amounts to Asian customers. Mattiske's experience was that new varieties of barley were introduced every year or 2. Further, he was aware Glencore Grain supplied a variety of barley known as

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95 Mahoney offered Mattiske the position of regional director in early 2014.

96 The other shareholders are Canadian Pension Plan Investment Management Corporation and British Columbia Investment Management Corporation.

97 Mattiske has a bachelor of commerce degree, and became a chartered accountant in 2000.

98 This division did not trade in barley.

Hindmarsh to maltsters. Thus, he assumed Hindmarsh was a malting barley.[99] In none of Mattiske's roles did he have any involvement with malting barley contracts or contracts with maltsters.

103 Mattiske started working on the acquisition of Viterra in early 2010. Those working on the transaction were largely based in Switzerland and the Netherlands. As managing director of Glencore Grain's Australian operations, Mattiske had primary responsibility for the part of the transaction concerned with Australia and New Zealand. Bank of America Merrill Lynch ("Merrill Lynch") was retained by Glencore as its investment adviser.[100]

104 As part of his role in this acquisition, Mattiske was involved in valuing Viterra's business in Australia and New Zealand, and assisting in the negotiation of the proposed back-to-back sale of some of the businesses to be acquired. He was also partly responsible for considering what parts of the Australia and New Zealand operations should or could be sold following completion of the acquisition.

105 About 2 or 3 days before Glencore's final bid was accepted, Mattiske was given access to the data room created for that transaction. Mattiske said his access was particularly limited, and more confined than others at Glencore because Viterra did not want to disclose commercially confidential information to a competitor's managing director. Although Mattiske did not go into any detail, he said that he did not believe he saw anything which changed his views about acquiring Viterra Inc.

106 From the time Mattiske started looking at Viterra's operations in Australia and New Zealand, he thought Joe White should be sold. The information available to him suggested Joe White appeared to be a straightforward business. In Mattiske's view, malting did not fit well with Glencore Grain's operations and he expressed this view to others at Glencore. Accordingly, there were no steps taken to restructure or integrate the Joe White Business into Glencore's grain business as was done with other

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99 In fact, Hindmarsh was not a variety of barley approved for malting: see further par 126 below.

100 Merrill Lynch was engaged for approximately $7 million to coordinate the sale process.

parts of Viterra's business in Australia and New Zealand.

107 Mattiske was a key witness for the Viterra Parties.

108 Robert Gordon ("Gordon") was previously the managing director and chief executive officer of Viterra Ltd. He was a director of both Viterra Ltd and Viterra Operations from 1 March 2010 to 8 November 2011.[101] Gordon was responsible for the management of Viterra's operations in Southeast Asia, including Joe White. Hughes reported to Gordon. Mattiske had never spoken to him.

109 Ian King ("King") was called to give evidence by the Viterra Parties. King was employed by Glencore as a business analyst from September 2011 to December 2016.[102] King's primary role was to assist in evaluating and implementing corporate transactions.

110 King described himself as a fastidious and meticulous individual, who, when involved in a transaction, took detailed notes of meetings and calls.[103] King considered himself an expert in mergers and acquisitions. He said, with his background as an investment banker, he was very familiar with how to run a sale process to maximise competitive tension, and considered it part of his role to do so. He also saw it as part of his role to challenge assumptions behind financial projections provided by management "in order to ensure" the financial projections would adequately withstand a potential buyer's scrutiny. He acknowledged that the financial model was the "foundation or the cornerstone … [o]f the rest of the transaction".

111 In 2013, King understood the difference between malting barley and feed barley.

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101 Gordon's replacement, Karl Gerrand, did not feature in the evidence at trial in any significant manner.

102 Before this, King worked for an independent investment bank in London for approximately 3 years, having worked the previous 3 years at Deutsche Bank AG, London. He holds a bachelor's degree in economics. At the time of giving his evidence, he held the position of transaction execution lead for Anglo American plc.

103 When King left Glencore, he did not take his notes. He had no knowledge of their whereabouts, and could not say whether they were shredded. He proffered the opinion that they were probably left in his files, but he clearly did not know. The notes were not discovered.

However, before the sale of Joe White, King had had no experience in the malting industry.[104] Further, this was his first experience as "the client" seller, rather than as the adviser. Furthermore, he had had no previous experience as an adviser where a client involved in a sale did not already have an understanding of the business being sold.

112 Throughout his time at Glencore, King's direct supervisor was the head of corporate development, Markus Walt ("Walt"), and King only reported to him. Walt was also involved in Glencore's sale of the Joe White Business.

113 King communicated with various persons in order to put together the sale information, including speaking with Mattiske approximately twice a week during the sale process.

114 Damian Fitzgerald ("Fitzgerald") is a lawyer who held numerous positions within Viterra. Fitzgerald was appointed secretary to Viterra Ltd on 27 September 2004, and to Viterra Operations and Viterra Malt on 10 March 2010; positions he continued to hold at the time of the trial. He was also appointed secretary of Joe White on 10 March 2010, and resigned from this position on 31 October 2013.

115 At the time of trial, he held the title of director legal for Viterra and Glencore Grain in Australia and New Zealand. In his position as general counsel, along with Mattiske he usually attended monthly meetings of the Australian and New Zealand executive team of Viterra.

116 Mattiske saw it as part of Fitzgerald's role to advise on legal aspects of transactions and provide legal advice on regulatory, governance and compliance matters, including with respect to internal corporate policies. In order to fulfil his role, Fitzgerald needed to be aware of the corporate policies within Viterra.[105]

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104 King had a more minor role in Glencore's acquisition of Viterra Inc, principally concerned with developing a financial model and a valuation of what was to be purchased, assessing various divisions of the business largely based on publicly disclosed information.

105 See further pars 192, 199, 203, 278 below. King gave evidence that Fitzgerald was in charge of corporate documentation and policy issues for Joe White as part of the sale process.

117 Although a witness statement was filed on his behalf,[106] Fitzgerald was not called as a witness.

118 Jonathan Wilson ("Wilson"), general manager – logistics and commercial relations from January 2013 until January 2018, was employed by Viterra Ltd and then Viterra Operations.[107] From October 2010 to January 2013, Wilson was Viterra's manager for barley and oilseeds.

119 Wilson arranged for Viterra to purchase barley directly from growers or from the trade. As to the latter, purchases were made from trading houses such as Louis Dreyfus, Co-Operative Bulk and Cargill. As for sales, the largest markets were Saudi Arabia and China. Wilson was also involved in contacting all end users to sell barley, including maltsters.

120 Wilson, along with other Viterra barley traders, met from time to time with representatives of Joe White to discuss Joe White's barley requirements. Wilson also regularly had such discussions with Wicks, often on a daily basis. Occasionally, during these discussions, Wilson was informed that particular customers of Joe White wanted a certain variety or varieties of barley, or had a preference for such varieties. From time to time, Wilson was informed which barley varieties were performing well. However, there was no evidence to suggest he was ever told the details of Joe White's customers' contract terms or the specific requirements of individual customers.

G. Viterra acquires Joe White and formalises aspects of the Joe White Business relevant to some of the Operational Practices

121 In September 2009, Viterra acquired ABB Grain, including Joe White.[108] From around

106 As part of preparation for trial, the court ordered witness statements be filed and served. This order was made after the parties submitted that in a case of this size, witness statements were the most appropriate manner in which to lead evidence in chief. Despite expressing considerable reservations in doing so, I made the order for witness statements on the basis that any controversial evidence would be required to be given orally.

107 Wilson completed a bachelor degree in social sciences (honours) at Queens University, Belfast, in 1999, a diploma of financial services from the Australian Financial Management Association in Sydney in 2004 and a masters of agribusiness at the University of Melbourne in 2008.

108 Viterra Malt acquired the shares. Viterra Operations acquired certain land that was used for the Joe White Business. Viterra Ltd had an interest in property associated with the Joe White Business. Accordingly, it is convenient to refer to "Viterra" as the purchaser of Joe White.

this time, the employees who operated Joe White, including Hughes, Youil, Wicks, Stewart and Argent, became employees of Viterra Ltd.

122 In early 2010, Gordon announced a number of transformation projects to be undertaken across Viterra's businesses, including Joe White.

123 At this time, conduct in the nature of the Operational Practices was already well established. The business records of Viterra demonstrate that the existence of, at the very least, some of the conduct comprising or underlying the Operational Practices was included in Viterra's records not long after the acquisition in September 2009.[109] Further, by July 2010, the historical use of grades of barley other than malt 1 barley[110] was recorded in a "Viterra" business record entitled "Historical Off-Spec Volumes, Spreads and Benefit".[111] The document explained that the baseline had been defined using the data it contained.

124 To elaborate on the second of these matters first, up until this time Joe White purchased some off-grade barley, but only because the volume of malt 1 barley available was insufficient to meet Joe White's demand.[112] However, in or around early to mid-2010, a formal practice of strategically utilising non-malt 1 barley was developed and pursued within Viterra, as part of the "transformation project for barley". Gordon had stated to Hughes that the quality of Joe White's malt was too high and that Joe White could do the same job at less cost. The "Viterra" business plan was formulated to increase use of off-grade barley from an average of 11 percent up to 30 percent in 2 phases over the 2011/2012 and 2012/2013 financial years. The implementation of the plan was not confined to Joe White employees, but required "co-operation from the grain group to develop 6 action plans".

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109 There was no evidence to suggest any such disclosure occurred before Viterra agreed to purchase Joe White.

110 See par 72 above.

111 This and other Viterra business records of this nature bore the "Viterra" logo.

112 The Viterra Parties submitted the purchasing of off-grade barley was not a new practice. So much is correct, but the fundamental change in approach was to entrench the purchase of off-grade barley as part of general operations, as opposed to resorting to this measure where the circumstances necessitated it.

125 A transformation project for barley was introduced to various persons, including Stewart, in May 2010. Stewart prepared a memorandum to the project team referring to the strategy for South Australia. The memorandum (which was addressed to a number of Viterra employees, including Andrew Hannon ("Hannon"), Viterra Ltd's country operations manager of storage and handling),[113] suggested there would be opportunities around Hindmarsh, before its malting status was due to be determined in March 2011. He stated that Viterra Malt would have good data and a feel for Hindmarsh's ability to make malt by the end of August 2010.

126 Stewart gave evidence that Hindmarsh was a feed barley that was introduced as part of the transformation project, and that it clearly fell into the category of off-spec barley. Hindmarsh was never approved as a malting barley.[114] Despite this, Hindmarsh was used to produce malt that was sent to some of Joe White's customers. Stewart gave evidence that he corresponded with Hannon concerning storage options and availability of Hindmarsh and other off-spec barley varieties. Hannon never queried off-spec barley being used. It was well known within Viterra that Joe White was using off-spec barley.[115]

127 Wilson was aware during 2009 or 2010 that Joe White was testing batches of Hindmarsh barley to see whether that barley could meet malting barley specifications. He also spoke directly with Joe White employees about Hindmarsh in late 2010 or early 2011. Based on these discussions, Wilson understood that Hindmarsh was "water-hungry" and did not go through malting machinery well because of the levels of betaglucan. Despite this and the non-accreditation, Wilson did not consider that the use of Hindmarsh for malting was inappropriate. His evidence was that

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113 Hannon gave evidence for the Viterra Parties. At the time he gave evidence he was group commercial manager for Viterra Operations.

114 On 11 November 2010, Barley Australia issued a media release noting Hindmarsh was released in 2007 and that it had failed to receive malt accreditation. It was considered that Hindmarsh did not have the required malting quality characteristics to warrant accreditation. The media release included a statement that there was no reason why grain companies could not market specially segregated varieties to any customer for any purpose if a demand existed for those varieties irrespective of their malting accreditation status.

115 Stewart also had ongoing dealings during the transformation with Peter McMeekin ("McMeekin"), a Viterra Ltd barley trader, concerning the requirement to procure off-spec barley. Stewart gave evidence that McMeekin had very good knowledge of these circumstances.

Hindmarsh remained a desired variety for many international maltsters. He also referred to a level of domestic demand.

128 Wilson gave evidence that when he was trading barley, the majority of Viterra's sales of Hindmarsh were to overseas customers, particularly Chinese maltsters. He said that some Hindmarsh was sold to domestic maltsters, including Joe White, but he had no knowledge of which customers, if any, were supplied malt produced from Hindmarsh barley.

129 Lucas Jones ("Jones")[116] explained that before the accreditation issue was determined, Hindmarsh showed a lot of promise. He gave evidence that Joe White invested a lot of time and effort in the lead up to the expected approval of Hindmarsh. To that end, Joe White purchased commercial quantities of Hindmarsh so that it could be tested and Joe White could become familiar with processing Hindmarsh into malt on a commercial scale.

130 Jones said that once Hindmarsh had been processed into malt, Joe White had to do something with it. He gave evidence that, rather than dump it, Joe White used it gradually by blending it with other malt that was then packed and shipped to Joe White's customers. Jones also referred to the cost benefits of using Hindmarsh. Because Hindmarsh was not a malting variety of barley, it was cheaper than malting varieties.

131 In late May 2010, a document was produced for Viterra Australia and New Zealand entitled "Ingredients for success".[117] The front page also contained the heading "Malt Cost Review – Steering Committee 1".[118] The document recorded that the current situation involved multiple barley varieties at each site, which was said to limit

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116 Jones was employed at Joe White for approximately 16 years, having previously worked for Adelaide Malting in its laboratory. From 2009 to 2013, Jones managed Joe White's barley supply. He holds a bachelor of science (chemistry) from the University of Adelaide. After the Acquisition he was production plant and barley manager until June 2018.

117 The document came 10 days after another document also entitled "Ingredients for success" which was prepared for the monthly executive meeting, which set out details of the transformation program, including referring to Hughes' role in the malt cost review.

118 The "Malt Cost Review" was 1 of 3 projects forming part of the transformation project in which Joe White was involved. The Malt Cost Review had 2 workstreams, being barley acquisition reduction and administration cost reduction.

segregation opportunities. It stated that off-grades were typically segregated on a "need to basis", such as drought. It further noted that such barley historically produced poor quality malt and provided limited blending opportunities because the bulk of the barley was also high in protein. Another document produced entitled "Transformation Project – Malt Cost Review" recorded that the objective was to reduce the cost of barley by using "off-specification grades". Under a proposal for the future state of some sites, an example was given of using 75 percent off-grade barley. This was compared with the "historical situation" of using multiple barley varieties with limited off-grade segregations. An example was given in the historical situation of using 25 percent off-grade barley with the proviso that "in reality could be more or less, depending on the season". At the conclusion of the section on reducing barley acquisition costs, it was stated that it was still a requirement to maintain quality to meet customer "expectation".

132 In relation to this document, Hannon gave evidence he understood that poor quality malt would mean it would be more difficult for Joe White to meet its customers' specifications. It was observed, in cross-examination, that historically when drought had given rise to an increase in the amount of off-grade barley, brewers had agreed to a higher proportion of such barley being used in malt supplied to them. In contrast, there was no suggestion that the transformation project would involve seeking the agreement of Joe White's customers to the increased use of off-grade barley regardless of the quality of the season.

133 This "Ingredients for success" document also stated that there were a number of challenges with the transformation project. These included that, even if the malt quality impacts were reduced by "[t]argeting premium varieties" of barley, if the volume of off-grades became too high quality would suffer. Hannon accepted that a concern was that if Joe White received insufficient amounts of quality barley, then it would have problems meeting customer specifications. He further acknowledged that a key risk of the transformation project was that Joe White would not receive enough quality barley. In late May 2010, an email commencing with "Dear

Executives" was sent to a large number of Viterra executives, including Hughes, Fitzgerald and Gordon, concerning a project charter for the "indirect procurement review project (an integration project)".[119]

134 In around June 2010, another "Ingredients for success" document was produced by Viterra, concerned with barley acquisition. It spoke in terms of the maximum amount of off-spec barley that "Viterra" could purchase under the strategy to increase its use. It also referred to reducing the cost of barley by using off-specification grades through taking advantage of segregation and storage and handling opportunities from Viterra's ownership of the South Australian supply chain and opportunities in other States that were expected to yield a net benefit of $3 million per year.

135 On 23 July 2010, Jones sent an email addressing the "Barley acquisition-transformation project". It was addressed to numerous Viterra employees, and copied to others including Hughes and Stewart. After referring to recent meetings, Jones said "Malt" had determined that the majority of "their plants" could use up to 30 percent "off-specification grain". He also expressed his keenness to take advantage of the cost savings this would allow. He said he was looking for the "Grain Group's assistance in working out how to achieve the 30% target".

136 The business plan for the transformation project was further formalised and recorded in a "Viterra" presentation dated 5 August 2010, entitled "[Australia New Zealand] Transformation Project – Malt Cost Reduction" ("the Malt Cost Reduction Transformation Project").[120] The first slide of the presentation set out the agenda and objectives, the first of which was to "[c]onfirm the baseline". Under this heading, the slide stated:

- Historical use of off specification barley
- Spreads between Malt 1 and Malt grades

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119 Similar documents were produced for the steering committee in early July and August 2010, the detail of which it is unnecessary to refer to.

120 See further par 375 below. Stewart gave evidence that there was another transformation project directed at operating costs. This was a separate workstream known as "Operating, General and Administrative Costs Project".

Mattiske suggested that "off-specification barley" in this context was barley that "doesn't quite" meet the specification, however he was not involved at the time.

137 The other objectives of the presentation were to "[a]rticulate the targets", which were specified as "wave 1 – year 1, in time for harvest 10/11" and "wave 2 – year 2 and beyond", and to "[r]eview the implementation plans" for South Australia, the East Coast and the West Coast.

138 The second slide stated:

> The Barley Acquisition strategy aims to lower the average unit cost of barley by *increasing the off-grade purchases*. This will deliver cost savings over and above the $1.3m currently realised.[121]
>
> The Malt business has already been realising savings through off-grade purchases. …
>
> - Traditionally, off-grade was taken largely as a necessity through seasonal conditions and elements outside Viterra control.[122]
> - The proposed strategy aims to make *these purchases more strategic* and less reactionary.
> - This strategy should serve to minimise the risk of seasonal impact and *maximise purchasing discounts*.
>
> (Emphasis added.)

139 A table entitled "Barley Acquisition off-spec savings $A, historical" detailed savings from 2006 to 2010 from the use of off-grade barley. A spreadsheet in existence on 24 June 2010 showed that, for the financial years 2006 to 2010, on average, Joe White had used 75,103 tonnes of non-malt 1 barley, at an average saving of $17.66 per tonne, amounting to an average annual saving of $1,326,520. Historical purchases of non-malt 1 barley by region and the seasonal influence on the return achieved through use of off-grade barley were recorded.

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121 Just how successful the project ultimately was in delivering savings was not entirely clear. In June 2011, Hughes reported total savings to date at only $170,000. Further, Mattiske's evidence was that he did not see any positive financial results from any aspect of the project.

122 As Stewart explained in giving evidence on this topic, the use of off-grade barley by Joe White up to 2009 was essentially reactive to exceptional circumstances. Up until that time Joe White generally purchased malt 1 grade barley.

140 A slide in the presentation was headed:

> [Viterra] Malt believes it can increases (sic) its use of off grade barley from an average of 11% to 24%. With the co-operation of the Grain group it plans to reach this target over 2 phases.

141 Further slides set out detailed action plans to increase the use of off-grade barley for each of Joe White's plants in Western Australia, South Australia, and on the East Coast. The Viterra executives not only approved the Malt Cost Reduction Transformation Project, but various Viterra representatives were appointed to a barley acquisition project team to deal with storage, marketing and acquisition.

142 On 27 September 2010, an update on the malt cost review was provided to Viterra's chief operating officer, Fran Malecha ("Malecha") who was then also a director of Joe White, albeit for only 1 more day.[123] The key points included that the project had been completed with internal resources and assistance from the "transformation team". The key challenges were stated to be the segregation and acquisition of off-grade barley, and maintaining the quality of malt shipments to meet customer expectations while using off-grade barley.[124]

143 On 30 September 2010, Stewart circulated minutes of a transformation project meeting held 2 days earlier. The recipients included Viterra employees, such as Hannon and McMeekin, who had attended the meeting. The minutes referred to a focus on reducing the amount of Hindmarsh segregations because it was likely Hindmarsh would not receive accreditation. The barley varieties identified as targets for off-grade purchases were Flagship and Buloke.[125] The minutes also listed a number of strategies to maximise off-grade segregation in the then current environment.

144 The segregations plans produced in October 2010 showed reduced segregations for Hindmarsh. Hannon's evidence was that he did not know what Joe White intended

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123 Malecha was a director of Joe White from 23 September 2009 to 28 September 2010. He was also a director of Viterra Ltd for the same period, as well as being a director of Viterra Malt from 30 October 2009 to 28 September 2010 and of Viterra Operations from 23 September 2009 to 25 September 2010.

124 This review had been preceded by the presentation of the "Malt Strategic Plan" by Hughes on 18 August 2010, which was provided to the Viterra Australian and New Zealand executive, including Gordon and Fitzgerald.

125 It was noted Commander tonnages were not large enough to warrant separate off-grades.

to do with the Hindmarsh barley if it did not receive accreditation. Further, he was unaware of the extent to which Joe White's customers were willing to accept malt which included barley that was not accredited.

145 Stewart gave evidence that he was unhappy with the introduction of the Malt Cost Reduction Transformation Project, and had objected to the project. He thought that using off-grade and off-spec barley would potentially decrease the quality of the malt being sent to Joe White's customers. However, an email from Stewart towards the end of the transformation meetings stated the next phase included "[m]aking quality malt from the off-grade barley" but did not suggest this could not be done. The email was copied to Accenture Consulting.[126] A representative of Accenture Consulting responded, stating that Stewart had provided a very eloquent summary and that he was fully appreciative of the challenges of making quality malt from off-grade barley.[127] Stewart forwarded the email chain to Hughes. Further, he told Hughes of his concerns. He said to Hughes that whilst Joe White had occasionally needed to use lower grade barley in the past due to seasonal volatility, the adoption of using off-grade barley as a targeted strategy might limit Joe White's ability to meet customer quality requirements. Hughes told Stewart he agreed with Stewart's concerns but said the position was not negotiable. Stewart's evidence under cross-examination was that the role the project team from Viterra Malt (which included Jones and him) were given was to try to determine what savings could be made without compromising the quality of the malt. Hughes said that Jones was going to take the lead and asked Stewart to support Jones. Jones reported to Hughes.

146 Stewart was of the opinion at the time that Joe White would need to be pencilling results more often if it was required to use substandard barley. He said this followed logically.[128] Jones gave evidence that on occasion Viterra supplied off-grade barley to

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126 Accenture Consulting was engaged by Viterra to work on the Malt Cost Reduction Transformation Project.

127 Though there was nothing in the email to suggest this could not be done.

128 As a matter of fact, in the subsequent period, Stewart said he did not really see any noticeable difference in the quality of malt that was coming through, though he acknowledged there may have been some subtle effects. However, he also acknowledged that "certainly in time and in certain seasons there would have been a much higher probability of having problems".

Joe White in breach of contract. He said at times Joe White was required to accept "off-grade barley", which had to be used rather than dumped. The poor quality malt was used in small quantities in blends, which meant it could take a long time to use it up.

147 Mattiske gave evidence that he could not recall a transformation project for malt. He had reviewed Viterra's transformation projects and formed the view that they had generated no value or positive financial results. Mattiske said that by the time Glencore acquired Viterra, all transformation projects were completed or dormant and that none was re-enlivened by Glencore. Contrastingly, Stewart's evidence was that the Malt Cost Reduction Transformation Project's initiatives were continued after Glencore's acquisition of Viterra. In light of Mattiske's self-professed ignorance of much of how the Joe White Business was conducted, Stewart's evidence must be preferred in this regard.[129]

148 During his time working at AusBulk, Mattiske was told by AusBulk traders that Joe White blended off-grade barley. He gave evidence that he believed it was quite common in the grain industry to segregate barley into different grades to allow batches to be blended consistent with customers' specifications.

149 During Mattiske's cross-examination, he volunteered that there was "absolutely nothing wrong with using off-grade barley". When asked whether he understood if customers were aware of off-grade barley being used, he stated, somewhat non-responsively, that he could not see why it would ever be an issue because "they were still getting exactly what they want[ed]". He further "imagine[d]" that customers would know about it because "[e]verybody knows". During his evidence, Mattiske made the sweeping statement that off-grade barley "can easily meet customer specifications".[130] He continued by stating, correctly, that off-grade barley is not "off-variety". A little later in his evidence, Mattiske asserted that he presumed all Joe

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129 See further par 731 below and the reference in contemporaneous documentation to a transformation project being in place in mid 2013.

130 Cf pars 23, 131, 145-146 above.

White customers tested the malt supplied, but then acknowledged he did not know whether or not this was the case.[131] In fact, not all of Joe White's customers did their own testing. Stewart's evidence was that many did not. Further, if a customer conducted its own tests of a sample of malt, it was usually after the batch had been used in the brewing process and a performance problem had been revealed.[132]

150 McIntyre's evidence on whether Joe White's customers tested the malt supplied was addressed by a general statement that many of them did not analyse the malt they received from Joe White. She also gave evidence on this topic concerning some customers specifically. Her witness statement referred to Asia Pacific Breweries Group (Heineken)[133] ("Asia Pacific Breweries") and Thai Beverage Public Company Limited ("Thai Beverages") conducting their own testing when they received malt from Joe White. Even though McIntyre believed this testing was occurring, she persisted with her "practice" of pencilling Sign-Out Reports for these customers. She said Joe White received a number of complaints from these 2 customers between 2010 and October 2013, which were handled by her or Stewart.[134] In dealing with those complaints, McIntyre would say that the retained sample of the malt delivered had been retested with the further results being just inside or just outside the customer's specification, or that the inconsistency in results was due to normal laboratory variation. During her cross-examination, McIntyre was taken to this part of her witness statement. She was asked whether she was aware of other customers that did their own testing. After referring to Sapporo Breweries Ltd ("Sapporo"), she was unable to name any other customer and explained she was having a mental blank. When she was then asked whether there were any Japanese companies in this

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131 At 1 stage in his evidence, Mattiske said he believed he was told Joe White's customers undertook their own testing and analysis of malt delivered, but soon after acknowledged it was not based on anything he was told, but rather it was an assumption he made partly because of his association with the grains business.

132 In Stewart's closing submissions, it was contended the evidence indicated most of Joe White's customers conducted their own tests. However, the sole source identified for this contention was Stewart's own witness statement. The evidence referred to was subject to a ruling under s 136 of the *Evidence Act* that it was confined to his state of mind. In short, it was not evidence of the fact. In any event, the evidence concerning his state of mind did not include a statement that most brewers conducted their own tests.

133 Asia Pacific Breweries was a 50 percent Heineken owned enterprise.

134 See par 80 above.

category, she referred to Sumitomo Corporation Asahi ("Asahi"). She then stated that the other customers who did their own testing were all part of the Heineken group. Further, she noted that she believed Heineken's individual operators would send a random shipment sample to its technical centre for testing, but she could not recall the frequency. When prompted about customers in Vietnam, McIntyre said that "Thai Tan did. Saigon did. Hanoi and Thai Duyen did, but I'm not sure of the frequency of that either. It seemed to be somewhat inconsistent." After again confirming she was unsure how often malt was tested by these customers, she recalled that Oriental Brewery also did its own testing. It was in this context that she gave evidence that it was her "understanding" that most if not all of the larger customers did their own testing and that if the malt did not comply with the required specifications, the customers' testing would show this. She then agreed with the proposition that the reason she did pencilling for the customers that did their own testing was "primarily" because of the analytical variability between Joe White results and those of the customers in their own laboratories.[135]

151 In summary, McIntyre identified a significant number of customers with respect to whom she knew or believed conducted their own testing. However, she was unaware how often this was done.

152 In addition to this evidence concerning Joe White's customers, an expert called by the Cargill Parties gave evidence that, in over 40 years of working for brewers (28 of those years in senior positions),[136] he had never tested malt upon its delivery to see whether it complied with specifications. Further, he was not aware of any other brewers having done so.

153 Whatever the level of testing conducted by Joe White's customers, it was plainly not adequate to detect the various measures Joe White took to conceal that it was

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135 See also par 84 above. The last question in this chain of cross-examination was, "Is it fair to say there would have been no point in recording results for other reasons because the customers [who did their own testing] would detect it when they did their own testing at the end; is that your understanding at the time?". Interestingly, when McIntyre asked if the question could be repeated, the question was withdrawn.

136 See fn 1961 below.

supplying malt that did not meet the specifications required.[137] A critical piece of evidence on this topic was Stewart's evidence that Joe White was relying on the fact that it was understood that many customers did not test the malt.[138]

154 Consistent with Mattiske's evidence,[139] the Viterra Parties' position at trial was that there was nothing improper in adopting the approach of using greater quantities of non-malt 1 grade barley.[140]

155 Internal emails from this period (using Viterra email addresses) also demonstrated that Joe White employees were engaging in both pencilling and the use of off-grade barley. An email from Stewart to other Joe White employees on 11 August 2010, discussing a discrepancy raised by a customer between the Certificate of Analysis provided by Joe White and the results of the customer's own laboratory analysis, stated "I think we have been caught out fair and square on this one". Under cross-examination, Stewart acknowledged that there was no problem with the customer's analysis on this occasion.[141]

156 Another internal email, also sent on 11 August 2010, noted that some Joe White employees were refusing to sign the Viterra Code.[142] The email stated this had come about because the employees were being asked to certify they were using exclusively malt-grade barley when they were not in fact doing so. Gordon stated this was

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137 The matter of whether Joe White met its customers' specifications is discussed at length: see issue 10 below.

138 See also par 1045 below.

139 In this context, "assertions" is not used in a pejorative sense. Rather it is to acknowledge, as Mattiske did, that his understanding with respect to barley and malt production was somewhat limited. In his witness statement, Mattiske gave extensive evidence of his understanding of malting based on his dealings in the grain industry while also recording that he had never been directly involved in the malting industry before Glencore's acquisition of Viterra.

140 Cargill Australia made no allegations in the Statement of Claim (see par 1849 below) specifically based on this historical approach, however relied on evidence concerning this approach as it made it more difficult for Joe White to ensure that customer specifications would be met: see, for example, pars 145-146 above.

141 The Viterra Parties sought to downplay the significance of this email by pointing out that Stewart was not asked what he meant by "caught out". However, there could be no ambiguity about the meaning, not only because of the reference to "fair and square", but also because Stewart's evidence that there was no concern about the customer's analysis made it plain the fault was with Joe White. As to the precise reason for the fault, the Viterra Parties correctly submitted this was not explored with respect to this particular transaction.

142 See pars 58-64 above.

occurring "even though the malt is in spec".[143] The email referred to Fitzgerald "helping to assess legal requirements that were missed from the global agreement". It is also apparent from the email chain that a Viterra Code "hotline" was set up, though it appears there were technical problems with it.

157 The email chain was ultimately forwarded to Fitzgerald on 12 August 2010, with a request from the director of human resources, Karen Ross ("Ross"), to coordinate a response.[144] Alicia Bickmore ("Bickmore"), legal counsel at Viterra from April 2010,[145] gave evidence that Fitzgerald instructed her to review that "global code of conduct" so that it accorded with Australian requirements,[146] but that she was not aware of this email chain. Although Bickmore's recollection was vague on a number of matters, she gave evidence that her instructions concerning the Viterra Code was the annual review, and that she recalled no particular issues being raised at that time.

158 One of the employees who was uncomfortable at the prospect of signing the Viterra Code was Stewart. Upon being confronted with the requirement to acknowledge that he would be accurate and truthful in all dealings with customers, and accurately represent the quality, features and availability of Viterra products and services, Stewart perceived an issue. He was also concerned with the requirement not to create or condone the creation of a false record.

159 Stewart gave extensive evidence on this point. He said his concern arose from Joe White supplying malt that did not meet customer specifications, the use of the Malt Blend Parameters Procedure and the pencilling of Sign-Out Reports.[147] Further, he said that with the adoption of the Malt Cost Reduction Transformation Project and its imperative to use more off-grade barley, this was likely to exacerbate the occasions

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143 The basis upon which Gordon expressed this position with respect to compliance with specifications was not apparent on the evidence: see further pars 162-163 below.

144 The correspondence showed that as early as June 2010 Ross consulted with Gordon and Fitzgerald to seek clarification on the Viterra Code. Ross noted that the "old ABB [Grain] Code of Conduct was much broader than the Viterra Code".

145 Bickmore reported to Fitzgerald.

146 At 1 stage, she said it was likely it was Fitzgerald, but that it might have been Benjamin Norman (see par 359 below) who gave the instruction. Later she said she actually recalled Fitzgerald gave her the instruction.

147 See par 2248(1) below.

upon which the issues that were concerning him would arise.

160 He said that Dr Megan Sheehy ("Sheehy"), the technical services manager at Joe White, McIntyre and Jones all approached him with concerns about Joe White's practices regarding Certificates of Analysis and having to sign the Viterra Code. McIntyre also gave evidence of her uneasiness. She said that she was not comfortable signing a statement referring to always being accurate and truthful in dealings with customers and in representing the quality, features and availability of Viterra products and services. She explained her discomfort came from her daily duties including altering results on Sign-Out Reports for Certificates of Analysis. McIntyre discussed her concerns at the time with Sheehy and Naomi Moller ("Moller"), technical centre chemist. She said they raised their concerns with Stewart and Hughes, both of whom said that they considered their concerns were fair and would do something about it. McIntyre also gave evidence of discussions with Stewart in which she told him that she did not think the pencilling policy was the right thing to do. McIntyre was not cross-examined on her evidence concerning the Viterra Code.

161 Under cross-examination, Stewart readily agreed that the introduction of the Viterra Code threw into sharp relief the practices that were occurring at the time concerning pencilling and Certificates of Analysis. Stewart said he discussed the concerns that had been raised with Hughes and queried how the Viterra Code could be complied with when the Malt Cost Reduction Transformation Project also had to be satisfied. Stewart said the personal discomfort he felt in signing the Viterra Code because of the conduct in which Joe White was engaged was particularly because of pencilling. Hughes told Stewart that he had already relayed some concerns to Gordon and Malecha. Hughes stated that Malecha had said "my spider senses are tingling" in response to Hughes' issue.[148] Stewart gave evidence it was important to him that

148 The Viterra Parties submitted that in the absence of any evidence from Hughes or anything else to corroborate Stewart's evidence, the court should infer that Hughes would not have given evidence that he discussed the issue with Malecha. In making this submission, reliance was placed upon the evidence given by Mattiske that in October 2013 Hughes stated he had not previously raised the matter of the Operational Practices with persons at Glencore or Viterra. However, this overstated the effect of Mattiske's evidence, which was confined to Hughes acknowledging he had not told "Glencore or Viterra people at that time": see par 1255 below. Further, Hughes had clearly told Gordon (a person at

Gordon and those advising Gordon agreed with the manner in which to proceed. However, Stewart was not specific with respect to Hughes providing Gordon's response.

162 An email sent by Hughes to Gordon on 10 August 2010 squarely raised that there were concerns held at the time. Hughes referred to a discussion with Gordon the previous week by "a couple of the malt staff" concerning the Viterra Code possibly being in conflict with decisions being made regarding the "accepted practice of buying off-grade barley". Hughes stated that, most notably, the practice involved blending off-grade barley with first grade barley and documenting the entire lot as being first grade "along with other minor changes on the Certificate of Analysis".[149] He noted the final lot fell within "the acceptable range of analysis for the customer". Hughes referred to the fact that the practice had been in place for many years and stated that it was "well accepted in every malt business" he had visited.

163 However, in the same email, Hughes said the Malt Cost Reduction Transformation Project had brought the practice into the spotlight with the consequence that some personnel felt uncomfortable rationalising the practice with a statement in the Viterra Code, namely, "be accurate and truthful in all dealings with customers and accurately represent the quality, features and availability of Viterra Inc products and services". Hughes concluded the email by asking for Gordon's advice. The following evening, Gordon forwarded Hughes' email to Ross, with the message, "As per previous email".

164 The Viterra Parties submitted that an inference should be drawn that if Hughes had been called as a witness he would not have given evidence that he believed, or

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Viterra) something about his concerns and the concerns of others, and therefore to construe this evidence in the manner suggested would only be on the basis that Hughes was expressing an untruth. Either way, it did not lend support to a finding that Hughes had not raised the matter in 2010. Furthermore, the evidence of Stewart concerning Malecha was given in his witness statement, and was not challenged by Hughes' counsel or raised by any other party despite Stewart confirming this evidence during cross-examination. In the circumstances, this submission of the Viterra Parties cannot be accepted. That said, it is quite a different matter as to what Hughes actually said to Malecha (or Gordon).

149 The Cargill Parties submitted this description of "minor changes" made on a routine basis did not accurately capture what was actually occurring.

informed any person whose knowledge might be attributable to the Viterra Parties, that there were any actual inconsistencies between the Viterra Code and the Operational Practices. In making this submission, the Viterra Parties referred to Hughes informing Gordon that the practice of changing Certificates of Analysis was well accepted in every other malt business he had visited, and that the final lot of malt fell within an acceptable range of analysis for the customer.[150] They also referred to Gordon positively stating that malt supplied by Joe White was "in spec".[151]

165 In my view, there was no basis to assume, in August 2010, when the practice of pencilling was not the subject of any formal procedure and was arbitrarily conducted without the knowledge of Joe White's customers,[152] that Hughes would have given evidence that such dealings were "accurate and truthful … and accurately represent[ed] the quality, features and availability" of the malt supplied. Further, on no basis could conduct giving rise to the Varieties Practice or the Gibberellic Acid Practice be considered to be anything other than misleading and false.[153] Indeed, on the assumption Hughes would have been a truthful witness, it is difficult to envisage evidence being given by him which would have been different to the substance of the evidence given by Stewart on this point.[154] Moreover, it would be difficult for Hughes to have explained in any compelling way why he expressly instructed Joe White employees not to inform the customers of the true position.[155]

166 In relation to what Hughes informed Gordon about (or any other person whose knowledge might be attributable to the Viterra Parties), it is not possible to draw any relevant inference with any confidence. Certainly, Hughes was defending the conduct in which Joe White was engaged. That said, he was not suggesting that the conduct was accurate and truthful; on the contrary, it is implicit in him seeking advice that he

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150 See par 162 above.
151 See par 156 above.
152 See par 197 below.
153 Though, notably, the contemporaneous emails did not refer to the provision of unauthorised barley varieties or the use of gibberellic acid when prohibited.
154 See, for example, pars 167, 174 below.
155 See par 90 above and par 172 below. Further, more generally, in relation to the issue of Hughes not being called as a witness, see pars 1970, 2126 below.

had, at the very least, concerns in this regard. However, it is not possible to objectively form any view as to what Gordon,[156] or for that matter, Malecha, Ross or Fitzgerald, understood to be the true position when there was no communication before the court to demonstrate that, at that time, any of them fully appreciated the nature and extent of the conduct being engaged in.

167 Based on his discussions with Hughes, Stewart believed the issue had been addressed at the executive level of Viterra for Australia and New Zealand. He gave evidence that he "remained uncomfortable with the practice of documentation provided to customers not reproducing Joe White's analysis". However, as there had been no suggestion from Hughes or anyone else that the practices would change, and Viterra pressed staff to sign the Viterra Code, he believed he had no "real" choice but to continue his function of implementing the practices in place and to sign the Viterra Code if he wanted to retain his job. In any event, a directive was given by Viterra, through Ross,[157] in August 2010 to the effect that employees who refused to sign up to the Viterra Code would still be bound by it.

168 By way of observation, when in the witness box Stewart struggled with a patent tension in his evidence. While seeking to justify his conduct in overseeing and implementing a policy,[158] which allowed for testing results to be misrepresented (in the context of what he had been told initially by Hughes about the necessity of such conduct and the implementation of some "rigour" to the process),[159] he also had to grapple with his obvious discomfort both back in 2010 and while giving evidence of his full appreciation that false statements were being made to Joe White's customers about the composition of malt delivered.

169 As part of Stewart's evidence to justify his conduct, he said he was repeatedly told by

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156 See further fn 793 below.

157 Gordon was forwarded the email by Ross, with the attachment, entitled "Code of Conduct Refusal". In an email sent 17 August 2010, Ross had made an enquiry as to what would occur if "people refuse to sign the paperwork".

158 Stewart was the person responsible for implementing the Viterra Certificate of Analysis Procedure on a day-to-day basis.

159 See par 197 below. Stewart said he did not necessarily regard it as a dishonest practice as it was an industry practice that "we" aimed to improve by using more scientific rigour.

brewers that they understood it was difficult to meet every customer specification in every shipment and that malt did not always meet specifications. Stewart said he was informed by customers when malt provided by Joe White did not perform satisfactorily in the brewing process. He also gave evidence of his understanding that brewers were not overly concerned with the correctness of Certificates of Analysis and were primarily concerned with whether the malt performed well in making beer. However, despite this suggested lack of concern for correctness, Stewart also gave evidence that customers would expect the Certificates of Analysis "would turn up correct from a quality assurance perspective".[160]

170 In relation to barley varieties, Stewart fully understood that some customers specified a particular variety or particular varieties, but that Joe White was not always supplying as specified. He further understood that the customers were not only not being told, but it was also being reported the correct variety or varieties were being used. When confronted with these somewhat startling facts, Stewart gave evidence that he did not know how significant these circumstances may have been for the customers. Stewart also knew gibberellic acid was being added to malt contrary to some customers' specification, and that they were not being informed. He accepted the unauthorised additive should have been disclosed.

171 Stewart said that Joe White enjoyed an excellent reputation for delivering high performing malt. He said that Lion Nathan and Sapporo recognised Joe White as supplier of the year on several occasions.

172 Stewart acknowledged that an alternative commercial approach to supplying malt out of specification would have been to contact the customer to communicate the true position and to negotiate with respect to the dispatch of the shipment. While his evidence was that he was under instruction from Hughes not to discuss the position with customers,[161] Stewart also gave evidence, although no specifics were provided,

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160 See further par 411 below.

161 At another point, Stewart deposed that there did not need to be any decision about disclosing the Operational Practices to Joe White's customers because that was the way Joe White had always done business and Stewart was just documenting it.

that Joe White occasionally adopted the approach of raising the matter with customers.[162] However, Stewart suggested that to do this in every instance would not be an efficient way to conduct a malting business. Indeed, Stewart stated further that, in his experience, customers, and in particular brewers, did not appreciate the imposition of addressing minor variations and the consequent shipment delays if malt would nonetheless perform satisfactorily.

173 Stewart said, for these reasons, Joe White's decision was usually to proceed with delivering malt, even if out of specification, if Joe White was confident the malt would perform in accordance with the "customer's needs".

174 As somewhat of a catch-all for his participation in what had gone on in the past at Joe White, Stewart gave evidence that he was troubled but, at the same time, comforted by the fact the malt performed well and "if [he] was, you know, to participate in the malting industry, [he] really had little choice but to follow those procedures". However, Stewart said he understood that a Certificate of Analysis sent to a customer amounted to a representation and an assurance that the facts concerning the malt supplied were as stated. When it was put to Stewart that he must have appreciated that supplying malt and representing it possessed certain attributes when it was fully known, with documented internal processes, that in fact it did not, was a serious deception of the customer, Stewart agreed. He lamented, "but unfortunately this was part of my job".[163]

175 After struggling with the patent tension referred to above for much of his cross-examination by the Cargill Parties' senior counsel, Stewart was given the opportunity to uninhibitedly state his position. Given the answers he gave in seeking to justify some aspects of the procedures adopted with respect to Certificates of Analysis and some of the other issues in this case, it is instructive for the relevant evidence to be set

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162 Based on the evidence before the court, it is likely that such occasions were rare.

163 The Viterra Parties submitted the question put during cross-examination that elicited this answer was premised on the assumption that Certificates of Analysis did misrepresent the qualities of malt and that Stewart's answer was confined to a specific Certificate of Analysis. In fact, the question put was on a far more general level, which was plainly understood by Stewart as it was reflected in his answer which was broad in compass and contrite in substance (as was his demeanour at the time he gave his answer).

out in full. After Stewart was attempting to justify "as a by-product" the use of 2 standard deviations derived from the malt analytes proficiency testing scheme, referred to as MAPS ("the Malt Proficiency Scheme"),[164] being simply applied in the practice of pencilling Sign-Out Reports and the consequential details recorded in Certificates of Analysis, the relevant exchange was as follows:

> I would like to give you the opportunity, Dr Stewart, before we go further to clarify your position in relation to the use of the 2 standard deviation leeway, if I can call it that, that you say is supported by [the Malt Proficiency Scheme] because I detect in your statement an ambivalence on your part about whether you want to embrace the [Certificate of Analysis] policy and defend it on the one hand or distance yourself from it and blame the commercial people on the other. So which is it to be here and now, Dr Stewart? Are you going to say to his Honour now that you regard the adoption of a 2 standard deviation as a legitimate approach having regard that you are applying it to a certificate that states facts without disclosing to the customer that's what you have done?---In the context of Viterra Malt I thought that that was a good compromise, and in my personal opinion and the way that - I'm not sure if this is relevant, but in the way that Coopers Malt currently operates we don't do any of those practices. So we have in effect adopted the Cargill practice, if you like. For me being in the industry, we were under pressure to continue to send the malt out and the 2 standard deviation or the … [C]ertificate of [A]nalysis [P]rocedure appeared to be a more robust way of doing it rather than the arbitrary way. So that's why I say that the 2 standard deviations is better than an arbitrary approach. But, you know, the approach that I favour and the approach that Coopers currently use is to state exactly what was analysed on the [C]ertificate of [A]nalysis, and that is certainly my preference.
>
> So really what you are saying in the last answer, if I am understanding you correctly, is that a system of pencilling and thereby altering the measured results unconstrained by any parameters as to value is worse than a system which is at least constrained by 2 standard deviations; is that right?---Correct, yes.
>
> *Do you accept that whether you vary or report falsely, I should say, the results of the analysis obtained in the lab by 2 standard deviations or more you are, irrespective of the range of deviation, making a false statement to the customer?---Yes, those are – correct, yes.*
>
> *And that is what is wrong with it, isn't it?---Yes.*
>
> *And that's why you were uncomfortable with it?---Yes, correct.*
>
> *And that's why you don't want to own it; is that right?---Correct, yes.*
>
> *And you are embarrassed by this policy, are you not?---It certainly was a source of unease for people at Joe White's (sic); yes, most definitely, yes.*
>
> And you wouldn't dream of suggesting at Coopers that they undertake that

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164 See further pars 207-211 below.

> kind of practice, would you?---No. Mind you, nor do we base it on a blend analysis. We analyse the actual malt going in that container.
>
> That's a different debate, isn't it, about which minds amongst reasonable maltsters may differ; do you agree?---Yes.
>
> So we are concerned with the [Certificate of Analysis] policy?---Yes.
>
> Can his Honour then take it that you no longer seek to defend as a legitimate practice the alterations of [C]ertificates of [A]nalysis by up to 2 standard deviations?---*I have always only ever said that it was a more robust procedure and based on some good science. So I don't defend sending a [Certificate of Analysis] that is incorrect to customers, no. I was always uncomfortable with that*.[165]
>
> (Emphasis added.)

176 Having given this clear and unequivocal evidence as to the unacceptable nature of altering Certificates of Analysis in the manner in which Joe White did, the following day Stewart seemed to suggest there was nothing about which to be uncomfortable. He expressed his belief that most brewers knew about altering Certificates of Analysis because of the general knowledge in the industry. When it was put to Stewart during cross-examination that he was very keen to assert the concept of industry practice, Stewart agreed. Stewart said he was aware of the industry practice not only from Hughes,[166] but from other colleagues and some direct information. When asked whether there was any scientific analysis or any sort of survey done of customers to support the existence of a common industry practice, Stewart said there was not. However, he said he had had conversations with individuals from the industry who had verified its existence.

177 While on the whole Stewart was a satisfactory witness, this topic is not complete without referring to the fact that at times, because of the difficult line Stewart was attempting to walk, his evidence was less than satisfactory. By way of example only, Stewart was asked about why it was that he failed to disclose to Joe White customers the practice of pencilling. Rather than answering the question, Stewart took the

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165 In his re-examination, Stewart gave evidence that Coopers simply analysed what was placed in a container for delivery and faithfully put the test results of that malt on a Certificate of Analysis. This applied to both malt to be used internally (for Coopers to use to make beer) and for external customers. He said if there were any parameters out of specification, a sensible discussion would be held with the external brewer about whether or not the brewer would accept the malt. He further said that that was the way he enjoyed doing business.

166 See par 73 above.

opportunity to attack the manner in which Cargill operated Joe White after 1 November 2013, referring to brewers being "asked every 5 minutes" for a derogation when something was slightly out of specification. He then went on to give his opinion as to what he thought brewers understood about the conduct of maltsters. When it was put to Stewart that he had not answered the question as put, Stewart accepted this and also acknowledged he was conscious his answer was non-responsive at the time he gave it.

178 This consideration of Stewart's evidence would also not be complete without referring to the fact that, before he gave evidence, a certificate under section 128 of the *Evidence Act 2008* (Vic) was sought and given.[167] Stewart availed himself of the protection available under this provision by way of privilege against self-incrimination in other proceedings in relation to a number of matters about which he gave evidence.[168] These matters included evidence of: the development and implementation of the Reporting Practice, including the Malt Blend Parameters Procedure (and its concealment), pencilling and the Viterra Certificate of Analysis Procedure (and its concealment); the Varieties Practice, including the increased use of barley varieties not approved by customers because of the Malt Cost Reduction Transformation Project; the Gibberellic Acid Practice, including him being directly involved in approving a shipment despite a customer expressly stipulating additives were not to be used; and the signing of the Viterra Code.

179 Section 128 includes the following:

> (1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness—
>
> (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
>
> (b) is liable to a civil penalty.
>
> (2) The court must determine whether or not there are reasonable grounds

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167 Stewart was subpoenaed to give evidence by the Viterra Parties.

168 A certificate was issued in relation to evidence contained in a total of 19 paragraphs of Stewart's witness statement, together with evidence Stewart gave orally on the same topics.

for the objection.

180 Despite Stewart's application for a certificate (which was made by experienced senior counsel on his behalf), and despite the court determining there were reasonable grounds for each of the objections made before giving the certificate,[169] the Viterra Parties submitted that to the extent there was evidence to the effect that "some of Joe White's staff had personal/subjective concerns" regarding the practice of adjusting test results, such concerns were mistaken and unwarranted. The reference to some staff was because Testi and McIntyre also sought and obtained certificates under section 128 with respect to their evidence, broadly on the same subject matters as those identified by Stewart in obtaining his certificate.[170]

181 Finally on this issue, it must be observed that the Viterra Parties' submission on this issue failed to grapple with the evidence of McIntyre to the effect that frequently results were fabricated because no testing had been done.[171] Further, no such submission could have been made by the Viterra Parties with respect to the Varieties Practice or the Gibberellic Acid Practice as both involved deliberate deception.

182 Furthermore, before returning to the chronology, and although far from determinative, findings made with respect to the legitimacy or otherwise of the Operational Practices are supported by the fact that each of the 3 persons critically involved in their implementation had been, and remained, conscious that they were engaged in inappropriate behaviour.[172]

183 In the ensuing months of 2010, it appeared to Stewart that the approach of getting more malt from off-grade barley in accordance with Viterra's directive under the Malt

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169 No submissions were made by the Viterra Parties that there were not reasonable grounds for giving the certificates.

170 To be fair, Stewart, Testi, McIntyre and others who worked at Joe White engaged in conduct that more senior management not only sanctioned, but encouraged and required. Leaving aside the question of the appropriateness of the Operational Practices more generally, there was no evidence to suggest anything other than that there was a reasonable basis for them to believe that their conduct concerning the Operational Practices was consistent with what had been approved by senior management. Unlike Hughes, they were offered ongoing employment with Cargill on a long-term basis.

171 See par 78 above.

172 This observation remains valid despite some of the concessions made during cross-examination of these 3 witnesses concerning the legitimacy, or possible legitimacy, of some of the conduct referred to in the evidence the subject of the s 128 certificates.

Cost Reduction Transformation Project became standard process for Joe White. Stewart gave evidence that Joe White's staff became used to operating in such a manner. However, he said concerns continued with respect to the manner in which Certificates of Analysis were being generated.

184 As a result, in around September 2010, Stewart discussed with Hughes whether Joe White should report a theoretical blend value or equivalent, rather than the purported actual results (after pencilling). Stewart suggested this would allow Joe White employees to comply with the Viterra Code.

185 In September and October 2010, meetings were held at which it was acknowledged that the Viterra Code raised questions of how to handle customer information in Certificates of Analysis.

186 Stewart gave evidence that he decided with Hughes against the use of a theoretical blend approach because it did not address the contents of the shipment itself. Stewart further gave evidence that "Joe White" wanted to maintain confidence in the quality of the malt that it shipped.

187 The Operational Practices continued against a backdrop of business transformation pursued by Viterra via a project titled "Business Excellence through Strategic Transformation", of which the Malt Cost Reduction Transformation Project formed a part. An email sent to all Viterra employees in February 2011 detailed progress on the project. It stated that during 2010, the Australian Malt division worked on 2 "transformation projects" within the business, designed to reduce cost and increase revenue in the Southeast Asian region. These projects included a "review of the process by which we acquire malt barley", resulting in an anticipated benefit of $1.3 million overall, and a review of "operating expenses and processes", resulting in an anticipated saving of $2.3 million in the 2011 fiscal year and a possible saving of $1.5 million in the 2012 fiscal year.

188 While dealing with the events of 2010, it is convenient to refer to the renewal of Hughes' employment contract. In around mid-2010, a contract was agreed to between

Hughes and Viterra Ltd ("the Hughes/Viterra Contract").[173] Because of some of the issues raised in this proceeding, it is necessary to spend a moment referring to the lead up to the Hughes/Viterra Contract, as well as some of its terms (which terms in most instances were also reflected in, or similar to, the terms of the contracts of service of the other Third Party Individuals).[174]

189 A letter dated 11 June 2010 addressed to Hughes entitled "CONFIRMATION OF EMPLOYMENT" and purportedly signed off by Gordon,[175] confirmed Hughes' full-time position "with Viterra". After setting out Hughes' total fixed remuneration package of $300,000, it was noted that the additional components of his employment conditions were as detailed in an attached contract of service.

190 Under cover of a letter dated 23 June 2010, Gordon forwarded a further draft of the Hughes/Viterra Contract. The letter stated that Viterra, being a reference to Viterra Ltd, recognised the contributions and achievements of staff in pursuit of achieving Viterra's corporate objectives. Hughes' position with Viterra Ltd was again confirmed. The covering letter recorded that Hughes was eligible for the "Viterra Short Term Incentive" and the "Viterra Mid Term Incentive" schemes, together with annual awards based upon his performance "as well as that of Viterra". Also on 23 June 2010, emails were exchanged with the subject, "Code of Conduct Roll Out". In the second of those emails, Ross stated she had spoken to Gordon and Fitzgerald to seek clarification concerning the Viterra Code. She noted that it had been approved by the board, that it was the first time she had seen the disclosure policy and that she thought it could potentially cause some questions from employees.

191 Returning to the Hughes/Viterra Contract, it had a number of terms which linked Hughes' remuneration and performance inextricably to that of Viterra. The terms and conditions of employment required Hughes to perform all duties to the satisfaction of

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173 See further par 1873 and issues 135, 136 below.

174 In relation to each of Youil and Stewart, the written contract was entered into between the respective executive as the employee, and was signed by Hughes on behalf of Viterra Ltd as the employer. With respect to Wicks, the service contract was countersigned by Norman on behalf of Viterra Ltd. On the face of the document, it was unclear who signed Argent's service contract on behalf of Viterra Ltd.

175 The first page of the document contained Gordon's name and his position as president for South East Asia, although it did not actually bear his signature in the place provided for it.

Viterra Ltd. To this end, Hughes was required to comply with all Viterra Ltd's operational practices, procedures, policies and directions, which were subject to the right of Viterra Ltd to amend them from time to time or to introduce new ones. Further, it was recorded that all policies and procedures were held by the office of Viterra Ltd, on the intranet "Pulse" and were available from Viterra's human resources department.[176] Pulse enabled documents to be retrieved from Viterra's wider "Total Records and Information Management" system (referred to by Viterra employees as "TRIM") ("the Records System").[177]

192 Mattiske gave evidence that Pulse contained Viterra's policies. He believed there were approximately 50 policies uploaded. Mattiske had access to Pulse and had reviewed some of the uploaded policies. However, he could not recall whether Joe White's policies were on Pulse. He further said that he had never reviewed the Malt Blend Parameters Procedure or the Viterra Certificate of Analysis Procedure. Pulse had a search engine. If someone wanted to find the Viterra Certificate of Analysis Procedure on Pulse, a search for "certificate of analysis" would have brought it up.[178] Stewart's unchallenged evidence was that anyone internally in Viterra could see documents uploaded on Pulse.

193 The Hughes/Viterra Contract made no distinction between the head office of Viterra Ltd and the head office of Joe White. In short, Hughes was required to perform his

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176 The effect of a document being put on Pulse was that it then formed part of Viterra's records, and was available to those with access who searched for such a document. There was no evidence to suggest there was any form of publication of the fact that a document had been uploaded to Pulse. Testi gave evidence that access to Pulse was available to staff of Viterra Malt, as it was determined by information technology staff. Joshua Wilson-Smith (see par 615 below) gave evidence that Pulse was "Viterra-wide" and was the operational intranet for everyone that worked for Viterra. In closing submissions, Stewart's senior counsel sought to distinguish Pulse from the Records System. In so doing, it was submitted Pulse was the means by which information was disseminated and promulgated "throughout the organisation". On the evidence before the court, it was not possible to form such a sweeping conclusion such that it could be presumed that documents on Pulse would have been brought to the attention of everyone who worked at Viterra.

177 The Records System used letters to indicate the relevant area (for example, CF for Corporate Folder), a number to show the year (for example, 04 to identify 2004) and a further number which demonstrated the sequential number of the folder that was raised at the time: for example, par 288 below. Every document was assigned a number and was traceable.

178 Stewart gave this evidence somewhat tentatively, but it was not the subject of any challenge. Moreover, it would be highly surprising if the intranet did not have a search engine.

duties at the "Head Office, Adelaide",[179] subject to the right of Viterra Ltd to require Hughes to make a reasonable relocation as determined by Viterra Ltd.

194 It was a condition of employment that Hughes was to be the subject of performance development reviews, to be conducted throughout the year. Further, Viterra Ltd agreed to endeavour to improve the performance of Hughes and that of Viterra Ltd, with Hughes to be provided feedback on his performance on an ongoing basis as well as through formal interviews.

195 As part of a termination clause, if Hughes were terminated he was required to deliver up to Viterra Ltd "all correspondence, including documents and other papers and all other property belonging to [Viterra Ltd] or its Associated Companies …". Further, if Hughes were made redundant, a redundancy payment would be made in accordance with the "Viterra Policy". Furthermore, Viterra Ltd was entitled to make deductions from Hughes' pay for various stipulated reasons.

196 As referred to in the covering letter, the Hughes/Viterra Contract provided that Hughes was eligible for certain incentives. In relation to his short-term incentive, this was part of the "Viterra Short Term Incentive scheme" and was to be based not only on Hughes' performance, but also on the performance of *Viterra*. As for his mid-term incentive, described as the "Viterra Mid Term Incentive scheme", that was to be provided separately by Viterra. The Hughes/Viterra Contract required Hughes to work 38 hours per week. However, his daily hours were to be set by Viterra Ltd's management to meet the operational requirements of Viterra Ltd. Further, in setting out a restraint of trade and other matters dealing with conflicts of interest, it was recorded that Hughes was a key link between Viterra Ltd and *its* customers. In that regard it was recorded that Viterra necessarily entrusted Hughes with Viterra Ltd's customer relationships, which were "an element of its business". And, "[i]n order to protect that business", a 3 month restraint period was imposed if his employment with

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179 It was clear from other parts of the Hughes/Viterra Contract, that this was a reference to Viterra's head office; for example all policies and procedures of the employer were to be stored at that office.

Viterra Ltd were to cease.

197 Despite the matters set out above,[180] as at 2011, pencilling had not been formalised within Joe White to any significant extent. Stewart gave evidence that, up to this time, Certificates of Analysis had been the subject of arbitrary "correction". Stewart explained that, with the imposition of the Viterra Code, change was necessary as the arbitrary pencilling was not entirely truthful. This was addressed in early 2011, when Viterra Malt decided to introduce a procedure to provide some structure and, according to Stewart's evidence, more scientific rigour and a more rigorous procedure.

198 The genesis of the new procedure appeared to include an email from Sheehy to Stewart and another which discussed a first draft of the guidelines for Certificates of Analysis. After stipulating various things that could no longer be done, Sheehy also referred to working "out what [to] put exactly" for the parameters that did not have any stipulated standard deviations for test results recorded in any recognised testing scheme.

199 Accordingly, with respect to the Reporting Practice being reflected in Viterra's business records, on 18 February 2011, the first version of the "Viterra Malt Certificate of Analysis Generation – Export Customers Procedure" ("the Viterra Certificate of Analysis Procedure") was created and circulated.[181] As the title suggested, its applicability at that time was confined to export customers.[182] It provided that:

> All Production Managers, the Technical Centre Chemist, Customer Service Administrator, the Chief Chemist, General Manager Technical and all Managers responsible for signing off Certificates of Analysis *are required to adhere to the guidelines* outlined in this document.
>
> (Emphasis added.)

The procedure was outlined as follows:

> All results must be present on the Certificate of Analysis prior to approval being signed off in [the laboratory information and management system ("the

180 See pars 157-163 above.
181 A draft had been circulated in November 2010.
182 Most of Joe White's customers from 2010 to 2013 were international brewers.

Laboratory Information System")][183] by the Production Manager, or their representative.

- In the event that all results are not available at the time of shipment, *expected blend results can be used as a substitute for all parameters*,[184] with the following exclusions:
  - Actual NDMA[185] and DMS[186] results must be available for all Carlsberg Asia, Heineken and Japanese Customer groups unless otherwise approved by the General Manager Technical.
- The Certificate of Analysis cannot proceed for final sign-off and forwarding to the Shipping Department until all data is present. Failure of results to be available may cause delays in Shipping Documentation.

Results that *appear out of specification* on the Certificate of Analysis *may be adjusted by the Technical Centre Chemist (or their nominated proxy)*[187] *based on the associated analytical error defined for that test parameter as defined in the* [*Malt Proficiency Scheme*] *program, by up to two Standard Deviations where required. These changes will be approved by the Chief Chemist and General Manager Technical when signing off the Certificates of Analysis.*

- These changes *are not to be made by the Production Managers in* [*the [Laboratory Information System]*.
- All out of specification results should be repeated if possible, particularly where the results are significantly different from the expected value.
- The final shipment results *must be within two standard deviations* of the pre-shipment result, highlighting the importance of accurate pre-shipment data.
- Results that still remain *out of specification after a maximum two standard deviation adjustment can only be altered further and signed off for progressing of the shipment by the consensus of two or more General Managers [and] the Market Manager*, or the shipment may be recalled.

(Emphasis added.)

200 Thus, changes could be made "where required", so as to report compliance with the relevant specification, both with respect to non-complying results up to 2 standard deviations (as identified in the Malt Proficiency Scheme) or non-complying results beyond 2 standard deviations from the customers' specifications; the only difference

183 The Laboratory Information System is described in par 255 below.
184 This was a reference to the theoretical blend approach: see pars 25-29 above.
185 NDMA stands for nitrosodimethylamine.
186 DMS stands for dimethylsulphide.
187 Compare par 75 above. Although there was no record of McIntyre ever being the technical centre chemist's nominated proxy, she addressed most of the test results when they were out of specification. See also fn 238 below.

being the required process to be taken before any such adjustments were able to be made.

201 Stewart gave evidence that when he was involved in approving out-of-specification malt, he considered the test results overall, the customer's needs and whether the malt would nonetheless perform well for the customer. He further said that when he took out-of-specification malt results to Wicks or Youil, or if neither of them were available, Hughes, for co-approval he explained the technical aspects of the malt. Then, the commercial issues would be addressed (including the costs and production implications of withholding the shipment). Stewart said if he was satisfied as to the malt's quality, its despatch would always be approved. Further, he said even if he was not so satisfied, the despatch would be approved by Wicks, Youil or Hughes. In substance, the perceived commercial imperatives of Joe White drove the decision as to whether malt which did not comply with customer specifications would be despatched to the customer in any event.[188]

202 Returning to the Viterra Certificate of Analysis Procedure, under the heading "Records" the following was stated:

> All results relevant to a given shipment must be recorded in [the Laboratory Information System] and will automatically be transferred into [a Laboratory Information System] based Certificate of Analysis … Certain Customers such as Lion Nathan, Kirin and Sapporo require the information to be presented in their own Certificate of Analysis format or with other supporting document (sic) in a pre-defined format.
>
> Non-Conforming Shipment release form to be completed where required and attached with [Certificate of Analysis] documentation.

203 Under the heading "References", 3 items were identified, namely: "Internal Viterra Malt Procedure"; the "[Malt Proficiency Scheme] Standard Deviation Values as determined by the [Malt Proficiency Scheme] Technical Advisory Group"; and a "Malt Blend Parameters Document" (being a reference to the Malt Blend Parameters Procedure), with the address on Viterra's J-drive. As to the last of these items, Testi gave evidence that this document was "on the server".

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188 See further par 2238 below.

204 Finally, Sheehy was recorded as the author and Stewart as the person who approved the Viterra Certificate of Analysis Procedure. Sheehy worked under Stewart and Stewart considered she was very good at writing procedures. Stewart's evidence was that the document was tabled and approved at a monthly meeting of the "Viterra Malt executive".[189]

205 Stewart's evidence was that it was important that the technical team in head office saw the original results "warts and all", so that any decision about quality and performance leading to adjustment of documentation could be made on a proper basis. Further, he instructed plant managers not to make any adjustments outside the Viterra Certificate of Analysis Procedure.

206 Also on 18 February 2011, Testi sent an email to a large number of employees, including all Joe White executives, all Joe White plant managers and McIntyre.[190] The email referred to a phone conference that week and the fact that it had been discussed that the Viterra Certificate of Analysis Procedure would be confined to export customers at that point. Testi also noted that the Viterra Certificate of Analysis Procedure had been given an intranet document number and had been uploaded onto Viterra's intranet, Pulse.[191]

207 A moment needs to be spent discussing the Malt Proficiency Scheme and what was disclosed by providing information concerning its existence. Self-evidently, the Malt Proficiency Scheme was central to the intended operation of the Viterra Certificate of Analysis Procedure.[192]

208 This is apparent not only from the contents of the Viterra Certificate of Analysis Procedure, but also from an email sent by Stewart on the same day. In that email, Stewart referred to the Malt Proficiency Scheme standard deviation table, which was attached, and said it could be used for the trial Certificate of Analysis procedure.

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189 Stewart could not recall who was at the meeting.

190 The email attached a "Non-Conforming Shipment Form". This was solely an internal document and, to the extent it was used, it was not sent to Joe White's customers when the malt did not conform.

191 Testi provided the intranet address and document number.

192 See par 199 above; but also see par 198 above.

Stewart directed that Joe White could operate within 2 standard deviations. The attachment set out a whole range of analytes, and the "standard deviations" applicable to them respectively.[193] The document recorded that these were the results as at 18 February 2011 based on round 169, which was a reference to the test that had occurred that month.

209 The Malt Proficiency Scheme is a form of inter-laboratory comparison or ring-testing, by which a participant laboratory may assess the calibration and quality of their testing.[194] The purpose of the Malt Proficiency Scheme was to enable laboratories undertaking the analysis of "malt and barley to monitor and improve the quality of their measurements for a range of analytes". The Malt Proficiency Scheme had over 100 participating laboratories worldwide.[195] It operated by sending a portion of the same single sample to the participating laboratories for analysis, and compiling an analysis of the laboratories' results, which were then distributed.[196] Naturally, the range of deviation is wider with respect to some components when compared to others.

210 By February 2011, Viterra already had within its records a document entitled "Malt Analytes Proficiency Testing Schemes Procedure", which had been created by Sheehy and approved by Moller in August 2008. The document was for distribution to all "Viterra Malt Laboratories", and stated that they were all bound by the relevant procedures outlined in it. In addition to the Malt Proficiency Scheme, reference was

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193 In fact, the values attributed to each analyte were the standard deviation for proficiency assessment values: see further par 216 below.

194 Self-evidently, if laboratories calibrate testing equipment differently, then different results would occur in respect of the same sample. Stewart gave evidence that different results between Joe White's testing and customer testing sometimes occurred because of this. Further, McIntyre gave evidence some adjustments were made to results because Joe White was aware from the testing under the Malt Proficiency Scheme by some of Joe White's customers that their test results read differently to Joe White's results: see par 77 above. Stewart's evidence was that some laboratories "read 3 [or] 4 standard deviations off". Furthermore, by the Malt Proficiency Scheme utilising a single sample as the control sample it avoided the possibility for variance from variability within the malt itself if more than 1 sample was used in testing a batch of malt.

195 Testi gave evidence that she personally derived confidence from the fact that the Malt Proficiency Scheme was an industry scheme with a scientific and statistical basis.

196 Each result was reported as a "z score", which was a measure of the number of standard deviations from the mean of all reported results.

made to a Heineken analysis scheme[197] and a San Miguel analysis scheme. It was recorded that the primary aim of "the schemes" was to enable laboratories undertaking analysis of malt and barley to monitor and improve the quality of their measurements for a range of analytes.

211 The procedure outlined the manner in which the laboratories were to participate in the Malt Proficiency Scheme. There was also a procedure for "all participating laboratories" to participate in the Heineken scheme. In relation to the Malt Proficiency Scheme, the following was stated:[198]

> If a **z score** is **>2.00 or <-2.00** this result must be entered into AusCAR as a non-conformance. Non-conformances must also be raised for failure to enter results, and for assigned values where the original laboratory result for that plant falls in the category of **>2.00 or <-2.00**, as notified in the Internal Comparison Report.
>
> (Original emphasis.)

212 Cargill's malt business unit leader in 2013, Doug Eden ("Eden"), was taken to this passage during his cross-examination. Eden was a long-standing Cargill employee who, in 2013, had spent a number of years working in the malting industry.[199] He acknowledged he understood what "MAPS" was, but said that this was an area that was not his strength. He accepted that the passage in question would have alerted a reader to "this analytical approach that's being taken relating to 2 standard deviations".

213 This document, in discussing the proficiency schemes, made no reference, either expressly or implicitly, to the Malt Blend Parameters Procedure. Further, later iterations made no reference to the Viterra Certificate of Analysis Procedure after it had been introduced in February 2011. It also said nothing about changing the test results on Sign-Out Reports or in Certificates of Analysis. In short, the document did

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197 See fn 554 below.

198 The language used did not precisely match the wording in the Malt Proficiency Scheme, but it is unnecessary to discuss this further.

199 Eden ceased his employment of 37 years with Cargill in 2015. During that 37 years he spent approximately 3 years in the mid 1990s working for Cargill Australia in Wagga Wagga, New South Wales. He has a bachelor of economics and business accounting from Coe College.

not give notice of these other procedures or the practice of pencilling. Further, Eden's acceptance of the reference to a 2 standard deviations approach in the document in no way amounted to an acknowledgement that the inclusion of this document in the Data Room put Cargill on notice of the Reporting Practice.[200]

214 Some of Joe White's customers also participated in the Malt Proficiency Scheme. McIntyre gave evidence that when a complaint came from a customer who was a participant, the customer would be told the test results were within the Malt Proficiency Scheme and the European Brewery Convention standard inter-laboratory variations. Sometimes customers would accept the explanation; sometimes not. During her cross-examination, the proposition was put, which she accepted, that if a customer accepted the explanation then the customer was also accepting malt that was out of specification. Thus, despite being within the "standard inter-laboratory variations", the evidence was that this was considered as not meeting the customer's specification.

215 Stewart gave a description of the Malt Proficiency Scheme as a widely-used quality assurance scheme. He gave evidence of Joe White's participation, and said that if a participant discovered that it was "repeatedly … an outlier, it might calibrate its equipment or processes to achieve results closer to the population average". (Testi took exception to "repeatedly" in this statement, and said an adjustment might be made after only a single outlier, depending on the result.) In his evidence in chief, Stewart said the Joe White technical team[201] described the Malt Proficiency Scheme as satisfactory, and 2 standard deviations for any particular parameter as scientifically

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200 See par 465 below. In the Viterra Parties' closing submissions it was stated that Cargill was told Joe White used the "MAPS Policy" which *showed* that Joe White's analytical approach was to record a result as being non-conforming only if the result was plus or minus more than 2 standard deviations from the target parameter. When their senior counsel was asked how that submission was put, it was conceded that "showed" was not the best verb. It was then said that "accepted" or "assumed" might be a suitable replacement, but then it was acknowledged that it could not have been "assumed" that Joe White in particular took this approach. Finally, it was suggested "accepted" was the appropriate replacement. This exchange demonstrated the Viterra Parties' unsuccessful attempt to overstate the connection between the disclosure of the Malt Proficiency Scheme as a document relevant to Joe White's operations and the existence of the (undisclosed) Viterra Certificate of Analysis Procedure.

201 Which Stewart identified as primarily Sheehy, but also said "probably McIntyre may have been consulted".

robust and an appropriate principle to apply.[202]

216 Every month, the Malt Proficiency Scheme would prepare and distribute a report which set out for each parameter the range of results achieved by its participants. The information provided in the monthly reports included standard deviation values, "robust" standard deviation values, standard deviation for proficiency assessment values[203] and a satisfactory range. In relation to standard deviations reported, the deviation differed for each parameter, depending upon the results obtained. Naturally, standard deviations for each parameter change from time to time depending on the results of the monthly testing. The Malt Proficiency Scheme reported that a result within 2 standard deviations was a satisfactory result. Further, it was stated that a result of more than 2 standard deviations was a questionable result. Importantly, not all specifications or parameters on which Joe White reported formed part of the Malt Proficiency Scheme.[204]

217 Joe White prepared an internal document which summarised the results Joe White plants submitted as part of the Malt Proficiency Scheme program. Joe White also reported the results of its customers who took part in the Malt Proficiency Scheme.

218 A report emanating from the Malt Proficiency Scheme for September 2013 was tendered. Its aims were described as follows:

> The primary aim of the [Malt Proficiency Scheme] is to enable laboratories undertaking the analysis of malt and barley to monitor and improve the quality of their measurements for a range of analytes. [The Malt Proficiency Scheme] will also enable laboratories and regulatory bodies concerned with the analysis

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202 But also see par 175 above.

203 The standard deviation for proficiency assessment was the expected standard deviation, which was different from a standard deviation that any particular participant would have calculated or a standard deviation calculated by some other means.

204 The fact that the Malt Proficiency Scheme did not cover all the parameters for which Joe White provided specifications was fully appreciated by those responsible for overseeing the reporting on malt at Joe White. An email in November 2010 from Sheehy to Stewart and Moller provided a first draft of "Certificate of Analysis Guidelines". After setting out certain assumptions that she had made (including that Joe White could no longer adjust final shipment results to match pre-shipment results and that Joe White could no longer adjust results bordering on the specification limits to make them "fit more comfortably!"), it was recorded that Sheehy had not worked out what to put for those parameters (of which she gave a number of examples) that did not have standard deviations specified in the Malt Proficiency Scheme.

> of malt and barley to gain information on the efficacy of methods and assist in the development of new methods.

219 Expert evidence was given that the Malt Proficiency Scheme was not intended to provide a basis to adjust test results that were being reported to customers.[205]

220 When Stewart was taken to this report during cross-examination, he accepted that what had been done at Joe White was to take a protocol about the way in which laboratories, participating in the Malt Proficiency Scheme, would do certain things and identify a standard deviation for each parameter from the working out of that protocol amongst its participants. Then Joe White took the value of 2 standard deviations from this protocol and simply transposed it to suggest a tolerance that should be allowed when testing malt in a Joe White laboratory.

221 In other words, Joe White used the "standard deviations" derived from the results of testing processes and equipment of all of the participants in the Malt Proficiency Scheme. Joe White then simply applied them to the processes adopted and equipment used by Joe White at each of its plants and laboratories in purporting to identify variances that were claimed to be within a satisfactory range and could be represented to comply with customer specifications if they came within those ranges.

222 Stewart acknowledged the Malt Proficiency Scheme did not provide a licence to a malt producer to misstate results on a Certificate of Analysis; it was not designed for that purpose; and its function did not include such a practice. He gave evidence that the Malt Proficiency Scheme provided a measure of the variation of each characteristic of the participating laboratories and that Joe White was "simply applying that variation in pencilling the [Certificates of Analysis] or the [S]ign-[O]ut [R]eport".

223 In summary, neither Stewart's evidence of what was involved nor the acceptance by Eden concerning the Malt Proficiency Scheme alerting Cargill of an analytical approach involving 2 standard deviations,[206] provided a basis for finding it gave notice of the existence of the Reporting Practice or some similar practice. The fact that

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205 The expert was called by the Viterra Parties. See further par 2201 below.

206 See par 212 above.

an approach involving 2 standard deviations was used in the Malt Proficiency Scheme for the purpose of calibrating testing equipment said nothing about Joe White altering results by pencilling if results were within 2 standard deviations (or, for that matter, beyond 2 standard deviations), and only reporting the information that was covertly changed rather than the actual results.

224 Further, there was no illusion with respect to the fact that Joe White would be continuing to ship malt that did not comply with its customers' specifications. On 22 February 2011 (being only 4 days after the Viterra Certificate of Analysis Procedure was circulated), Testi sent an email to all plant managers, and others including Stewart, attaching a spreadsheet to be completed with respect to all shipments which required "out of specification approval". The email suggested the spreadsheet would be forwarded to Testi at the end of each month for benchmarking. Testi's evidence was that this spreadsheet was only used for a very short period of time.[207] Her evidence was that Sheehy took over the responsibility for benchmarking compliance and reported figures to Testi each month, but she was unsure when it started.[208]

225 Following this formalisation of pencilling in the Viterra Certificate of Analysis Procedure, the Operational Practices within Joe White with respect to the Reporting Practice continued. The Operational Practices relating to domestic customers, and to all customers regarding the Varieties Practice and the Gibberellic Acid Practice were unaffected by the introduction of the Viterra Certificate of Analysis Procedure.

226 Stewart gave unchallenged evidence that Hughes gave instructions that the Viterra Certificate of Analysis Procedure was not to be included in the quality procedure manual (which was made available to the auditors of the International Organisation for Standardisation and of Joe White's customers).

227 Stewart gave evidence that the Viterra Certificate of Analysis Procedure complemented the Malt Blend Parameters Procedure. According to Stewart, the 2

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207 See further pars 235, 245-248 below.

208 Testi's evidence was that "benchmarking" did not mean anything more than reporting, because Joe White was only benchmarking amongst its own performance.

procedures were intended to work hand in hand, with the Malt Blend Parameters Procedure addressing "tolerance" in packing malt from available batches on a calculated theoretical blend, and the Viterra Certificate of Analysis Procedure addressing "tolerance" in the results obtained from testing packed malt.

228 On 25 February 2011, Jones sent an email recording that a barley discount had been agreed to with Viterra on non-malt grades of barley, being $23.26 per tonne. It applied to all deliveries from 1 March 2010. Jones' evidence was this was part of the implementation of the Malt Cost Reduction Transformation Project, though he also acknowledged that there had been a discount in the previous year; the difference being that the implementation meant Joe White was increasing its use of non-malt grade barley in order to meet the project's objectives.

229 On 2 March 2011, the Malt Blend Parameters Procedure was updated. Testi circulated version 28,[209] under cover of an email sent to a large number of persons, including Hughes, Youil, Wicks, Stewart, Jones and McIntyre (but not Argent). The email observed the update had occurred to "reflect monitoring of non-conformance of malt blending parameters in benchmarking instead of customer specification as was previously listed".

230 The attached document bore no numbers or other indicia to suggest it formed part of Viterra's management systems. However, it clearly did. For example, Stewart's performance and development reviews for the year ending 1 November 2010[210] both expressly identified "Malt Blending Procedure" as something with which Stewart was required to comply in order to effectively manage profitability.[211] Both reviews referred to the Malt Cost Reduction Transformation Project 3 times, the first in time noting Stewart was currently working on it, that it was to be implemented in achieving

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209 A memorandum dated 22 March 2010 from Stewart referred to revisions 23 and 24 of the Malt Blend Parameters Procedure, stating it had been updated to reflect new customer specifications, barley performance and the requirement of a particular brewery.

210 Joe White's financial year was from 1 November to 31 October. There were 2 reviews for Stewart for the year ending 1 November 2010, preceding dated 16 December 2009 and after dated 8 November 2010.

211 The review stated the Malt Blending Procedure was to be reviewed and updated every 6 months.

stated goals, and that the results would appear in future personal development reviews of Viterra.[212] The second review at the end of the relevant year recorded that Stewart had completed wave 1 of the Malt Cost Reduction Transformation Project and had shown good leadership, multi-functional ability and negotiation skills. Both reviews commented that Stewart was a high achiever who was focused on outcomes and who had learnt to balance this "with considering the journey on the way to achieving these outcomes and consequently has become a better manager". In both of the reviews, Hughes was recorded as Stewart's leader.

231 Some further observations should be made about the performance and development reviews. It was recorded that Stewart's leader was Hughes, in Hughes' role as the executive manager of malt. It was stated that the human resources department, which was a department of Viterra, had redesigned the personal development review process, and that this process was an essential tool for managers and employees. The process was part of, amongst other things, identifying "the Company's corporate objectives" and providing an opportunity to understand career aspirations and how they could grow within "Viterra". In relation to the objectives, the following was stated:

> Each year the company's objectives are identified. These objectives are filtered down to teams across the organisation to establish how they can contribute to the successful achievement of company objectives.
>
> These goals should also reference [individuals'] Job Descriptions, to ensure that we continue to grow the company's culture and values.
>
> As this is a continual individual consultation process [personal development reviews] open up a formal "performance specific" communication line between the manager and the team member.

Plainly, the performance, development and review of Stewart were seen as being part of Viterra's operations on an ongoing basis.

232 In relation to the specific objectives identified for Stewart, some were directed specifically to Joe White's operations. However, the objectives Stewart was required

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212 Similar requirements were imposed upon Stewart by his performance and development review for the year ending 1 November 2011.

to satisfy included: working cooperatively with Viterra's Australia and New Zealand sustainability department to set up initiatives that would improve both energy and environmental performance of laboratories; and ensuring Viterra Malt exceeded an 85 percent compliance to the Viterra safety health and environment strategic plan. Further, with respect to "Key Behaviours" it was stated that Stewart was required to seek new and innovative opportunities to develop and grow "Viterra". Furthermore, the development plan identified for Stewart required him to be more active in his participation within the general Viterra research and development program in Australia, New Zealand and North America. In so doing, Stewart was directed to interact with 2 individuals who were not part of Joe White's operations.

233 Stewart's evidence was that personal development reviews were conducted regularly and would include key performance indicators and key areas for attention. He said he was reviewed on how successful he was in meeting the objectives set for him, which included the Malt Cost Reduction Transformation Project.

234 Further, Viterra issued budgets for Joe White which incorporated cost savings of the transformation. On 24 November 2010, Stewart received a budget report which set out the revised targets in forecasting the malt margin. As a consequence, Joe White procured greater quantities of cheaper barley varieties not approved by its customers, especially Vlamingh and Hindmarsh. Further, although Stewart gave evidence that a "decent" quality of malt was maintained, he said there was an increase in the extent to which adjustments to Sign-Out Reports were made for the purpose of preparing Certificates of Analysis. Furthermore, the change resulted in an increase in the use of varieties not approved by Joe White's customers. Despite all this, Stewart's evidence was that Joe White was still able to "meet the quality *expectations* of its customers" (emphasis added).

235 The stated purpose of the Malt Blend Parameters Procedure, valid from 1 March 2011, was as follows:

Customer's Malt Specification

Regardless of the Malt Blending Procedure, every effort should be made to pack malt that is within a Customer's Specification, and at no time should a malt blend *that is likely to result in a customer complaint* be packed. *In some cases the blend parameters listed are to be used in place of the customer specification* where these will be marked on the table below. Compliance to the Malt Blending Parameters is monitored via the Viterra Malt Benchmarking Report.[213]

(Emphasis in original.)

Self-evidently, it was contemplated that malt could be sent that was out of specification unless it was likely that the customer would complain.

236 The procedure stated that a production manager had authority to pack a malt shipment if the *parameters for a theoretical blend* were within the malt blending parameters (which were to be used "in place of the customer specification"). However, if a malt blend had 1 or more parameters that lay outside the malt blending parameters, the following procedure was to be followed:

a. The Plant Manager is to set up local procedures to ensure appropriate review, should a parameter fall outside the Malt Blending Parameters or an analysis value for a parameter in the Malt Blending Parameters is not available.

b. The Plant Manager *may authorise* the packing of the theoretical blend *where appropriate*.

    i. To determine appropriateness, the Plant Manager should assess at all times the potential impact of an approved blend on customer shipment quality, including the impact of all parameters, not just those documented in the Malt Blending Parameters.

    ii. A record is to be kept for all theoretical blends that are approved for packing using the Blend Approval Form.

    iii. Blend Approvals are required to be reviewed as part of the Management Review process. Corrective actions are to be developed to address *the need to pack shipments that are outside of Customer Specification or the Malt Blending Parameters*.

    iv. The National Quality Systems Coordinator will audit the review of Blend Approvals and the corrective action that follows annually.

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213 Benchmarking reports were to have been prepared every 1 to 2 months. There was also a quarterly review of the benchmarking data: but see also par 224 above.

(Emphasis added.)

237 Thus, malt that was outside customer specification and outside the non-disclosed malt blending parameters could still be packed for shipment "where appropriate".

238 Under the heading "Actual Shipment Analysis", the procedure stated:

> It is the Plant Manager's responsibility to ensure the actual analysis for all shipments is reviewed once analysis becomes available. The Plant Manager is responsible for instigating a recall of a shipment based on actual laboratory analysis should it be warranted. The General Manager Technical, General Manager Operations, General Manager Commercial or Marketing Manager are to be informed immediately if such a situation occurs, and prior to the recall being initiated.

239 Under the heading "Head Office Support", it was stated:

> The General Manager Technical is available for consultation to determine the appropriate course of action regarding the packing of a theoretical blend or the impact of actual shipment analysis, and should be regarded as the first point of contact should the need for consultation arise. The General Manger Technical may consult with the Executive Manager Malt, General Manager Operations & Commercial or the Marketing Manager.

240 Next, the document listed 16 separate malt blend parameters for 29 of Joe White's customers. Some customers did not have specified parameters for particular characteristics, whereas others did; but all customers had at least some parameters listed.[214]

241 Annexed was a "Blend Approval Form", which stated, "By signing the Blend Approval Form, the Plant Manager acknowledges that they have considered the potential effect of the theoretical blend on the quality of the shipment." The form required the attachment of both the theoretical blend analysis and the "actual" laboratory analysis of all batches in the blend. According to Testi's evidence, the function of the form was for the plant to seek the necessary approval from their plant manager if the blend was not within the malt blend parameters. She said that the Malt Blend Parameters Procedure was applied every day that plants were blending malt and that compliance with the malt blend parameters was critical to performance.

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214 It is unnecessary to go into the detail.

242 Testi gave evidence that the Malt Blend Parameters Procedure was a means of dealing with differences or biases between results from Joe White's laboratories and customer laboratories. Her evidence was that the Malt Blend Parameters Procedure catered for such biases to reduce the risk that a customer would query a shipment as being out of specification in light of the results of the customer's own testing. She explained that, by this means, Joe White was able to ship malt that met a customer's perceptions of compliance with its specifications, rather than necessarily complying with the specifications.

243 Further, Testi contrasted the Malt Proficiency Scheme under which results could vary from month to month. Her evidence was that the parameters under the Malt Blend Parameters Procedure were built up over a long period of time to take into account particular ongoing issues with customers, as communicated by Stewart.[215]

244 McIntyre gave evidence about the purposes for which the Malt Blend Parameters Procedure was designed. After referring to the fact that many Joe White customers did not analyse the malt they received,[216] she stated that the Malt Blend Parameters Procedure was designed to accommodate circumstances in which it was difficult to produce a blend of malt that was 100 percent within specification for whatever reason. Further, it was designed to identify the specifications that Joe White assessed as being particularly important to each customer's process. She continued:

> The idea was that if the malt met the key specifications within the values identified in the malt blend parameters, the fact that those specifications differed from the contractual specification would not be likely, in Joe White's assessment, to matter in practice because the customer would still get a good result in the brewery. *The malt blend parameters indicated to the plant how far out of the contractual specification they could blend.*
>
> (Emphasis added.)

245 Testi prepared benchmarking reports from data supplied by Joe White's managers. A number were tendered. The report for February 2011 was circulated by Testi to a large number of addressees, including all Joe White executives and all Joe White plant

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215 See also fn 194 above.

216 See par 150 above.

managers. In a worksheet entitled "Compliance to Malt Blend Param", that report stated the percentage of shipments in specification for the 8 plants then in operation on a monthly basis for the period from December 2009 to February 2011. Of the 120 entries,[217] only 5 entries recorded 100 percent of shipments were in specification. Further, most of them were significantly less than 100 percent, with many being 50 percent or lower, including materially lower.

246 Another worksheet in the report was entitled "C of A" and listed information on a monthly basis for Certificates of Analysis for the period from July 2010 to February 2011. This worksheet listed various parameters for 4 plants,[218] plus for the "Grain Technical Centre". Many of the entries recorded 100 percent. Many did not. Of those that did not, a large number were between 90 and 99 percent. But some were much lower; including lower than 50 percent and even zero.

247 Testi gave evidence that she completed benchmarking reports up until 1 November 2013, and a short time beyond this. Despite this, benchmarking reports for 2013 were not included in her witness statement and none of the parties sought to tender them. Testi's evidence was that the benchmarking reports in her witness statement did not tell the court anything about what was happening in 2013.

248 On 27 June 2011, Testi circulated the quarterly benchmarking review to all Joe White executives, all plant managers and others. With respect to compliance with malt blend parameters, it was stated most non-compliances related to low moistures for certain customers or low levels of free amino nitrogen. As for benchmarking of Certificates of Analysis, it was stated percentages for compliance had been reported as part of the quality objective review, which was released the previous day. Essentially, that review provided some percentages, but only in very broad terms. It was observed that:

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217 A small number specified no amount and appeared to record an error in the spreadsheet cell.

218 The parameters included dimethyl sulphide, free amino nitrogen, and nitrosodimethylamine, but there was no consistency between the parameters recorded for each plant.

> Malt is being released in-line with the [Viterra Certificate of Analysis Procedure] however alignment between pre-shipment and shipment results is an area for improvement.

249 On 28 June 2011, version 30 of the Malt Blend Parameters Procedure was produced. The "Viterra" document was entitled "Malt Blend Parameters Procedure". There was very little change to the substance of the document issued on 2 March 2011,[219] though it contained more administrative details and some of the parameters had been altered. It recorded it was originally issued in December 2006, and bore a document number reflecting that, as well as a further number showing it had been entered into the Records System. Testi was recorded as its author, with approval from Stewart. However, this version was not placed on Viterra's intranet.[220]

250 The continued use of off-grade barley throughout 2011 and 2012 may be traced through a review of internal Viterra documents produced during this period. A "Viterra" presentation slide, dated 23 May 2011 and titled "[Australia New Zealand] BEST Projects April 2011", lists as a "project" increasing the use of off-grade barley to 30 percent. This same goal of 30 percent use of off-grade barley was detailed at length in a Viterra executive briefing on malt cost reduction dated 21 June 2011, which noted savings of $1.3 million had already been realised and repeated previous observations, namely:[221]

> The Malt business has already been realising savings through off-grade purchases. This project aims to make such savings more strategic and less reactionary.

251 It appears that "the Viterra board" was aware, and approved, of at least the policy of increasing Joe White's use of off-grade barley to reduce costs.[222] A document, dated 31 August 2011 and described as a "reference document" providing details of the "Processing – Malt Strategy to reality program and associated initiatives", stated that

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219 See par 229 above.

220 See further par 278 below.

221 See par 138 above.

222 Stewart gave evidence under cross-examination that he understood it was approved by the board. Although the weight of this evidence was questionable (Stewart was not on the distribution list or on the board), the question that gave rise to the evidence was not objected to (no doubt, advisedly) given the contents of the document dated 31 August 2011 and that those on the distribution list included Fitzgerald, Ross, Hughes and Gordon. Accordingly, it was highly likely it had board approval, formal or otherwise.

the strategic plans associated with, amongst other things, the transformation were approved by the Viterra board in November 2010. Specifically with respect to malt sales and the underlying cost of barley, it was recorded that Viterra had "[a]lready targeted in Barley Acquisition (off-spec grain) project".

252 An internal Joe White email chain, dated 21 September 2011, provides an example of the manner in which substitution of barley varieties was pursued and condoned. The initial email in the chain was from a customer, Nestlé Singapore Pte Ltd ("Nestlé"). It sought an update on the delivery of 2 containers. Confirming the order of malt required by Nestlé was a blend of 2 different types of barley (60 percent "Gairdner" and 40 percent "Buloke" varieties), an employee stated internally "[p]lease note that it was 100% Buloke". Mont Stuart ("Stuart"), marketing manager at Joe White, responded with an email to McIntyre, copied to others including Stewart, stating: "I assume you will report 60 Ga/40 Bu as per their request". On the face of it, this correspondence demonstrated a conscious and deliberate decision to mislead Nestlé with respect to the malt being delivered on this occasion.

253 With respect to the email from Stuart referred to above concerning Nestlé's order, McIntyre gave evidence that she understood it to be an instruction that she should complete the report to the customer to make it appear as if the shipment matched the customer's requirements when in fact it did not.

254 The Certificate of Analysis sent to Nestlé, which was signed off by Moller, in fact recorded "60% Gairdner/40% Buloke". Further, the correspondence that accompanied this Certificate of Analysis was illuminating. On 16 September 2011, Nestlé emailed Joe White asking for an update on the "2 trial containers of 60% Gairdner/40% Buloke blend". Joe White responded on a Viterra branded email stating that the 2 trial containers had been loaded and that an updated Certificate of Analysis would be sent at a later date. A further response was sent on 23 September 2011, attaching amended Certificates of Analysis with the covering note that they were for the 2 containers of "60% Gairdner/40% Buloke blend". The same afternoon, Nestlé responded stating that the Certificates of Analysis referred to "60% Gairdner/40%

Stirling, and not Buloke blend". The email, which was copied to a number of people including Stuart, McIntyre and Stewart, enquired as to how Nestlé would identify the 2 containers of trial malt. In a final email on this issue, Joe White apologised for attaching the same Certificate of Analysis twice, and attached "the respective [Certificates of Analysis]". The email repeated, contrary to the fact, that the 2 containers of trial malt were a blend of 60% Gairdner and 40% Buloke. Again, numerous people were copied into this email, including Stuart, McIntyre and Stewart.

255 The Laboratory Information System was a centralised laboratory, production and stock management software system dealing with all aspects of malt quality, including testing results, correlating with customer contract specifications, analysis (including to identify any parameters out of specification) and generating Certificates of Analysis for malt supply to customers.[223] It also recorded details of customer orders and barley received from grain traders.[224] McIntyre was the Laboratory Information System administrator.[225]

256 The Laboratory Information System also tracked barley once it was delivered to Joe White by quantity, variety and location. Thus, it was always possible to determine which barley was used to create which batch of malt; perhaps, subject to funnelling.[226]

257 When Joe White obtained a new customer, or an existing customer requested a new malt variety, a profile was created in Joe White's finance software system and the customer's contractual specifications were entered into the Laboratory Information System. Although specifications were usually set out in a supply contract, sometimes changes would not be recorded so formally. McIntyre's evidence was that, as part of

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223 The laboratory information management system was referred to by some witnesses as the laboratory inventory management system.

224 For completeness, the Laboratory Information System was the subject of a ransomware attack on 16 June 2017. Cargill was unable to access the server containing the data after this time as it was fully encrypted as part of the attack. However, after some dispute about the ability of Cargill to rely upon certain restored material, a copy of the data contained in the Laboratory Information System in 2013 was obtained from the Viterra Parties as they had kept a copy. It was the data from this source that was relied upon for the purposes of the trial.

225 She was appointed to this position in 2009, and her responsibilities were expanded to include dealing with malt quality issues and customer complaints.

226 See pars 265-269 below.

her role in maintaining the information in the Laboratory Information System, she entered specifications herself from customer contracts and, if they were altered, she always asked for a written record of any changes.[227] A direction to change specifications, which might have been permanent or temporary, would usually come from Stewart, and occasionally from Wicks or Stuart. She also received notification from customers directly, but would not make any change to the Laboratory Information System without first discussing the matter with Stewart. So far as any temporary changes were made, McIntyre gave evidence that she would note it in her own calendar as to when it was to be changed back. Although when cross-examined she accepted the possibility that she might have missed a note in her calendar, she rejected the suggestion that it was probable and could not recall an occasion when it had ever occurred.

258 Frequently, Joe White would have contracts to supply malt over an extended period, such as a year, pursuant to which customers placed orders for specific quantities at a specific time. Joe White rarely sold malt pursuant to one-off orders.

259 On a daily basis, McIntyre was responsible for inputting and maintaining customer specifications in the Laboratory Information System and generating and preparing Certificates of Analysis. Malt analysis results were entered into the Laboratory Information System by the laboratory chemist when the tests were completed.[228] Once these populated the relevant fields, a hard copy Sign-Out Report with the actual results was generated. Pencilled "results" were added to the data stored by McIntyre in a field called "reported". This remained her responsibility up until the Acquisition on 31 October 2013. McIntyre also assisted with basic laboratory work.[229]

260 Further, Joe White also used a software package, sometimes referred to as "SAP", standing for the Systems, Applications and Products ("the Administration System").

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227 If a customer had targets in addition to specifications, McIntyre would enter the targets into the Laboratory Information System in the specification field but also note it was only a target.

228 If the malt was tested in the central laboratory rather than just a plant laboratory, the results from the central laboratory "took precedence" over the plant's laboratory results.

229 There was evidence of other functions performed by the Laboratory Information System. It is unnecessary to refer to the detail.

This also contained a record of the customer contracts. The Administration System was connected to the Laboratory Information System.

261 As for testing results, there were 2 main times when malt was tested at Joe White. Each batch of malt was processed from a single variety of barley and then stored in a silo at the plant. After a batch was produced, a sample was tested at the plant laboratory. The results of that testing were entered at the plant laboratory into the Laboratory Information System. From these results, a production manager was able to produce a theoretical blend of different batches of malt, the blend results being produced by algorithms in the Laboratory Information System. By this process, the properties of a proposed blend were ascertained. The theoretical blend produced within the Laboratory Information System was achieved by using a program called "Blend Manager". This program would identify when a blend would, or ought to, meet a customer's specifications. Malt was then physically blended in accordance with this calculated theoretical blend. Not all the parameters the subject of reporting to Joe White's customers were the subject of theoretical blend reporting.

262 The second testing of all parameters to be reported upon was done on the packed malt. The packed malt was the subject of standard tests at a plant's laboratory,[230] and more specialised testing at the central laboratory. The results of those tests were entered into the Laboratory Information System by laboratory personnel. Because this part of the process involved human input, Testi accepted during cross-examination that it was possible errors were made from time to time when entering results into the Laboratory Information System.

263 Some parameters were determined by visual inspection of the malt. However, most required conversion of the malt by "mashing" it into wort. This process is similar to a part of the brewing process; "a mash may be made by taking a sample of crushed malt, adding water and then heating the combination to particular temperatures for particular periods of time". The mash is then filtered and the resulting fluid is called wort. In preparing to make a mash, the malt may be crushed into different sizes. The

230 Except Devonport and Cavan: see fn 42 above.

2 main sizes are fine grind and coarse grind.

264 The primary method for making a mash is called Congress mash, which refers to the standardised process instituted by the European Brewery Convention. For all Joe White's international customers, Joe White tested on Congress mash. This process required 50 grams of either fine or coarse grind to be placed into a pot with 200 millilitres of water. This is heated to 45 degrees Celsius for half an hour, and then heated by an increment of a degree per minute until the temperature reaches 70 degrees Celsius. The temperature is then maintained for 1 hour, before the mash is cooled, weighed and filtered to produce the wort. Generally, it was the wort from this process that was then the subject of testing, and reporting subject to any adjustments that might be made.

265 The issue of funnelling has been touched upon.[231] When grain was released from a silo it would draw faster out of the centre of the silo and slower around the edges. Numerous batches could be stacked in a silo at a time, with the possible consequence that parts of a batch would be mixed with another higher batch because of the drawing from the centre. When this occurred, it was referred to as funnelling.

266 It was uncontroversial that funnelling occurred to some extent. The occurrence of funnelling was taken into account in the Laboratory Information System. However, there was a stark contrast in the evidence as to precisely how funnelling occurred.

267 McIntyre's evidence was that as 1 batch was nearing complete withdrawal from the bottom of a silo, parts of the batch above may form part of the drawdown. This evidence was given by way of agreeing with the precise proposition put to her by the Viterra Parties during her cross-examination, immediately after acknowledging it was not her area of expertise.

268 Stewart's position was quite different. His evidence, by which he referred to the phenomenon as rat-holing, was that it could result in the extraction of 80 percent from the top batch and 20 percent from the bottom batch, but the percentage would vary

231 See par 256 above.

depending upon the quantity that was released. He further explained that this could be exacerbated by "bridging out", which resulted from the accumulation of chaff and other materials on the side of silos, which might hinder or stop the flow.

269 Whatever be the precise manner in which funnelling occurred, McIntyre's evidence was that a blend produced could have had small traces from multiple batches recorded by the Laboratory Information System as forming part of a single shipment.[232]

270 From 2007 to 2011, McIntyre's line of reporting shifted from between Stewart, Wicks and Hughes, though these changes did not have any real impact on her duties.

271 An example of customers' malt parameters being adjusted was apparent in an email, dated 20 October 2011 with the subject "Malt Blend Parameters V31", sent by Testi to all Joe White executives, all plant managers and numerous other persons including McIntyre. On the face of the email, it was sent by Testi as "National Quality Systems Coordinator: Malt" with the email address julie.testi@viterra.com, the website address of www.viterra.com and the company on behalf of whom it was sent identified as "Viterra Ltd". In addition to attaching the updated malt blend parameters, Testi set out the changes for 5 different customers. Hughes responded to the email the same day, suggesting to Testi that when she sent out "performance critical information" the email should be tagged with a read-receipt, and that Testi should tick off each of the recipients once it had been read. Testi agreed that she would do it in the future. Under cross-examination, Testi said she understood that Hughes was referring to any changes to customers' malt blend parameters as performance critical information. She also agreed that malt blend parameters were discussed at management level and that compliance with them was critical to performance.

272 Joe White was also continuing to utilise gibberellic acid during this period, including in the production of malt for customers who did not approve its use. In an email from Stewart, sent on 25 November 2011 to a number of employees, including Wicks and

232 See also fn 1567 below.

McIntyre, he instructed a plant manager "don't put the GA away" (a reference to gibberellic acid) when preparing malt for Sapporo, a customer who had prohibited its use. Stewart gave evidence that, by this email, he was telling the recipients to continue using gibberellic acid despite Sapporo's position. He said he did so under instruction from Stuart to increase the soluble nitrogen levels. This is an example of a conscious and deliberate decision not to act in accordance with Sapporo's specific requirement concerning malt being delivered by Joe White. McIntyre understood from Stewart's email that the production team should continue to use gibberellic acid.[233]

273 The increased use of off-grade barley was having the desired result, at least in the early stages of the Malt Cost Reduction Transformation Project. A Viterra summary of malt transformation savings realised for the 2011 fiscal year, produced on 29 November 2011, showed the actual amount of "Barley Savings" as $2,375,464, which was $536,114 above the projected savings in the 2011 budget. The document recorded that, on average, the non-malt 1 barley was being used as to 40 percent of the total tonnage of barley, with Perth's usage being at 66 percent. Later, a "Transformation Pipeline Report" dated 20 March 2012 indicated that the Malt Cost Reduction Transformation Project was on track to benefit Viterra $10.4 million in the 2014 financial year.

274 However, customers were, in some instances, raising issues with respect to malt quality. On 30 December 2011, a customer informed Stewart that subsequent testing of delivered malt indicated that the malt was out of specification in many aspects, contrary to Joe White's Certificate of Analysis. The email sought feedback and corrective plans to prevent out of specification deliveries in the future. Stewart could not recall what action he took in response to this email. Further, in a completely non-responsive answer, Stewart stated under cross-examination that the differences highlighted the variable nature of malt analysis.

275 On 22 June 2012, a different customer refused to accept a delivery of malt with a lower

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233 In 2012, a visit by Sapporo and the concealment of the use of gibberellic acid was referred to in correspondence. A Joe White chemist sent an email to Moller forwarding an "edited version" of the method used "with no reference to [gibberellic acid] for [Sapporo's] visit". Moller forwarded the email to Stewart noting she had stamped the document "copy" and enquired as to whether it was okay to be given to Sapporo's representative on the basis it could be kept.

colour than specified, despite being asked to do so by Stewart. This problem was openly brought to the customer's attention by means of Stewart's request. Obviously, a failure to meet a colour requirement may be more conspicuous than a failure to meet some of the other specifications. In any event, in refusing to accept any variation, the customer referred to its "strict quality standards".

276 Joe White had procedures in place for managing customer complaints. Viterra introduced a software system to provide a "root cause investigation system", which operated together with Joe White's existing system. Both were used to identify problems leading to customer complaints.[234] McIntyre processed customer complaints and Testi was required to close off each customer complaint. Testi's evidence was that some of the complaints she processed concerned shipments of malt that were out of specification. What proportion of complaints this represented and the frequency of such complaints was not the subject of evidence from Testi. McIntyre's evidence was that "occasionally" Joe White's customers would query whether the Certificates of Analysis were accurate.

277 Returning to the malt procedures, on 10 February 2012, a further version of the "Malt Blend Parameters Procedure" of "Viterra" was revised to create version number 32.[235] A calendar invitation sent by Stewart, on 2 February 2012, referred to a review of the procedure by the Joe White malt team occurring every 26 weeks, though Testi gave evidence such documents were reviewed annually. Testi, who was noted as the author of the document,[236] gave evidence at trial that this document contained a number indicating the document was stored in the Records System (being CF/04/398), but she said it was distributed only within Viterra's malt business and that it was openly discussed by management. On 13 February 2012, Testi emailed version 32 of the Malt Blend Parameters Procedure to a number of Joe White executives, including Hughes, Youil, Wicks and Stewart, all plant managers,

234 A document was tendered entitled "Viterra Customer Feedback Tracking Procedure", which set out the regime as at April 2013.

235 This version also indicated that the Malt Blend Parameters Procedure was first issued on 11 December 2006.

236 Stewart approved the document.

numerous production managers, members of the technical team and a marketing manager. The email required that a document revision notice be signed by the relevant personnel at each site and be included at the next monthly meeting for food, safety and quality.

278 On or around 29 March 2012, the Malt Blend Parameters Procedure was eventually uploaded to Viterra's intranet, Pulse. By email, Testi requested the procedure be uploaded under the folder "JWM – Procedures". She noted "the blend parameters [had] never been uploaded to the Pulse in the past". The document was version 33. Accordingly, from this time the Malt Blend Parameters Procedure was available for any Viterra employee who had access to Pulse. Further, Stewart's evidence was that the Viterra Certificate of Analysis Procedure was available to all Viterra employees as it was on Viterra's "control system TRIM and also on the Pulse", though he acknowledged his evidence was a bit speculative.

279 Testi gave evidence in chief of other issues in 2011 to 2012, including concerning testing and the lack of availability of results at the time shipments were sent to Joe White's customers. When that evidence is considered in conjunction with her evidence during cross-examination, it is unnecessary to descend to any real level of detail for the purpose of determining issues in this proceeding. Such issues existed on an ongoing basis.

280 By way of example, on 5 July 2012 Testi circulated a mid-year review. The review recorded the objective that all malt was to be released in accordance with the Viterra Certificate of Analysis Procedure. It gave some details in relation to redirection of shipments and customer complaints. The review contained a summary of the test results that were available at the time Certificates of Analysis were issued. It showed a significant number of Certificates of Analysis were issued at a time when all the results were not available. The end of year review for 2012, circulated by Testi in January 2013, showed that this problem persisted, albeit there had been some improvement.

281 Also around this time, there were decisions being made with respect to the prohibited use of gibberellic acid. The issues with respect to soluble nitrogen levels in malt supplied to Sapporo were ongoing.[237] A number of emails sent on behalf of Sapporo expressed concern about the levels being too low and described the situation as very critical. Emails were sent by Stewart in response suggesting various potential issues and solutions. None of them disclosed to the customer the use of gibberellic acid as a possible means of solving the problem.

282 Stewart forwarded the email chain to various persons at Joe White to keep them in the loop and to give them an idea of how critical an issue the low levels of soluble nitrogen had become for Sapporo. In response, Stewart was informed by a production manager that a measure taken to try and address the situation was to increase the amount of gibberellic acid being used. Stewart took no exception to this. On the contrary, in the following month with respect to malt for Sapporo he suggested to the production manager that more gibberellic acid might help.

283 In early September 2012, Sheehy circulated for review a draft procedure for Certificates of Analysis production and Sign-Out Reports. The main change was to incorporate Joe White's domestic customers into the procedures already in existence with respect to export customers under the Viterra Certificate of Analysis Procedure.[238] In a follow-up email, she asked for comments or, if there were no comments, to receive that advice so that she could "publish the procedures".[239]

284 In response, by email to Sheehy sent on 13 September 2012, Miroslav Prazak ("Prazak"), plant manager in Sydney, stated, in relation to the recent draft of the Viterra Certificate of Analysis Procedure, that "documenting that 'adjustments are authorised practice' is somewhat damning", before adding that he had no comment.

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237 See par 272 above.

238 A further change was to require the involvement of the "Technical Services Manager" or her proxy in relation to pencilling for export customers up to 2 standard deviations. Both Moller (as technical centre chemist) and McIntyre (as customer service administrator) were formally appointed as Sheehy's proxies for this purpose on 26 September 2012. Previously, this could be authorised and performed by the "Technical Centre Chemist": see par 199 above.

239 Stewart gave evidence that if testing results were not available for domestic customers at the time of despatch, the theoretical blend analysis was issued upon delivery, with the results of the actual analysis forwarded later.

On the same date, Sheehy forwarded Prazak's email to Stewart, stating:

> A very good point from [Prazak] below. Should the [Viterra Certificate of Analysis Procedure] actually be an official TRIM procedure? We definitely need these guidelines *as this is what we do*, but we *don't necessarily want* and (sic) *auditor or customer to find this* in TRIM or a methods manual.
>
> (Emphasis added.)

285 Stewart agreed with Sheehy. During his cross-examination, Stewart acknowledged that he understood both Prazak and Sheehy were stating that it would not be desirable for customers or a quality auditor to discover the document.[240]

286 Also in September 2012, Sheehy emailed various people stating she had reviewed the Malt Proficiency Scheme to ensure there had been no changes in the last 18 months. She stated all the information was correct and attached an update as at 5 September 2012 "based on MAPS round 186". However, not all the proficiency assessment values in the attached document accorded with the Malt Proficiency Scheme values in round 186.[241] This was only the second table of values prepared for the Viterra Certificate of Analysis Procedure. After this time, it was not updated again, though changes continued to be made to the standard deviation for a large number of parameters from that time until October 2013.[242] Version 2 of the Viterra Certificate of Analysis Procedure was finalised on 26 September 2012, with Viterra filing folder number "CF/04/398".

287 On 11 October 2012, Sheehy sent an email to certain Joe White staff, copied to others including Stewart and McIntyre, attaching both the Viterra Certificate of Analysis Procedure and a "Document Revision Notice". The email, updating the "Certificate of Analysis Generation Procedure with Domestic Customers", was designated "high" importance and was concerned with how the proposed procedure might be viewed on the Records System. It stated:

> Following some excellent feedback from [Prazak], we have decided *to make this procedure obsolete in TRIM*, but we can still add new revisions into the folder when required. Hence it will live in TRIM still, *just unofficially*, and should not

240 Customers would send in quality auditors to Joe White periodically; usually once every 1 to 3 years.
241 See further pars 407, 2242 below.
242 See annexure A to these reasons.

> be stored in any official procedure folders at your site, as *we do not want customers or auditors to have access to this procedure*.
>
> (Emphasis added.)

The email referred to the applicability of the regime to both export and domestic customers, and noted a 3 month trial period of the procedure would commence on 1 November 2012. Stewart gave evidence that the document was marked "obsolete" so "it dropped below the radar, effectively". Later in his evidence he said its existence was disguised. Further, Stewart's uncontested evidence was that, just as Hughes had directed in relation to the Malt Blend Parameters Procedure,[243] Hughes instructed the executives that the Viterra Certificate of Analysis Procedure was not to be included in the quality procedure manual, which manual was made available to International Organisation for Standardisation and customer auditors. Similarly, Testi's evidence was that, by placing a document in an "obsolete folder", it was concealed on the system but could still be updated.

288 The "Viterra" Document Revision Notice, dated 26 September 2012,[244] stated that the Viterra Certificate of Analysis Procedure had been changed, and relevantly recorded:

> This document is for *internal use only*, and thus must not be kept in an official procedure folder, but filed separately *for private use only (i.e. not be available for audit or customer viewing)*.
>
> (Emphasis added.)

289 McIntyre gave evidence of this direction being given. Testi gave evidence that this direction was complied with, having checked the Records System as part of her document review for annual audits. In her role as national quality systems coordinator, Testi conducted annual audits of each of the Joe White plants to assess compliance with Joe White's quality systems.[245]

290 The effect of this was that neither Joe White's customers nor their auditors would be shown the "obsolete" folder. Stewart agreed under cross-examination that Sheehy

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243 See par 90 above.

244 As part of Viterra's recording keeping system, the document was numbered revision 1, and contained the form number 12/14245.

245 See further par 513 below.

was taking the lead when it came to where the procedure was to be stored.

291 Sheehy followed up this email with another "high" importance email on 31 October 2012.[246] In this email, she requested that the Joe White employees that received the email note any "roadblocks" they had in complying with the new Viterra Certificate of Analysis Procedure, predicting that:

> The main sticking point will mostly (sic) likely be not approving the [Certificate of Analysis] until all analysis is present … Please be mindful that we do need to get the [Certificate of Analysis] to customer still without an excessive delay, so if an exception is required then please organise this and document accordingly.

292 Self-evidently, the above communications demonstrated that the employees involved had a consciousness about a customer or an auditor taking a dim view of the Viterra Certificate of Analysis Procedure if its existence were to become known more broadly.

293 Customers' audits of Joe White's malting process were focused on non-conformance with food safety processes. Audits variously involved inspections of plants and reviews of the quality procedures carried out in the production of malt, including the ability to trace parcels of barley to shipments of malt.[247] Ordinarily, customer audits did not involve examining other aspects of the Joe White Business.[248]

294 In November 2012, Heineken's Asia Pacific Breweries Singapore plant[249] informed Joe White that it required malt that was less fermentable. The malt being supplied at that time was apparently meeting Heineken's specifications.[250] The problem was solved by providing different proportions of barley varieties to those in the specifications. This instance was referred to by Stewart in an example of the need for malleability

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246 Originally, the email was sent or copied to a significant number of employees, including McIntyre and Stewart. Sheehy forwarded this email on 1 August 2013 to Testi without comment.

247 For example, in 2010, Heineken determined not to accept malt from the Port Adelaide plant because it was using older drum technology and gave rise to food quality issues.

248 For completeness, Testi gave evidence of an audit conducted in June 2013 by a certification body for the ISO 22000: see fn 664 below. Her witness statement recorded the auditor being misinformed about the barley varieties used in relation to a shipment that had been randomly selected. However, after she had been cross-examined it was unclear whether the auditor had been deliberately misled or whether there was a plausible and legitimate explanation for the decision to provide information about barley varieties other than what had been recorded in the Laboratory Information System.

249 The entity in Singapore was Asia Pacific Breweries Singapore Pte Ltd, a subsidiary of Heineken NV.

250 This was the evidence given by Stewart. It was stated as a conclusion. The underlying evidence to support this conclusion was not before the court.

with respect to specifications. Stewart also gave evidence that occasionally a customer would agree to change a specification in response to changing harvesting conditions.

295 Also in 2012, another event occurred which had the potential to affect the Joe White Business. Co-Operative Bulk issued a termination notice under the Co-Operative Bulk Agreement. The notice stated Joe White had failed to pay monthly charges since December 2009, and demanded payment of $2,181,281.38. The demand was not the subject of any payment.

H. Cargill, Inc's malting business

296 In 2013, the global commercial malt market had approximately 30 major malting company groups.[251] At this time, Cargill, Inc and its subsidiaries, amongst other businesses, operated the third largest malt business in the world, with operations (in order of size) in the United States of America, Canada, Western Europe,[252] Argentina and Russia. Having entered the malting industry in 1979, Cargill, Inc had not yet secured a presence in Asia. Therefore, the incorporation of the Joe White Business into the global business was strategically a very attractive prospect. Not only would the purchase of Joe White increase Cargill, Inc's overall capacity to match or even slightly exceed the capacity of the 2 largest malt operations,[253] but it was anticipated that the benefit of millions of dollars in synergies would flow to Cargill, Inc's overall operations.[254] As a result, the firm view amongst a number of its executives was that Cargill, Inc would become a global leader if Joe White were to form part of its global malt business.

297 Cargill, Inc's malting business was organised as a business unit ("Cargill Malt"). Each

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251 There were also maltsters who made malt as part of a larger in-house operation, and supplied the malt to breweries within the same business, in contrast to selling to third party brewers on an arm's length basis.

252 Again in order of size, Belgium, Spain, Germany, France and the Netherlands.

253 Being Malteurop Groupe and Malteries Soufflet, each with approximately 10.4 percent of the global market.

254 Synergies were described as factors in merging businesses that would mean 2 plus 2 equals 5, by reason that the merged entities give each other some previously missing element or rationalisations might occur because of overlap of functions. In this case, potential synergies for Cargill included both revenue synergies and cost savings.

business unit of Cargill, Inc had a business unit leader. A business unit leader had direct operational responsibility for the business unit. A business unit leader may have been responsible for a number of businesses. In turn, business unit leaders were "tagged" to platform leaders, whose role was to coach the business leaders rather than have a direct operational function. Sitting above the platform leaders was the Cargill leadership team;[255] and above this team was the board of directors.

298 Any transaction involving the outlay of US$50 million or more was required to go to the board for approval.[256] Before a proposal could be put to the board, certain steps were required to be taken. Any proposal needed to be investigated and recommended by the leader of the business unit. Approval then had to be obtained from the business unit's platform as a whole. Then it had to be submitted to, and approved by, the Cargill leadership team as a whole. Cargill also had an internal strategic and business development department. This department worked with business units to develop opportunities and proposals, as well as advise the business units in the manner of a mergers and acquisitions firm (including by providing specialist project management and financial expertise).

299 The fact that the board may have approved an investment did not mean the acquisition would necessarily go ahead. If any of the business unit leaders, the relevant platform leaders, or the Cargill leadership team subsequently decided the acquisition should not proceed, then that position would be adopted without any requirement to revert to the board. Equally, neither the relevant platform leader nor the Cargill leadership team would override the business unit leader if she or he decided, notwithstanding the previous recommendation and approvals, that the proposed transaction should not proceed.

300 Cargill Malt belonged to the food ingredients and systems platform. In 2013, based

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255 The Cargill leadership team was described as a form of executive committee of the board. It was also referred to as a governance and management board. In 2013, its members (most of whom were members of the board) were Koenig (see par 343 below), Conway (see par 300 below), MacLennan (see par 963 below), Page (see par 963 below), Bill Buckner (who was tagged to the protein leadership team) and Marcel Smits, Cargill, Inc's chief financial officer.

256 The Cargill leadership team had authority to approve an indicative bid without board approval.

on earnings, Cargill Malt was the eighth largest business unit of the 26 business units in existence in the food ingredients and systems platform.[257] It had approximately 500 employees. Eden, as the malt business unit leader at the time, was "tagged" to Frank Van Lierde ("Van Lierde"), executive vice president of Cargill's food businesses division,[258] as platform leader, who was "tagged" to Paul Conway ("Conway"),[259] as part of the Cargill leadership team. Conway was also corporate vice president and vice chairperson of Cargill, Inc.[260]

301 As referred to above,[261] Cargill, Inc had a "string of pearls" strategy that a number of executives wanted to put together. This was to be achieved by combining the key regions of malt production throughout the world, including Australia. Moreover, it was considered that "made in Australia" had a reputation, around being "pure, clean, sustainable" and "green", and was expected to be a "sweetspot" if Joe White could be acquired.[262] In short, Cargill, Inc considered the sale of Joe White an important opportunity, and at least some of the executives involved in assessing the possible purchase were very keen for it to occur, and were mindful of what competitors might be capable and willing to pay.

302 As for its malt business already in existence, Cargill, Inc also had in place policies that governed the production of its malt and the provision of Certificates of Analysis to customers. These were recorded in a document that was approved by Steven De Samblanx ("De Samblanx"),[263] operations manager Europe, having been edited by

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257 Eden's evidence referred to 26 units in this platform. Conway's evidence referred to 16 units out of 60 units overall.

258 In that role, he was leader of the food ingredients and systems platform. At the time of giving his evidence, Van Lierde was the enterprise leader of food ingredients and bio industrials at Cargill, Inc. In 2013, Van Lierde was based in Europe, but travelled to the United States from time to time.

259 In 2013, Conway was the leader of the food ingredients and systems platform and of the grain and oilseeds supply chain platform. He had executive supervision of the Asia Pacific region and of plant operations (including safety). Conway reported directly to the then chief executive officer, Page. He spent a short time at the bar in London before commencing at Cargill, Inc in September 1979. He retired after 36 years on 31 December 2015. He became a member of Cargill, Inc's board in 2008 and remained on the board until his retirement. He was also a member of the Cargill leadership team. He holds a bachelor of laws with honours from Bristol University.

260 The other vice chairperson in 2013 was Koenig.

261 See par 1 above.

262 At the time, the other "sweetspot" was Argentina.

263 At the time of giving his evidence, De Samblanx was Cargill's global process technology lead for malt

Cargill, Inc's quality manager, Ruud Hermus ("Hermus").[264] The document described "the methodology [of] how to perform malt blends before shipment to customers and how to communicate analyses results to customers" ("the Cargill Blending and Certificate of Analysis Procedure"). The sixth version, dated 7 July 2011, identified the objectives:

> The objective of this procedure is:
>
> – To provide to the Plant Operations *strict guidelines* for malt blending, assuring that the *delivered malt complies with the customer's requirements*.
>
> – To assure that the Certificate of Analysis (COA), which contains the analytical specifications that are mentioned in the malt sales contract, describes correctly the quality of a malt delivery and if applicable the related barley, based on reliable lab analyses values only.

(Emphasis added.)

303 Speaking generally, the reference to "customer's requirements" does not refer to the specifications of a customer. In his evidence, De Samblanx agreed with this proposition, stating, "[r]equirements is broad".

304 The Cargill Blending and Certificate of Analysis Procedure also referred to Cargill, Inc's malt plant production system, known as MaPPS, which was the software used globally to enter and store analytical data. This allowed Cargill to manage the quality globally "with very high visibility". For example, it enabled De Samblanx to see the quality of malt recorded for each plant globally. The document provided:

> **5.2 MaPPS Company Specifications**
>
> The Regional Quality Manager publishes and gets malt specs internally approved in MaPPS …
>
> The MaPPS Company Specifications do contain several kinds of Customer Specifications:

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264 and the operations lead for Europe, the Middle East and Asia. He commenced at Cargill in around 1987, and has worked exclusively in malt for Cargill in France, Spain, China and Belgium (where he was based). He graduated from Leuven University as a biochemical engineer in 1985, before spending a year studying the food industry at École nationale supérieure de biologie appliquée in Dijon, France. It was also the subject of "Verification" by a Ms K. Churchill, who was responsible for regional quality control in North America. She is no longer employed by Cargill, Inc. For details of Hermus, see pars 1999-2010 below.

[Various details set out]

The "MaPPS Company Specifications" can also include "Target Specifications" for information only. Target Specifications, are specifications that are more strict (but not contradictory!) than the Customer Specifications, and thus describe more accurately the ideal malt quality for the customer. Plant Production Managers should try to deliver as close as possible to the target.

305 De Samblanx gave evidence that the target specifications were more conservative than the customer's actual specifications because the target specifications were providing more certainty for a better outcome than the customer specifications.[265]

306 In relation to blending, it was relevantly stated:

6. BLENDING PROCEDURE

In principle, the blending procedure has to assure that the delivered malt quality is complying with the customer's requirements, i.e. the Analytical AS WELL AS Non-Analytical Customer Specifications and Barley Specifications.[266]

Whenever a Customer Specification signed by both the customer and Cargill, conflicts with part of the blending procedure, the Customer Specification is valid and overrules that part of the blending procedure.

307 Section 6.1 dealt with "malt transfers". A malt transfer was defined to mean a quantity of malt consisting of a blend of 2 or more production batches not predestined for a customer (although De Samblanx gave evidence in some cases it may be predestined if it were convenient for silo management).

308 The document continued:

6.2 Blending Based on THEORETICAL BLEND AND ANALYSIS

The Theoretical Blend is the numeric combination of several Production Batches or Malt Transfer Bins. Each bin is part of the blend for x %. The sum of the % of each bin has to be 100 (eg Of theoretical blend of Bin A,B,C : Bin A : 20%, Bin B : 50%, Bin C : 30%).

The malt in the bins has to be analysed before used in a Theoretical Blend: the Standard Analyses mandatory and the Non-Standard Analyses optional. The Theoretical Analysis of the blend is the weighted average of the lab results for each parameter, according to the Theoretical Blend …

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265 As already noted, in some cases, customer specifications provided for a range, rather than a precise specification.

266 It would appear that "requirements" in this context is being used in a narrower manner than its general meaning: see par 303 above.

Validity of the Theoretical Analysis

The Theoretical Analysis for a certain parameter can only be considered as valid if the analysis for that parameter is known for all Theoretical Blend components.

Lab Deviation for certain parameters between Cargill lab and customer lab

The Theoretical Analysis can be adjusted for certain parameters, if a structural deviation between the Cargill lab and Customer lab is *proved and documented*. Only [the Business Unit] Quality Manager, in agreement with Operations Mgmt., can approve such an adjustment.[267]

The *customer has to be aware of the adjustment* (non adjusted figure should be mentioned on the [Certificate of Analysis]: see further)

…

If customer specifications do include non analytical parameters, the following *cannot be averaged in the blend unless explicitly approved by the customer*:

- Ageing,
- Curing (kiln-on/kiln off temperatures and hours),
- Varietal purity,
- Total steep-time,[268]

Each of the malt batches in the blend shall comply with the requirement(s).

(Emphasis added in italics.)

309 The document contained a "[d]ecision tree for loading",[269] which was a flowchart that set out the steps that were required to be taken before a batch of malt could be loaded for delivery to the customer. The starting point queried "[i]s a valid Theoretical Analysis available for all Analytical Specifications?" (emphasis in original). If the answer was "no", employees were directed to query whether the missing theoretical analysis was controlled by the food safety program, and if not, either perform the theoretical analysis or make contact with the commercial department to agree on an action to be taken.

310 If a theoretical analysis was available, or the missing theoretical analysis was not

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267 Eden acknowledged this approval part of the process did not involve notifying the customer, but plainly the customer was to be informed of the fact of the adjustment, as set out in the very next sentence. De Samblanx confirmed that such a step could only be taken "in transparency with the customer".

268 This is a reference to the steeping process used in transforming barley to malt: see par 12 above.

269 Loading in this context referred to the malt being loaded on the rail car, with the objective of it being delivered to the customer.

controlled by the food safety program, the flowchart stated "[i]s available Theoretical Analysis fully within Customer Specifications?" (emphasis in original). If the answer was yes, the malt could be loaded. If the answer was no, the flowchart directed the employee to make a mandatory request for customer derogation.[270] If a request for customer derogation was made, the flowchart required that the derogation be documented in the customer file and the regional quality manager notified. After this step, the plant was required to log the issue, and the regional quality manager was directed to participate in "problem solving and decision making".

311 The blending procedure went on to state:

> *No out of [specification] deliveries are allowed*, without informing Quality and the Commercial Department and *without "Derogation" of the customer*. The derogation, an approval to deliver the malt out of Analytical-, Non-Analytical – or Barley specifications, *has to be documented*.
>
> If a value for an analytical specification is not available at the time of blending, and the specification is not controlled by the Food Safety Program, it is recommended to make a sample, according to the Theoretical Blend, and to have it analysed in the laboratory for the missing parameter before loading. If that is not possible, the commercial department has to be asked if the loading can take place without the theoretical value. In that case, the analysis will be done on the delivery sample, which is not recommended (*If out of specifications, the customer has to be informed* by the Sales Department) …
>
> Each part of a delivery has to be conforming to the blending procedure (decision tree). If a delivery consists of more than one Theoretical Blend (e.g. A bin runs empty during loading and a new Theoretical Blend has to be made), each one of the single Theoretical Blends has to comply with the blending procedure.[271]
>
> **6.5 Accepted practices for derogation**
>
> The basic principle of customer derogation is that it *must be confirmed in writing*, either by Cargill or by the customer. *If not the derogation is not considered valid and delivery cannot take place*.

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270 Derogation was the term used in the industry, including by Cargill, to encapsulate a process where a customer was asked to approve acceptance of a delivery of malt where the specifications, as analysed by the maltster, whether by theoretical blend or otherwise, did not match the specifications required by the customer. Derogations may have been given for specific orders or shipments, or they may have been given on a standing basis in relation to a defined set of circumstances, including possibly a fixed period of time, depending on the agreement with the customer. In relation to Cargill, if the malt was to be produced and reported entirely based on the theoretical blend, Cargill was able to seek a derogation if required before the malt was actually blended, and then blend only if the customer approved the malt being delivered outside specification.

271 De Samblanx said this could arise where a large vessel was required to be loaded and it was not possible to make the required malt out of 1 blend.

(Emphasis added in italics.)

312 An accuracy check of theoretical blends was required to be performed every 2 weeks. These checks were conducted in order to "obtain a good correlation between the Theoretical Analysis and the Delivery Sample Analysis". De Samblanx said the procedure involved taking a sample of a transfer, having the actual sample analysed and then comparing the result of that analysis with the theoretical blend analysis results. The results of this testing were never recorded on a Certificate of Analysis, because the testing was done separate to the delivery process.

313 The Cargill Blending and Certificate of Analysis Procedure went on to set out the rules applicable to a Certificate of Analysis, and relevantly stated:

> **8.2 [Certificate of Analysis] Editing (What should be filled in the [Certificate of Analysis]?)**
>
> *The Standard Analyses (see Appendix 1-3)*
>
> For the Standard Analyses, always THE THEORETICAL ANALYSIS WILL BE FILLED ON THE [CERTIFICATE OF ANALYSIS] unless the wet chemistry[272] on the shipment is known and then this will be filled on the [Certificate of Analysis]. This rule does not apply in the case of Accuracy Checks of the theoretical blend.
>
> Even if the theoretical analysis or shipment wet chemistry for a parameter is slightly out of specifications (see decision tree for loading;[273] [European Union] customers), *the value out of specification has to be reported on the [Certificate of Analysis]*.
>
> *The Non-Standard Analyses*
>
> - The parameter is controlled by the Food Safety program
>
> …
>
> Other Non-Standard Analyses
>
> - If all individual components of the Theoretical Blend are analysed, the Theoretical analysis for that parameter has to be reported (ideal case),
> - If the parameter is analysed on a sample, composed according to Theoretical Blend, this analysed value has to be reported (second best option),
> - If the parameter is analysed on a delivery sample, *this analysed value has to be reported, even when the value is out of specifications*. In this case the

272 "Wet chemistry" refers to the chemical analysis of the actual sample being delivered after the malting production process is completed: see pars 33-34 above.

273 See par 309 above.

> Sales Department has to contact the customer and *ask for derogation*. (least recommendable option).
>
> …
>
> Lab Deviation for certain parameters between Cargill lab and customer lab
>
> Only in the case that a structural deviation for a certain parameter is documented and approved by the [Business Unit] Quality Manager and Operations [Management]. …, the Theoretical Analysis (or real analysis for Non-Standard analyses) *can be adjusted by the structural deviation. This has to be done consistently for all malt deliveries for this customer*. **Also the non-adjusted Cargill value has to be displayed on the [Certificate of Analysis] in this case.**
>
> …
>
> **8.3 [Certificate of Analysis] Verification**
>
> Compliance will be checked with this [Cargill Blending and Certificate of Analysis Procedure]. If the [Certificate of Analysis] is found to be compliant, the [Certificate of Analysis] will be signed by the Production- or Quality Department. [Certificates of Analysis] that have not been signed cannot be sent to the customer.

(Emphasis added in italics, otherwise emphasis in original.)

314 Eden was cross-examined concerning the detail of the Cargill Blending and Certificate of Analysis Procedure. It was not his area of expertise as he is not a maltster. He accepted the contents suggested that wet chemistry analysis was more reliable than theoretical blend analysis, but could not say to what extent. He also said he did not know of any other maltster who used the theoretical blend approach, but on the basis that he simply did not know what other maltsters were doing. Eden gave evidence that Cargill may or may not use the theoretical blend method, but whatever the customer required was followed.

315 De Samblanx was far more qualified to give evidence concerning the Cargill Blending and Certificate of Analysis Procedure, not only because he had approved it, but also by reason of his qualifications and his role at Cargill. He said the procedure had been prepared for the malt businesses of Cargill, Inc globally, and that it instructed how to manage Certificates of Analysis in line with corporate policy.[274]

316 De Samblanx stated that Cargill's preferred method was to use the theoretical blend

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274 The corporate policy referred to was also reflected in documents, both dated 22 October 2012, entitled "Certificate of Analysis … Policy" and "Certificate of Analysis … Questions and Answers".

analysis, and that it tried to get customers to accept that approach.[275] However, he gave evidence that theoretical blend results were only used with a customer's approval and if a customer required that the actual malt being delivered was to be tested, that approach was adopted. In those circumstances, a sample would be taken and the results of that test would be reported in the Certificate of Analysis.[276]

317 De Samblanx also gave evidence about the circumstances in which Cargill did not report the results of analyses to customers. He said this occurred if there was a belief the results were not reliable. In this regard, Cargill's laboratories ran "an internal standard", whereby samples were tested and compared with another sample with a "known analysis". If it was discovered that a certain value for the internal standard was not correct, then the values for the parameter in question would not be released. De Samblanx said this withholding of information was not a matter of changing the result, but rather it was denying the outcome. He said the analysis would have to be done again "the day after or the next run".

318 De Samblanx confirmed that, if a theoretical blend result of a single component was not available, then an actual, or wet chemistry, analysis would be conducted. This analysis only considered the analyte in issue, rather than all the parameters to be reported in the Certificate of Analysis.[277]

319 The details of the Cargill Blending and Certificate of Analysis Procedure have been reproduced at some length to demonstrate a number of points.

320 *First*, the preferred approach was to use the theoretical blend approach for the purpose of populating the Certificates of Analysis, rather than analysing a sample of the batch actually produced.

321 *Secondly*, in order to pursue the preferred approach, Cargill sought to avoid conducting any actual analysis of a sample of the malt to be delivered. In effect,

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275 According to the Cargill Blending and Certificate of Analysis Procedure (cl 6.6), most malt deliveries globally were based on the theoretical blend approach.

276 The testing applied to 1 or more of the specifications, depending on the customer's directive.

277 See further par 313 above.

Cargill could not report what it did not know, but chose not to become aware of the actual details in circumstances where ascertaining the information was a step that could have been taken.

322 *Thirdly*, Cargill conducted regular checks to seek to make the theoretical blend analysis and reporting reliable (as that word is to be understood in the context of reporting based on theoretical blend).

323 *Fourthly*, if, for whatever reason, an actual analysis took place, then Cargill was required to record the result with respect to the particular analyte and report it to the customer, regardless of whether it was within or outside the customer's specification.

324 *Fifthly*, if an actual analysis was required to be conducted, it was kept to the bare minimum, by confining it to the specification or specifications that could not be satisfactorily reported under the theoretical blend procedure.

325 *Sixthly*, it was mandatory that, if malt to be delivered did not comply with the customer specifications in any way, that fact had to be reported to the customer.

326 *Seventhly*, non-compliant malt could not be delivered unless a derogation from the customer was obtained, which authorisation had to be recorded in writing.

327 *Eighthly*, any reporting of results, regardless of the method adopted, was to be based on reliable laboratory analyses values only. If it was considered that the values were not reliable for some reason then the results were not to be reported.

328 Before leaving the topic of reporting and reliability of laboratory analyses and their relevance to the Cargill Blending and Certificate of Analysis Procedure, it is convenient to refer to some exchanges within Cargill in August 2012. An email was sent to the Cargill Malt leadership team by an operations manager referring to the standards set by the International Organisation for Standardisation.[278] The email provided a link to the organisation's manual for blending and Certificate of Analysis procedure, and made reference to a requirement that no shipment was allowed to

[278] See further par 513 below.

occur for malt out of specifications "without a derogation from the customer side".

329 In a responding email, Eden suggested that the operations manager discuss modifying Cargill's process slightly for the defined analytical specifications. Eden referred to an alternative to a mandatory request for derogation, being to only request a derogation when the actual analysis was outside the standard deviation of the analytical equipment. Eden said this would mean Cargill would have to use the standard deviation from the vendor or use Cargill's own statistical analysis to determine each analytical parameter. Eden further suggested that the statistical analysis could be programmed into MaPPS with a procedure to re-evaluate the position annually.

330 Under cross-examination, Eden said his suggestion in this email was part of the story. Eden gave evidence that he was not entirely correct to say that he was suggesting there was no reason why Cargill should not treat results as valid if they were within the standard deviation of the analytical equipment. The other part of the story with respect to this proposal was addressing what the customers expected, and seeking to obtain an agreement that they would accept this suggestion.

331 When De Samblanx was taken to this email, he gave evidence that he was of the opinion that Eden did not know about the subject matter that he was discussing. De Samblanx said that it was apparent Eden did not know exactly what was meant by standard deviations in the way that standard deviations have to be applied in relation to analysing the quality or reliability of an analysis. De Samblanx stated such a standard deviation was not something that could be used to justify changes of analysis results. De Samblanx also stated that Eden did not understand that it was very clear at Cargill that no malt could be shipped out of specification without the agreement of the customer. (Of course, De Samblanx was not aware of Eden's evidence at trial, as referred to in the previous paragraph.)

332 The only other witness taken to this document was Marc Viers ("Viers"),[279] worldwide

[279] Viers was employed by Cargill from 1988, initially as a merchant trainee. In 2010, he was appointed global commercial manager for Cargill Malt. He was a board member of Prairie Malt Ltd. At the time he gave evidence, he was enterprise risk manager for the food and ingredients and bio-industrial

commercial manager, malt. Viers gave evidence that the group of individuals referred to in the email did not have authority to make a decision in line with Eden's suggestion, which was contrary to Cargill's corporate policy and Cargill would not allow such an approach. Viers said he recalled discussions in 2012 about different alternatives for reporting the results in Certificates of Analysis, but he could not remember the detail.

333 In summary, these 2 emails in August 2012 do not provide a basis for concluding that Cargill was considering making modifications to its reporting procedure which contemplated making changes if results were within the standard deviation of the analytical equipment without discussing the matter with its customers. Further, the person with responsibility for Cargill Malt's procedures in relation to analysis and reporting, De Samblanx, did not give Eden's suggestion any serious consideration (or, for that matter, credibility).

334 *Ninthly*, if an error in results amounted to a structural deviation for a parameter, which was documented and duly approved, the relevant results could be adjusted, but this had to be done consistently for all affected malt deliveries to the customer.

335 *Tenthly*, whilst undoubtedly encouraged to accept the theoretical blend method, it was the customer that ultimately dictated the method to be adopted, or, if the customer chose a particular approach or particular approaches within a specified method, then the customer's decision dictated the approach.

336 *Eleventhly*, the procedure for compliance included complying with the barley variety, or varieties, when this was specified by a customer.

337 *Twelfthly*, the method and process adopted was required to be transparent, so that visibility was available both to the customer, by the means of accurate reporting of results,[280] and to Cargill internally.

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enterprise, being 1 of Cargill's 5 enterprises (previously known as platforms), having been appointed in September 2014. He holds a bachelor of science, majoring in agricultural economics from Purdue University.

280 With the exception of when results were determined to be unreliable.

338 *Thirteenthly*, although Cargill's commercial department's involvement would be invoked in some circumstances, it was no part of that department's role to override or change the reporting of the results of any particular analysis.

339 *Fourteenthly*, no part of the process of reporting to customers, as prescribed in the Cargill Blending and Certificate of Analysis Procedure, endorsed or provided for a general discretion for results to be changed, by pencilling or otherwise.

340 In summary, there was a markedly different approach between the Cargill Blending and Certificate of Analysis Procedure and the Viterra Certificate of Analysis Procedure. Leaving aside the underlying difference in the means of analysis most regularly used in the respective approaches, most strikingly Cargill's approach involved open disclosure to its customers of the process adopted, whereas the Viterra Certificate of Analysis Procedure was deliberately and mandatorily covert.

I. Cargill prepares for the possibility of purchasing Joe White

341 As early as September 2012, approval was given for Eden to explore the opportunity of purchasing Joe White sometime in the future. It was at this time that "Project Hawk" was instigated, with Eden as transaction leader.[281]

342 Even earlier, in March 2012, Cargill, Inc was monitoring Glencore's activities with respect to Viterra, with an awareness that Glencore was likely to become the ultimate owner of Joe White in the near future.[282] Van Lierde sent an email to the senior executives of Cargill, Inc providing significant detail about Joe White. The email referred to a recent malt strategy which acknowledged that Australia was "fundamentally attractive as a barley breadbasket and advantaged malt processing/export platform to serve growing markets of [Southeast] Asia and potentially [South] Asia". It was further stated that building a stronghold in Australia was amongst Cargill's top 3 prioritised strategic moves, with Joe White being the

281 Project Hawk was the name given to the project for Cargill to investigate and, if feasible, complete the purchase of Joe White.

282 Before Glencore's involvement, Joe White was being eyed by Cargill. Emails in September 2010 showed Cargill "of course" would be interested. Eden gave evidence that Joe White was on Cargill's "game board" before 2010.

better acquisition candidate of the 2 options available. A similar email was circulated by Eden. Van Lierde gave evidence that purchasing Joe White was amongst his top priorities from this time on, and remained so until the purchase was completed.

343 As a result of this strategy, Emery Koenig ("Koenig"), a board member of Cargill, Inc,[283] spoke to Mahoney in March 2012. Mahoney was already known to Koenig. Mahoney had previously worked at Cargill for a number of years.[284] From around 1992 to 1997, Koenig worked with Mahoney in Geneva, and sat on the same trading floor.

344 Koenig asked Mahoney if Glencore had any interest in selling anything on the grain handling or export side of Viterra's assets. Mahoney said that Glencore had no interest in selling those assets, but stated Glencore would like to have further discussions with Cargill at the appropriate time in relation to Glencore selling the entire malt business for both Canada and Australia.

345 The reference to a malt business in Canada concerned a 42 percent shareholding in Prairie Malt Ltd. This business was co-owned with Cargill, Inc. It was operated as a joint venture by Cargill, Inc on behalf of both shareholders, and was therefore largely a passive investment for Glencore.

346 Mahoney also told Koenig that Glencore had had a lot of interest from both Europe and Australia. However, he noted Glencore would not be interested in progressing such discussions until all regulatory approvals had been dealt with and Glencore had formally acquired these businesses of Viterra. Koenig recorded details of his discussion with Mahoney in an email, in which he said that he registered Cargill's interest in the entire malt business held or to be held by Glencore.

347 In July 2012, Koenig sent an email to Mahoney, following up from the March 2012 discussions. He confirmed Cargill's interest in Viterra's malt assets.

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283 Koenig was a long-standing employee of Cargill. At the time of his retirement in February 2016, he was vice chairperson and chief risk officer of Cargill, Inc, and had been a board member for 6 years.

284 Koenig had been told quite some time before that Mahoney, together with Ivan Glasenberg (see par 766), were leading the acquisition by Glencore of Viterra.

348 In September 2012, Eden circulated within Cargill a report entitled " Viterra Malt Overview", stating in the covering email that he observed that purchasing Viterra's malt business might have been the "solo opportunity for Cargill to finally enter the remaining malting/malting barley region that we do not play in today". In the report, Eden set out the key considerations in relation to this possible acquisition. In addition to demonstrating that Cargill had the opportunity to become the largest maltster globally, as well as some negatives, on the whole the report was very positive. The report contained a preliminary valuation of the Joe White Business, which, using agriculture company trading multiples of between 9 and 13 times earnings, was in the range of $432 million and $624 million.

349 Shortly after this report, the green light was given to Eden.

350 In October 2012, a Cargill employee working in the grain and oilseeds supply chain in Australia sent an email to a number of recipients, none of whom gave evidence in this proceeding.[285] The email gave details of the distribution of barley crops for regions in Australia by volumes, variety and trends. It provided information concerning preferred varieties, though this information appears to have been obtained from the website of Barley Australia. The email also addressed margins, procurement and barley strategies as well as details of the barley export market. Further, it covered synergies and benefits for Cargill's grain and oilseeds supply chain in Australia and Joe White. A spreadsheet attached to the email contained information as to varieties of barley used by Joe White at certain locations ("malt production"). Other attachments provided details of challenges in barley breeding in Australia and a presentation concerning malt and barley supply and demand issues in Australia from a brewer's perspective.

351 The Viterra Parties submitted that this level of information demonstrated that by October 2012 Cargill was engaged in detailed investigations into matters including the characteristics, availability and demand for malting varieties of barley in Australia. No such proposition was put to any witness. This could readily have been done

285 Joseph Christianson was a recipient: see further par 563 below.

despite the absence of any of the addressees to this email. In any event, it is clear that enquiries concerning barley supply and demand, and other market issues, were being explored. How detailed the investigations were was not clear.

J. Glencore acquires Viterra, including Joe White

352 In December 2012, Glencore purchased "the Viterra Group" with its subsidiaries, including Joe White. As early as March 2012, Glencore gave a presentation to a rating agency foreshadowing this purchase. In that presentation it was stated that Glencore intended to sell some of the businesses that formed part of the Viterra Group within 12 months of the purchase in order to reduce Glencore's exposure to Canadian $2.6 billion.

353 Glencore valued the transaction at Canadian $6.16 billion dollars, with Joe White representing only a small fraction of this value.[286] Some of the assets acquired were concurrently disposed of to other entities within the consortium. There were significant opportunities available to Glencore in grain marketing synergies, grain trading being the "bread and butter" of Glencore's business. Accordingly, Glencore retained the grain side of the Viterra business.

354 After the agreement to purchase had been signed, but before completion, Mattiske received unprompted calls from persons interested in buying Joe White. Although Cargill did not approach Mattiske, it did contact Glencore in Switzerland expressing interest.

355 After completion, Mattiske had approximately 30 people reporting directly to him. He was responsible for integrating Viterra's trading division into Glencore Grain's trading division. He also managed the divestment of Viterra's agriproducts business, the sale of a feed milling business, the closure of a wood business and the sale of Joe White. In addition, Mattiske was responsible for restructuring the remaining aspects of Viterra's operations in Australia and New Zealand, including cutting

286 An indicative value of Canadian $400 million was attributed to Joe White. This was not an actual valuation, and King was not aware of any valuation of Joe White at the time of its acquisition by Glencore.

approximately 350 jobs.

356 Glencore and Viterra continued to operate as separate businesses and legal entities, subject to the restructuring that was occurring around that time. In order to avoid 2 parts of "the business bidding against each other", Glencore took over the barley procurement function for Joe White which was previously performed by Viterra. Viterra's traders were moved from Adelaide to Melbourne, and worked with Glencore's trading operations.

357 From the time Glencore took over, Glencore and Joe White worked together very closely with respect to Joe White's barley purchases. Mattiske described the relationship as involving Glencore having an implied right of first refusal, before acknowledging he did not actually know what had been agreed as to how the parties were to transact with each other. In fact, Joe White did not have the ability to purchase barley from any other supplier without Glencore's authority.[287] Further, Jones' evidence was that Glencore did not always provide Joe White clear information about barley varieties and grades that were available.

358 Viterra provided storage and logistics services to Glencore Grain, and there was a clear delineation as to which employees worked for which business.

359 Once completion had occurred, Mattiske held monthly meetings of "the local executive team" at Viterra's office in Adelaide. The executives that attended the Australia and New Zealand executive meetings included Fitzgerald, Jason Rees

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287 This was confirmed in writing in annexure D to the Acquisition Agreement which recorded as a question and answer with respect to slide 13 to the Management Presentation Memorandum (see par 711 below): "Can you confirm that Joe White does not have the ability to purchase barley from a third party without Glencore's authority? Correct". Despite this, Mattiske initially gave evidence that, if Glencore could not procure a variety of barley, Joe White was free to source it from elsewhere. He later accepted the written position as being the correct situation and gave evidence that it did not surprise him. By way of further background, historically, Viterra had exercised some control before being taken over by Glencore. Jones gave evidence that when Viterra took over the barley procurement function from ABB Grain things changed significantly. He referred to a document from Viterra dated 4 May 2010 in support of this conclusion, which, amongst other things, prevented Joe White from purchasing more than 5,000 tonnes of barley or malt without prior notice to Viterra. However, Jones accepted during cross-examination that the arrangement loosened over time.

("Rees"), the chief financial officer of Viterra in Australia and New Zealand,[288] Benjamin Norman ("Norman"), director of human resources in Australia and New Zealand for Viterra and Glencore Grain,[289] and Wilson, as well as Hughes. Hughes continued to attend these monthly Viterra meetings until shortly before completion of the Acquisition, when Mattiske decided Hughes should only attend to report on "the Malt Division for which he was responsible and the safety section" because Mattiske did not think "it was appropriate for him to *continue to be involved* in the rest of Viterra's business" (emphasis added).

360 In addition to these monthly meetings, Mattiske spoke fortnightly with each individual executive, usually by telephone. Thus, from December 2012, Mattiske usually spoke to Hughes about 3 times a month. At no time during these discussions did Hughes ever raise any issues concerning customer contracts or compliance issues. On the contrary, in substance Hughes reported that he had a good relationship with customers and that they were happy. Hughes also said that Joe White had an excellent reputation. If it were otherwise, Mattiske would have expected Hughes to inform him of the position.

361 Around this time, Joe White supplied approximately 500,000 tonnes of malt per annum. It had a stable customer base of 30 to 40 brewers and food manufacturers,[290] with 80 percent of its malt exported.

K. Preparation for the sale of Joe White

362 Following Glencore's acquisition of Viterra, the decision was made within Glencore to proceed with the proposal to divest its Australian malt business, including Joe

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288 Mattiske gave evidence that, if he wanted to know something about Joe White's financial affairs, he would speak to Rees from time to time. Up until December 2012, Rees was also a director of each of Viterra Malt, Viterra Operations and Viterra Ltd, as well as having the title of Viterra Ltd's corporate controller (Australia and New Zealand). Rees had previously been a director of Joe White from 7 December 2009 to 13 December 2011 and from 23 March 2012 to 17 December 2012.

289 Norman's role included overseeing corporate policies and, according to Mattiske, required him to be aware of Viterra's corporate policies.

290 Joe White did very little business with new customers.

White.[291] This decision followed Walt and Maarten Roelfs ("Roelfs") visiting Australia to review Joe White in January 2013. Roelfs was responsible for business development, finance and trade for Glencore Grain. Mattiske was involved in "organising the arrangements with Joe White" for the trip, and introduced Hughes and Argent to these Glencore executives. Mattiske's evidence was that he was otherwise not actively involved in the sale in any material way. On 14 January 2013, Mattiske sent an email to Hughes listing the matters "we would like to cover". The list included an explanation of the business case, production and other operational reports, management reports and clarification of "key drivers of valuation". Mattiske suggested to Hughes that it would be good to include Argent. As part of this introduction, Walt and Roelfs were provided with a number of documents relating to the Joe White Business.[292]

363 The decision to sell Joe White did not need Glencore board approval, as the proposed amount of the sale was below the threshold for sales requiring such approval.[293] However, discussions within Glencore both before and after 17 December 2012 about selling Joe White were held with a number of senior executives. Mattiske said he discussed the issue with Ronald de Gelder ("de Gelder"),[294] a trader at Glencore, Ernest Mostert ("Mostert"),[295] Roelfs and Mahoney. In this context, Mattiske gave evidence that Mahoney, as chief executive officer of Glencore Agriculture, had the most direct line of responsibility as the most senior person within that business. Mattiske was not responsible for the decision to sell, but regarded it as his job, as the executive based in Australia, to get Joe White sold. In relation to the proposed sale of Joe White, Mattiske's evidence was that if there had been any decision to suspend the

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291 At the time of Glencore's acquisition, it was proposed to divest Canadian $925 million of assets, of which Canadian $400 million was represented by Joe White. Another sale in which King was involved in assisting Walt was the sale by Glencore of Prairie Malt Ltd, the business co-owned with Cargill, Inc. Viterra also sold off the agriproducts and New Zealand business units in around 2013.

292 These documents, which were also provided to Mattiske, included the "Malt Strategic Plan" for 2011 to 2015 (which referred to the "ability to buy off spec"), "malting for dummies" and a number of documents containing financial information.

293 King was not certain, but understood this threshold was US$500 million.

294 In 2013, de Gelder was a Glencore director of Australia and New Zealand, Asia and the Middle East, and was based in Rotterdam.

295 See par 366 below.

sale process before any contract was entered into, it would have been made by the "leadership of Glencore" based in the Netherlands and Switzerland.[296]

364 King acknowledged that 1 of the disadvantages of acquiring a conglomerate of assets is that, if you do not pre-sell the assets you do not wish to hold, then for some time as purchaser it is necessary to run the relevant business. He further acknowledged that this made the purchaser vulnerable to the management of the business, particularly when the purchaser had no independent expertise in relation to that particular business. He accepted, correctly, this might be a very significant risk.[297]

365 Furthermore, King accepted that prospective purchasers expect certain well-established processes to be followed if a vendor wants to be taken seriously. One of the "well-trodden practices" for the sale of a business is to provide an information memorandum about the business. In addition, King gave evidence that a prospective purchaser would expect to be able to conduct an assessment of the documentation and material relevant to the way in which the business operates and performs, as part of the prospective purchaser's due diligence.

366 In early January 2013, Walt sent an email to Roelfs, copied to King and Mostert. Mostert was a director of various companies in the Glencore group, including each of the Sellers and Joe White (having been appointed on 17 December 2012).[298] Mostert was also the chief financial officer for Glencore Agriculture. The email set out various matters Walt wanted addressed with respect to the proposed sale. As part of organising the sale process, Walt stated it was necessary to identify and nominate "the key Viterra people" to assist. These "Viterra people" included the "[m]alt biz people". He also referred to an incentive wage "of the key Viterra people in this process". Walt wanted a business plan, including the key performance indicators, to help Glencore

296 In this context, Mattiske identified Mahoney, Mostert, Walt and de Gelder.

297 See further pars 388-394 below.

298 His appointment as a director of Joe White coincided with the appointment of Mattiske (see par 97 above) and that of another senior executive, Andreas Hubmann. Andreas Hubmann was at the relevant times a director of Glencore Australia Pty Ltd, Glencore Australia Holdings Pty Ltd, Glencore Grain, Glencore Grain (NZ) Ltd, Glencore AG, Glencore and each of the 3 Viterra entities (amongst other companies).

better understand the Joe White Business.

367 An internal Glencore presentation delivered in January 2013, and entitled "Action plan for divestures", set out the planned first steps for the sale process. Merrill Lynch, Deloitte Financial Advisory Services LLP ("Deloitte"), and King & Wood Mallesons ("Mallesons") were to be engaged as advisers to the sale.[299] The document indicated that "management", specified as Hughes and Argent, would be involved and incentivised.[300] It then set out a number of steps to be undertaken in preparation for the sale, including populating a proposed data room and preparing and planning management meetings. The document specified, in relation to the management meetings, that "GH" (Hughes) and "SA" (Argent) were to be "well instructed"; the presence of Glencore and Merrill Lynch at these meetings was recorded as "required". The tasks that needed to be performed were set out in a table over 3 pages. In relation to many of the tasks, Mattiske was identified as being the person in charge, either on his own or in conjunction with others.

368 Before continuing, it is necessary to say something about the role of Hughes and Argent. Throughout the trial, the Viterra Parties sought to attribute much, if not all, of Hughes and Argent's conduct and knowledge to Joe White, to the exclusion of both

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299 Any formal retainer of Mallesons was not in evidence. At 1 stage during closing submissions it was suggested on behalf of the Viterra Parties that Mallesons were only acting for Glencore, and not Viterra. In essence, it was put that Viterra, the Sellers, did not have solicitors acting for them right up to the time of the execution of the Acquisition Agreement. The suggestion made was without substance. It was in direct conflict with the Viterra Parties' written closing submissions which stated that, between 28 July 2013 and 4 August 2013, Cargill "and Glencore (on behalf of Viterra) negotiated the terms of the draft [a]cquisition [a]greement". Obviously, if Mallesons was acting for Glencore who was negotiating on behalf of Viterra, then Mallesons was necessarily acting also on behalf of Viterra. Lead senior counsel for the Viterra Parties subsequently clarified the position, acknowledging Mallesons must have acted for the Sellers in connection with the preparation of the Acquisition Agreement and its completion. (Mallesons was expressly referred to on the title page of the Acquisition Agreement and the drafts that preceded it when the terms were being negotiated. The first draft prepared by Mallesons and forwarded to Cargill was dated 14 July 2013, being 3 weeks before the Acquisition Agreement was entered into: see par 979 below. Mallesons was involved in assisting Viterra's legal officers well before this time: see, for example, pars 616, 940 below.) On this point, when Mattiske was asked whether Glencore was conducting the sale process, he said he was not sure which legal entity was doing so. He said Joe White was owned by Viterra, and it was his belief it was Viterra selling Joe White, albeit the decision-making was being made by his superiors at Glencore. For completeness, Lindner's evidence was that her instructions mainly came from King and Fitzgerald. There was no evidence to suggest that, in instructing Mallesons, Fitzgerald was somehow not acting in his designated position as the senior in-house counsel for Viterra; albeit he may have also been acting for or assisting Glencore.

300 See further par 1876 below.

Glencore and the Sellers. Whilst Hughes and Argent, as ongoing executives of Joe White, undoubtedly owed duties to, and generally speaking continued to act on behalf of, that company, from the time they were instructed by Glencore to be involved in the sale of Joe White, they were necessarily also acting on behalf of Glencore and the Sellers. As King readily acknowledged, Glencore needed these executives to assist it in the conduct of the sale, and their tasks and responsibilities in relation to that process (including preparing the Information Memorandum[301] and any due diligence) were tasks uniquely related to Glencore's and Viterra's interests in obtaining the best possible price. To adopt King's words:

> In any business you are selling you need the incumbent management to sell the business *for you*.
>
> (Emphasis added.)

369 Further, although Glencore enlisted Hughes and Argent to assist,[302] they were not privy to all the inner workings of the sale process. For example, it was agreed to have weekly update calls. King could not recall whether they were held weekly, but acknowledged Merrill Lynch representatives were spoken to frequently. In any event, a list of required attendees was prepared. The list included Fitzgerald, Mattiske and Nicholas Pappas ("Pappas"), a Mallesons' partner, as well as representatives of Merrill Lynch, but not Hughes or Argent. As King explained, this was because these 2 executives were not the people responsible "from a Glencore perspective", nor, as Mattiske effectively acknowledged,[303] were they the decision-makers for the sale.

370 The first of these update calls was scheduled for 4 March 2013. An action list was circulated by Merrill Lynch. Neither Hughes nor Argent was an addressee, but many senior Glencore personnel were.[304] Most of the action items were identified as being

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301 See par 470 below.

302 Mattiske's evidence was that he told Hughes in around early February 2013 that Glencore had decided to sell Joe White, and asked both Hughes and Argent to assist with the sale process. Mattiske asked them to manage the Joe White Business well and to cooperate with the external advisers. He also alluded to the fact that they were required to actively assist because "we" did not have the expertise to do it "ourselves". Mattiske went so far as to give evidence that Hughes and Argent were crucial to the sale process "as they were the only ones that knew Joe White in detail".

303 Mattiske's evidence related to Hughes, but was equally applicable to Argent.

304 These included Walt, Mostert and Roelfs, as well as King, Mattiske and Fitzgerald (the last 2 being senior officers of Viterra and Joe White).

the responsibility of Merrill Lynch, Mallesons or Glencore, or in combination. Management (presumably a reference to Hughes and Argent) were not listed as being solely responsible for anything. Their proposed involvement was limited to: assisting with vendor assistance data packs, together with Deloitte and Glencore; assisting with a revised business plan, together with Glencore; identifying sensitive information, together with Glencore; and agreeing on a "clean room/black box" process for sensitive information, in conjunction with Glencore. With respect to finalising the Teaser,[305] the Information Memorandum, and circulating the draft outline of the Management Presentation Memorandum,[306] those matters were the responsibility of Merrill Lynch. Finally, sign-off of the Information Memorandum was listed as being the sole responsibility of Glencore.

371 Returning to the chronology, another document considered by Glencore in January 2013 was a document previously forwarded by Merrill Lynch in October 2012, entitled "Process Considerations on Asset Disposal". King did not discuss the contents of the document with Merrill Lynch. He described the document as fairly generic in covering all potential options for a proposed process involving a blind auction. It is unnecessary to discuss the document in detail, however it did provide some insight to the process involved.

372 The document set out the elements of a "Targeted 2-Stage Auction". In the first stage, the sale process would be launched by the dissemination of a number of documents to potential buyers,[307] all of which were issued by Glencore in due course. The second stage was scheduled to commence after indicative bids were received from potential buyers. Amongst other things, it would involve a presentation from the management of Joe White. Key action to be taken included to finalise and rehearse the proposed management presentation.

373 Additionally, it referred to clear communication on goals and appropriate

305 See par 457 below.
306 See par 711 below.
307 Namely, a non-disclosure agreement, a "teaser", a round 1 process letter, an information memorandum and a data pack.

incentivisation of management to support the sale process.[308] It set out what ought to be included in an information memorandum, including an overview of activities and products, as well as an operating model overview incorporating details on product sourcing, manufacturing, logistics, marketing and communication, amongst other things. With respect to financials, it was stated that at least 3 years of historical results should be provided.[309] It was also stated that the financial information should include "top-line growth, profitability, changing product mix, cash flow generation" and current financial performance as compared to the previous year. King agreed this was the sort of information that a purchaser would expect to find in an information memorandum. Merrill Lynch also set out the advantages of having a full vendor due diligence. King was cross-examined on these suggested advantages, agreeing with some but disagreeing with others.

374 Cargill was referred to in the document, along with other "Inbound Indications of Interest". Koenig was noted as the contact. As already touched upon,[310] Cargill, Inc's interest in Joe White had existed for some time. According to Eden and others, Joe White had a wonderful reputation and Eden believed it was a well-run business and a strong performer in Southeast Asia. Further, based on his previous experience of working in Australia, he considered Australian companies were strong on legal compliance and had a "fabulous" reputation for all agricultural and food exports.

375 On 16 January 2013, the Malt Cost Reduction Transformation Project and a number of other attachments were forwarded by Hughes, from his Viterra Ltd email,[311] as "Executive Manager Malt … Viterra Ltd", to James Maw ("Maw"), head of grain

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308 King gave evidence of the incredibly important role management played in any divestment process, because they were the people who would present the business to any potential purchaser. He also said it was important to align management's incentives with the seller's incentives.

309 Subsequently, King expressed the view that the historical financial information should be confined to 3 years because the business modelling had fundamentally changed around 2010. King considered this was a sufficient level of disclosure.

310 See pars 341-348 above.

311 From this point of the judgment onwards, there are references to numerous emails that were sent and received in 2 or more time zones. Generally, the top of any email chain (being the last email in the chain) showed the date and time in the relevant time zone in Australia. Emails earlier in the chain show the date and time of the place where the email was received by the person who sent the following email (being the next higher email) in the chain. To the extent that times and dates of emails are referred to below, they will be the times and dates that appeared on the email being referred to without further explanation, unless an explanation is required because of the importance of the timing.

trading at Glencore (a person "very well known" to Mattiske), and copied to Mattiske and Argent. Mattiske gave evidence that it was likely that he skim read the covering email, but did not open the attachments. However, he also acknowledged that, at the time Glencore acquired Viterra, there was a procurement policy that involved using off-grade barley, and that he arranged for Glencore to replace Viterra as the supplier of the off-grade barley. Whether Mattiske read the attachments or not, Hughes was corresponding openly with Glencore about previous cost-cutting measures undertaken at the direction of Viterra.

376 On 21 January 2013, about a week after Walt and Roelfs' trip to Australia, a meeting was held between King, Walt, Mahoney, Mostert and Roelfs, and perhaps others, to discuss "kicking off" the sale.

377 During this period, it appears Glencore was provided with copies of at least some of Joe White's barley contracts. For example, on 25 January 2013, Jones forwarded to Jonathon Evans ("Evans")[312] at Glencore Grain copies of contracts for the provision of grain by GrainCorp Operations and CBH Grain Pty Ltd (a related company of Co-Operative Bulk) to Joe White. The reason why these particular contracts were sent at this time was not the subject of evidence. In any event, with Glencore being the supplier of barley to Joe White after December 2012,[313] it could be readily ascertained by Glencore as to what barley was being supplied to Joe White.

378 On 29 January 2013, Fitzgerald emailed Mattiske seeking a copy of the proposed information memorandum. He noted that Mallesons had also not seen a copy. Fitzgerald expressed the desire to read the document before it went out. Mattiske's response was that an information memorandum had not been created. Mattiske gave evidence that what followed was, amongst other things, the gathering of data and information, saying it all became very busy very quickly.

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312 Evans was called to give evidence for the Viterra Parties. From March 2012, he has been a barley trader at Viterra, and then Glencore, initially under the supervision of Wilson. From December 2012, Evans took over from Wilson as the person most responsible for engaging with Joe White in relation to the supply of barley.

313 See par 356 above.

379 On 31 January 2013, King emailed Argent on the assumption that Mattiske had already told Argent he would be in contact. King explained his role to Argent, and on the face of the email, expressed a desire to help Argent develop a business plan and a discounted cash flow for Joe White. King attached a discounted cash flow that had been provided to him previously, probably by Walt. Under cross-examination, King accepted that, despite this wording, in fact he was intending to ask Argent to assist King in preparing a business plan and a discounted cash flow.

380 Argent responded, stating Mattiske had not foreshadowed the contact. He told King the discounted cash flow was slightly different, and forwarded the then current version to King. Also on 31 January 2013, King sent an email to Roelfs, Walt and Glencore's accountant stating Argent had provided a balance sheet to help with the business plan and model. King noted Deloitte would examine the document in more detail, and stated that it was important to understand provisions such as employee benefits, workers' compensation, "Other" and "Other Financial Assets" in more detail.[314] Glencore's accountant promptly responded. He identified a series of matters that he said Deloitte "should cover". These included very big swings month on month in working capital. He could not detect any real seasonal trend and noted it was important to get the right number for the average working capital. He also noted the balance sheet was very clean from a debt perspective and that he was keen to keep it that way. Further, by reference to some months showing negative inventory, he stated that needed to be "understood or cleaned up" as it suggested potential issues with bookkeeping unless there was a good reason. When taken to this email during cross-examination, King explained that it was part of Deloitte's role to review the information and try to explain the anomalies or movements to give a buyer a greater understanding of the financials. He said this process was also to assist Glencore.

381 Numerous other emails were exchanged from this time, with Argent promptly responding to King's ongoing queries. The emails demonstrated King made numerous changes to the model. This was reflected in an email sent on 6 February

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314 King identified the relevant lines of the spreadsheet in doing so.

2013 by King to Argent, attaching an updated version of the model. King accepted he had done a fair amount of work, inputting matters and building it up to investment banking standard. With respect to the valuation as then prepared, King stated in the email that he had not had "a chance to play with this some more", but said he intended to refine it further.

382 Consistent with his evidence that valuing a business is an art, not a science, King said he "play[ed] with certain numbers", "tweak[ed] things" and "fiddle[d]" with various inputs to portray something "which [was] hopefully still accurate but present[ed] the business in the best possible light". King agreed what was sent on 6 February 2013 was an example of him taking ownership of the process of putting together the model.

383 By 7 February 2013, the model was sufficiently advanced for King to suggest the inputs and assumptions warranted finalisation with Rees and Hughes, before discussing the outputs with Mattiske.[315] Subsequent emails from Argent referred to Argent discussing the model with each of Hughes and Mattiske.

384 On 1 February 2013, Walt emailed Roelfs and Mattiske, copied to King and others at Glencore, attaching a first draft index of what he said should possibly go into the proposed data room. He said the list had been compiled by checking what "the Viterra data-room contained for our acquisition supplemented with other key material information a potential buyer would reasonably expect". He stated the others should feel free to add or amend, but suggested it be kept at a fairly high level. He further suggested Mattiske run the list "by [Fitzgerald] (and maybe [Argent])" to verify that the corresponding documents could be put together to see if anything else should be flagged or added. Mattiske responded saying he had checked locally and that there would be no issues in collecting this information.[316]

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315 King gave evidence he wanted Argent and Hughes, as well as Mattiske, to regularly review and comment on the financial projections.

316 Mattiske's evidence was that he checked with Fitzgerald and Rees, who told him they had checked with others. Despite this evidence, the Viterra Parties suggested in their closing submissions that from early in 2013 "*Joe White* and Glencore began preparing to populate" a data room (emphasis added). This and subsequent events demonstrated it was Glencore and Viterra who took responsibility for what was to be included in "the Viterra data-room", not Joe White: see, for example, pars 615-621 below.

385 On the same day, King sent an email to Mattiske. He stated it would be useful for management to flag if any of the information was commercially sensitive, and therefore not something that they would want a competitor to see unless they were very serious about buying the Joe White Business. King stated that this would have then required a discussion at a later date, because he was sure management's initial reaction would be that most information was commercially sensitive. King stated that the commercially sensitive information could be withheld until "very late on in the process and potentially not provided until right at the end as a final confirmatory due diligence item prior to signing".

386 On 8 February 2013, Roelfs emailed Walt stating he understood that Walt had a "50% finished draft" information memorandum or at least a skeleton. He asked Walt to send it to "us" for "our inputs". The email was also copied to Mattiske and Mostert. Walt acted accordingly, stating the draft was a work in progress and inviting comments before the draft was handed over. In addition to other comments provided, on 10 February 2013, Mattiske made a number of suggestions. In the meantime, Argent continued to forward financial information as requested. This included Viterra monthly operational reports (which Argent described as management reports) for the 2011 and 2012 financial years, and part of the 2013 financial year, as well as a reconciliation of the consolidated audited accounts to the "Malt [Management] report" for the 2011 financial year.[317]

387 In preparation for the sale, Merrill Lynch advised Glencore in February 2013 to have a more traditional auction approach with a financial vendor due diligence report on Joe White. Merrill Lynch wrote to King, Walt and Roelfs on 22 February 2013, stating:

> … although we do recognise that management[318] have been part of prior processes, we have seen in other past processes that a [vendor due diligence] was a very good method to identify any unknown issues and allow them to be remedied/addressed before buyers undertake their due diligence in the second round; in particular where the seller has not owned the asset for a long time.

317 These were sent to Deloitte, copied to Rees.

318 King's evidence was that this was a reference to Joe White management.

388 Glencore elected to proceed with the sale process without undertaking a vendor due diligence. An internal Merrill Lynch email, also sent on 22 February 2013, records a conversation with King.[319] The email stated:

> [King] said they most definitely don't think we need a [vendor due diligence]. The head of Australia Agri *(David Mattiske) is very comfortable with the business* and they just don't see sponsors being interested in the business other than the hybrid ones that are already active in the space.
>
> (Emphasis added.)

389 In response, Kenneth McLaren from Merrill Lynch wrote that he felt there was a risk Glencore was "being very naïve" in proceeding without undertaking vendor due diligence. It was stated that those involved at Glencore had not done a lot of "these types of carve-out deals", referring to its experience being limited to Canadian transactions which were in a "US style". It was stated that Merrill Lynch could not just listen to Glencore and say it was okay as those at Glencore would say that they knew the answer. After it was stated that Glencore probably would not know the answers and would listen to argument, the email continued:

> I just think Glencore are taking a decent risk in launching if haven't had anyone look at it for them other than a light touch vendor assist and ceo[320] saying it is all fine.

390 King gave evidence confirming that a vendor due diligence report was deemed unnecessary, on the basis that the Joe White Business was most attractive to strategic buyers rather than private equity. King said the thinking was that strategic buyers already had an existing or strategic interest in malt, understood the marketplace and where the business would fit, and therefore would not need a report from a third party accountant. King acknowledged that, in not accepting Merrill Lynch's advice to conduct a vendor due diligence, this deprived Glencore of the opportunity to potentially discover the existence of the Operational Practices. In closing submissions, the Viterra Parties' senior counsel acknowledged that, given his expertise and

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319 Although King could not recall the telephone call, he said the account of it given in this email seemed sensible.

320 King gave evidence this was most likely a reference to Mattiske.

background, King's opinion on this issue ought to be given some weight.

391 King said he further assumed that those running Glencore's agricultural business in Australia would have undertaken an element of due diligence.[321] In this regard, he identified Mattiske, Rees and Fitzgerald as the individuals likely to have done so. King suggested there was an element of self-interest in Merrill Lynch's advice, because if a vendor due diligence were conducted, it would mean less work for Merrill Lynch.[322]

392 Contrary to King's assumption, Mattiske gave no evidence to suggest that he had conducted, or been part of, a vendor due diligence process. Mattiske said he understood it was unnecessary to engage in any form of vendor due diligence because potential purchasers were likely to have a much better understanding of the malting industry and the Joe White Business.[323] Mattiske was very busy on other matters at the time, including the restructure of Viterra. In short, Mattiske's position was that his involvement in the sale process was very limited, although he had some responsibility to ensure it went smoothly, the sale process was being conducted and managed by "the Glencore team" in Switzerland, assisted by Merrill Lynch, Mallesons and Deloitte.

393 Mattiske's evidence was that, as a director of Viterra Malt and Joe White,[324] during the sale process he continued to rely on Hughes as the interface for information about the operation of the "Viterra Malt business". He said he also relied on Hughes and others to obtain all relevant information for prospective bidders, but then pointed out that he considered he was not involved in procuring all the information to be supplied. That said, Mattiske accepted he had ultimate responsibility for the information

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321 King gave evidence of the distinction between a vendor producing a vendor due diligence report and a vendor due diligence. The former involved a report being produced by an external accountant upon which prospective purchasers could rely, whereas the latter involved the vendor performing the due diligence itself. He also gave evidence that in producing a vendor due diligence report, it would be expected that the accountant would make enquiries of management similar to the way enquiries were made during vendor assistance, but a bit more extensive on the operational side.

322 Merrill Lynch were to be paid a success fee based entirely on a successful sale, regardless of the amount of work that Merrill Lynch would be required to do.

323 See further par 398 below.

324 The question to which Mattiske responded in giving this evidence did not refer to his directorship of Viterra Ltd or Viterra Operations.

gathering conducted by others "in Viterra". However, Mattiske said he was unsure as to whom the "team of people tasked with gathering information" should have spoken, including whether it should have included Stewart. He said that decision was a matter for Fitzgerald, Rees, Hughes and Argent.

394 As to the risk of the existence of dishonest practices in the conduct of the Joe White Business, King accepted such a risk existed and that the risk was heightened by Glencore having not previously been involved. He acknowledged that the risk might have been managed and potentially eliminated by Glencore undertaking a vendor due diligence. He further acknowledged that, by a vendor without familiarity with the business deciding not to undertake due diligence, it took the risk that improper practices might later be discovered. However, in circumstances where the Joe White Business was being operated successfully, in 2013 he considered there was little risk of the existence of covert dishonest practices. Further, King said he did not expect that a vendor due diligence "would have uncovered the covert practices that were alluded to".

395 On 25 February 2013, Merrill Lynch emailed numerous Glencore executives, including King and Mattiske, with an agenda and various other documents. They included a draft information memorandum outline. King had not had any input into this document.

396 Also on 25 February 2013, Deloitte emailed a large number of persons at Glencore and Viterra, including Walt, Roelfs, King, Mattiske, Rees and Argent (but not Hughes), attaching versions of the draft workbooks, which had been updated to address previous comments. The amendments included changes to the pro forma normalised results. The following day, Rees sent an email to Deloitte, copied to Argent, addressing malt figures in statutory accounts. In that email, Rees provided responses to a number of queries and also confirmed that the Unadjusted Earnings[325] level for the "malt segment" was correct.

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325 See par 492 below.

397 Also on 26 February 2013, Mattiske gave evidence that King and Walt travelled to Singapore to meet with "a number of Glencore, Viterra and Joe White executives and key advisers from Merrill Lynch to formally commence the sale of Joe White". Mattiske attended, together with Hughes and Argent. This was the first occasion King had met Hughes and Argent in person. The agenda for the "Kick-off Meeting" indicated that a number of topics concerned with process management were to be discussed. This included preparation for a sale, including a vendor due diligence, an information memorandum and a data room. King had no recollection of any discussion about vendor due diligence at this meeting, including whether it was raised at all.

398 Notes of the kick-off meeting expressly referred to management's preference not to do a vendor due diligence.[326] It was decided that a more descriptive commentary would be provided in the information memorandum instead. As part of this, it was resolved that Glencore should aim to identify key areas which might concern bidders and specifically address them. In addition, it was recorded that an information memorandum should include growth and potential upside. In relation to likely bidders, it was stated that management expected key interest from 3 entities including Cargill. Under a heading "Potential Investment Highlights" a number of items were listed, including that Joe White was number 1 in Australia, it had a dominant position in Southeast Asia and a trusted brand name with a premium product.

399 King was content with Merrill Lynch attending to the detailed drafting of the proposed information memorandum, and consulting with Deloitte for that purpose. However, in early March 2013, he directed Merrill Lynch that if information was to be included beyond that contained in the data packs,[327] then he required that Glencore

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326 In his witness statement, Mattiske said he formed an understanding based on the discussion at the meeting that it was not necessary to go through the process of a vendor due diligence because potential purchasers were likely to have a much better understanding of the "malt industry and Joe White's business than us". However, under cross-examination, he stated that he thought vendor due diligence was discussed before the kick-off meeting and "we generally thought that this was an asset sale", that the bidders "would know a lot more about this business than we did, they could test the assets themselves [and] do their own due diligence". He also added that Glencore had never relied on vendor due diligence and never found it useful. Accordingly, the decision not to do a vendor due diligence was not something for which Hughes or Argent had any real responsibility.

327 See par 425 below.

be consulted before Deloitte was required to undertake any additional analysis. This direction was reflective of King's control over the compilation of information as part of the sale process. He referred to himself as the project manager, and believed he drove it "pretty well". Under cross-examination, King accepted the information memorandum he project-managed would not have seen the light of day unless he was personally satisfied with it.

400 Also in February 2013, Eden made contact with Glencore and enquired about the receptiveness of selling multiple businesses to Cargill directly rather than going through an auction process. Although Eden could not recall doing so, it appeared from contemporaneous documents that Eden informed Glencore that Cargill was most interested in the malt assets.

401 During March and April 2013, King gave detailed feedback on the various drafts of the proposed information memorandum. He described the iterations of the document as an evolving feast. King gave evidence that the "operational and corporate information came directly from Joe White management". King said he was involved in reviewing and settling the documents relevant to the sale process. This included the Information Memorandum, the contents with which he was personally satisfied.

402 An issue for King was how to address the poor financial performance for the 2013 financial year. Naturally, it was in Glencore's interests to advocate a business plan that predicted "a more normalised level in [financial year] 2014 and subsequent years". To this end, the 2013 financial year budget needed to be revised. With respect to the business plan, King disavowed that what was ultimately formulated was his business plan. He explained that management had to be comfortable with the plan as it was them who were going to have to present it at the management presentations. While this evidence was undoubtedly correct, it did not paint the entire picture. There could be no question that Glencore would not have allowed management to put together and present a business plan without its input. Further, it was in Glencore's interest to portray a business plan in the most positive light that could sensibly be advanced to obtain the best price for the Joe White Business. A desire to provide such

a portrayal was not something that unincentivised Joe White management would naturally share.[328]

403 In early 2013, this was the subject of discussion between King and Argent. King suggested it would be good to discuss whether Argent could reforecast in light of the year-to-date results. King stated that a step up in the 2014 financial year results was "going to require quite a bit of explanation to get buy in from any potential purchasers". Further, in his evidence, King candidly acknowledged that he was trying to make management push up the figures for the budget for the 2013 financial year to make the business more attractive to a prospective purchaser.

404 Consistent with this attitude, King emailed Mattiske, copied to Walt, on 4 March 2013 stating that management might need to push up the 2013 financial year budget to something that was a bit more normalised. Mattiske enquired in response:

> What do *we* need [it] to be? *We* will simply get [Mostert] to approve, as yet no budgets have been approved.
>
> (Emphasis added.)

Notably, there was no suggestion by Mattiske that Hughes or Argent needed to be involved. However, soon after Mattiske enlisted their services to assist in achieving the desired outcome.

405 In response to Mattiske's suggestion, Walt responded that the "million dollar question" was why the margins were so depressed in 2013 and, more importantly, how the 2014 financial year could be so much better. Somewhat emphatically, his email concluded, "[t]hat's what we need to answer!".

406 Mattiske sought to have the budget increased. Mattiske believed it was a common practice of Viterra business units to understate their budgets significantly in order to make it easier for executives to achieve their bonuses. He spoke to Hughes, Argent and Rees. He told them he was not going to pay a bonus on the proposed budget and

328 See, for example, par 406 below.

directed them to try harder.

407 Meanwhile, the Operational Practices within Joe White were continuing. In late February 2013, a production manager sent an email to Sheehy providing copies of forms setting out non-conformance with specifications for San Miguel. In a responding email, Sheehy noted that Joe White did not have a procedure for coloured malts as that parameter was not covered by the Malt Proficiency Scheme that Joe White "base[d] the [non-conformance] procedure on". Sheehy further noted that the Malt Proficiency Scheme was only for pale and pilsner malt. The email continued:

> Hence whilst we don't officially require a non conformance for coloured malt, it is still necessary of course *to check with [Stewart] on anything that is deviating significantly* from the customer specification to gain written or verbal approval to proceed.
>
> (Emphasis added.)

408 Implicit in this communication was the acceptance that if there was a deviation from the customer specification which the production manager did not consider to be significant then the malt could be shipped without checking with Stewart. The email was also sent to Stewart, along with McIntyre and Moller.

409 In March 2013, Testi emailed a revised "Non-Conforming Shipment Form" to Joe White employees including the managers, production managers and quality personnel at each of the 7 Australian plants. The email was copied to Stewart, Sheehy and Moller. The form stated that it was to be attached to any Certificate of Analysis that did not meet the criteria of the Viterra Certificate of Analysis Procedure. It included a section for recording the parameters that were out of specification, and required the signature of 2 general managers and the plant manager or plant manager's delegate. The "Viterra" document revision notice also attached to Testi's email indicated that the Non-Conforming Shipment Form was in its fourth version, had been the subject of 35 revisions and had been posted to Pulse on 5 March 2013 (the date it was revised).[329]

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329 Like other Viterra document revision notices, this document had a specific document number.

410 On 6 March 2013, a "Viterra Non-Conforming Shipment Form" was completed and signed off with respect to a shipment for Oriental Brewery.[330] In signing off on this document, and the related Sign-Out Report, Stewart gave evidence that he was documenting a process where a specification was outside 2 standard deviations to, he "guess[ed]", give a level of accountability and traceability around why shipments were allowed to proceed even though they were outside 2 standard deviations. The Certificate of Analysis produced with respect to this delivery made no disclosure about any specification being adjusted. Further, it recorded the relevant specification, moisture (which Stewart acknowledged was a very important characteristic from a brewer's perspective), complied with Oriental Brewery's specification. Furthermore, this Certificate of Analysis recorded the required barley variety, namely Baudin, was supplied, but Stewart's evidence was that he could not be sure which variety was actually used. Stewart said he understood at the time that Joe White was representing to its customer the facts as set out in the Certificate of Analysis.

411 At 1 point, Stewart gave evidence that customers were happy with malt delivered provided it performed well in the brewery, and customers were not concerned about the accuracy of the Certificates of Analysis, but had an expectation they would "come in-spec from more of a quality assurance type perspective". This evidence seemed to suggest that all breweries Joe White supplied were in the know about the deception created by altered results recorded in Certificates of Analysis. Under cross-examination and arising from this evidence, in rejecting a proposition that Stewart wanted the court to understand that a Certificate of Analysis was a meaningless piece of paper, Stewart repeated that customers were happy if the malt performed well and that they had an expectation the Certificates of Analysis would be "correct from a quality assurance perspective".

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330 For completeness, the Viterra Parties submitted that Oriental Brewery was a Heineken subsidiary, which was based on the tentative evidence of Viers: see par 332 above. No reference was made to further evidence given by Viers soon after that Oriental Brewery was a subsidiary of Anheuser-Busch InBev, by reference to a buyout in 2014, and the Viterra Parties' senior counsel's acknowledgement that he had been wrong in saying it was a Heineken business "now". Nor was reference made to Eden's evidence that Oriental Brewery was a Korean company. In short, there was no basis to conclude on the evidence that this company was a Heineken subsidiary. On the contrary, numerous times during the trial Oriental Brewery was referred to in distinction from Heineken.

412 When it was put to him again that his evidence still suggested the Certificates of Analysis were meaningless, Stewart then reverted to seeking to justify the procedure from a scientific point of view. His evidence was that the changes used were "done within the error of the tests. So as a scientist I need to look at facts and evidence, but I also need to consider the robustness of those measurements and the larger area associated with those tests and I believe justified moving some analysis back into specification". This apparent attempt to suggest that a scientific approach was taken across the board with respect to the pencilling engaged in to record results within specification was entirely unconvincing. The evidence demonstrated that many changes were made to bring results within specification without any consideration of particular errors of tests. Further, as the evidence also demonstrated,[331] if there were a particular error with results that needed to be taken into account, it needed to be accounted for consistently rather than on an ad hoc basis which simply allowed results to be brought within specification.

413 Not a single document was put before the court which clearly corroborated any suggestion that Joe White's customers (or quality assurance departments of Joe White's customers) knew of and were content with Certificates of Analysis being provided which recorded test results other than those produced from the laboratories and accurately recorded.[332] The tendered correspondence between Joe White and its customers indicated the opposite was the case.[333]

414 Also in March 2013, Stewart was raising issues with the quality of barley that Joe White was receiving from Glencore Grain and the ability of Joe White, utilising that barley, to meet its contractual obligations to customers. An email dated 8 March 2013 from Stewart to Peter Sidley ("Sidley") at Glencore Grain responded to Sidley's

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331 See pars 2237-2239 below. For completeness, in March 2013 the stated quality objectives were changed. However, this did not alter the applicability of the Viterra Certificate of Analysis Procedure or the Malt Blend Parameters Procedure.

332 Cf pars 1664-1665 below.

333 In making this observation, it is not suggested that Stewart's evidence on this issue was a complete fabrication. It may be there was some covert arrangement between Joe White and some quality assurance department of a customer or customers, but there was no evidence beyond Stewart's very general statements to suggest any such arrangements were widespread.

notification of changes in barley supplied. Stewart noted that Glencore Grain had "taken away 2,000 mT"[334] of malt 1 barley and replaced it with "2,000 mT of Malt 2". Stewart stated:

> As you know Peter there is a substantial drop in quality from FL1Q[335] to FLNQ.[336] [Joe White] have already had 6,000 mT of the Sapporo CCFS[337] grain taken from our allocation, which will have a considerable impact on our ability to service Sapporo. Now this drop in barley quality with (sic) further compromise our ability to meet Sapporo's requirements.

415 Sidley responded[338] that he was not sure how much of the 2 different grades of barley were comingled in the same bins. He said the details of the tonnages previously provided were the best figures he had to advise. Stewart continued to push for the provision of higher quality grain from Glencore Grain. Later in the email chain, he repeated his request for a reinstatement of "the earlier allocation" and stated "Sapporo are an important customer to [Joe White] and it is essential that we maximise the amount of FL1Q to meet their very high standards". Regardless, Sidley later directed that Evans respond to Stewart stating that the tonnages and grades allocated to Joe White would not be altered because the barley sought by Joe White had been allocated to an accumulation for 1 of Viterra's customers.

416 On 6 March 2013, Deloitte emailed the current version of the data books to Glencore's accountant, copied to Argent. It was noted there were still a few items outstanding concerning intercompany loans and creditors. Glencore's accountant forwarded the data books to Walt, Roelfs and King, inviting them to make any final comments before the data books were sent to "the banks". Argent was not included in this invitation.

417 On 12 March 2013, Merrill Lynch emailed Argent, copied to King, Hughes and others, referring to a drafting session proposed to be held the following day. It invited Argent and Hughes to block away the majority of the day after 10am, but also expressed an

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334 mT stands for metric tonnes.

335 FL1Q stands for "Flagship malt-1 grade malt".

336 FLNQ stands for "Flagship off-grade malt".

337 CCFS stands for "Collaborative Contracts Farming System". This system required barley to be traceable from the grower all the way through to its presence in the malt.

338 Five days later, after Stewart had followed up with a further email seeking an update.

understanding that they had other commitments. Presumably, the drafting session took place,[339] but no evidence was led as to whether it occurred, how long it took or what, if anything, Argent (or Hughes) drafted or assisted in drafting. King did not recall attending any meeting of this nature.

418 On 15 March 2013, King sent an email to Merrill Lynch, copied to Walt, which attached draft updated vendor assistance data books. King noted not all balance sheet schedules had been updated, however he stated they were not necessary for the draft of the information memorandum and would be finalised in the next version. King suggested that when the final version was available it would be useful for Merrill Lynch to cast a critical eye over it and consider some of the areas which Merrill Lynch might feel could cause a buyer to raise an eyebrow, so that the commentary could be improved if needed and so that management could be prepared for the inevitable questions. In relation to the "valuation presentation", King referred to a discussion with Walt and stated that they thought it would make most sense for that presentation to be distributed to the 2 of them as well as Mattiske and Roelfs. He also suggested that this distribution be followed by a call in which these Glencore representatives could be walked through the presentation.

419 In response, Merrill Lynch enquired as to whether King thought it was possible to show earnings going back further than the previous 3 years to support the "point on stability of business/through the cycle earnings". King pointed out this suggestion might have given rise to problems with the various normalisation adjustments that Deloitte had made to the financials. King continued:

> Given that we want potential purchasers to focus on the pro forma normalised [Unadjusted Earnings] rather than the Base [Unadjusted Earnings] it will be difficult to draw out the consistency of earnings by going back further especially given that [Joe White] has changed hands/merged a number of times (2001, 2002 & 2009) as well as significantly expanded production over that time. Having said that, suggest you guys in Australia have a chat with management when they meet with them on Tuesday and see what they think.

In an email sent 3 days later, Merrill Lynch stated that it had spoken with Hughes who

339 See par 423 below.

thought going beyond 3 years was doable and should provide a strong message in terms of stability of earnings. However, it was noted that it would take some time for Argent to pull together the information and then for Deloitte to review it and prepare adjustments. Merrill Lynch essentially asked King whether the matter should be pursued further. It was not.[340]

420 Also on 15 March 2013, Merrill Lynch sent an email to Hughes and Argent attaching an updated power point presentation concerning "Key Investment Highlights". The email noted that the updated presentation reflected comments that had been made by Hughes and Argent, but did not identify which comments were attributable to each of them individually. The email then set out suggestions by Merrill Lynch, before stating that Merrill Lynch would continue to work on other sections of the draft information memorandum.

421 On 20 March 2013, Merrill Lynch emailed Argent, Hughes and others, addressed "Dear all", and attached the latest draft on the financial section of the proposed information memorandum. The same observations made in the preceding paragraph concerning the extent of Argent's and Hughes' level of involvement in this iteration apply to the probative value of this evidence.

422 On 22 March 2013, Mattiske sent an email to Argent, copied to Hughes and Rees, asking for a management report for Joe White. Later that day, Argent emailed 2 reports, 1 being a group report prepared on a monthly basis.[341] Mattiske gave evidence he generally received and reviewed updated group reports on a monthly basis. He did not request or receive internal reports as he did not consider he needed that level of detail. Further, he gave evidence that he trusted Hughes and Argent and believed he had no reason not to accept what they told him about the Joe White Business.

423 Also on 22 March 2013, Merrill Lynch circulated the second draft of the proposed information memorandum. The covering email stated that the draft encapsulated

340 See fn 309 above.

341 This report was ultimately provided to Cargill as part of the due diligence process.

management feedback obtained over 2 separate sessions, together with some initial observations from King. The draft was provided to Walt, Mattiske, Roelfs, Hughes, Argent and a lawyer at Glencore. On 23 March 2013, King provided extensive comments in response. Those comments were directed to the business overview, the investment highlights, the key financial information, the sale process overview, and the investment highlights concerning general comments, Joe White being the largest Asia-Pacific maltster, the geographic footprint, the high-quality asset base, the proven business model, the financial profile and the management team. Amongst other things, King directed Merrill Lynch to add further text, delete text and to reword what Merrill Lynch had drafted. In response, Merrill Lynch said it would work through each of King's comments.

424 On 25 March 2013, King provided further comments with respect to the industry overview section. Again, the comments were extensive. On 28 March 2013, Merrill Lynch responded stating that the industry overview section had been revised and all of King's comments had been incorporated with only 3 exceptions. After explaining the relatively minor exceptions, Merrill Lynch invited King to provide any further comments.

425 Deloitte were duly instructed by Glencore to prepare "vendor assistance data packs", which were completed by 22 March 2013.[342] The data packs were the product of an investigation into the historical financials of Joe White, and were intended to make those financials more meaningful to the bidders by giving a better portrayal of the underlying profitability. King gave evidence that Glencore relied heavily on Argent to ensure the information provided to Deloitte was accurate. King said, as between Hughes and Argent, most of his conversations were with Argent.

426 King gave evidence that Argent had a "deep understanding of the Joe White Business,

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342 During cross-examination, King expressed the opinion that a vendor assistance data pack was not "wildly different" from a vendor due diligence report, apart from the "reliance piece". However, he acknowledged that Deloitte having to take responsibility and be liable for the contents of a report would have meant it would have been very likely Deloitte would have been more thorough and careful in preparing a due diligence report than the care that was likely to have been taken in preparing the data packs.

especially from a financial perspective". Further, King found Argent very helpful and efficient. At no time did King believe Argent was withholding information from him. Indeed, King said Argent carried out his tasks with aplomb and considered he was quite exceptional at his job. However, he was not "an operational guy", nor a chemist. King did not recall ever discussing the malting process with Argent and was not aware of Argent ever being involved in negotiating customer contracts. Accordingly, King's evidence of reliance on Argent to ensure information was accurate was necessarily confined to the reporting of financial information.

427 On 24 March 2013, Merrill Lynch circulated a draft of the financial section of the proposed information memorandum. The next day, King emailed a response stating a huge amount of work still needed to be done. He said he had discussed it internally at Glencore, and considered there should have been a much more thorough review process before circulation. He complained of a distinct lack of detail, and said the document fell well short of providing the necessary information for a bidder to be able to properly understand the Joe White Business. King referred to 2 critical themes: (1) the need to address why the results for 2013 constituted a "blip"; and (2) the requirement for a fair adjustment of $15 per tonne with respect to the "blending and accumulation margin".[343]

428 Merrill Lynch emailed that it was agreed more work needed to be done, but said the financial section had been circulated to get further inputs from King and Mattiske, in addition to discussions with management.

429 On 28 March 2013, Merrill Lynch sent an email to Mattiske, Hughes and Argent stating that King was keen to advance the financial section of the information memorandum. A meeting was proposed on 2 April 2013 to address some of the key outstanding issues involving the fall in earnings for the 2013 financial year and the forecast uplift for the 2014 financial year, the key profit and loss movements (both historical and forecast), normalisation of the accounts for the 2012 and 2013 financial years, the

343 As to the latter, see fn 549 below. This margin was subsequently referred to as the Accumulation and Position Margin: see par 526 below.

malting margin, the Accumulation and Position Margin, and cash flows. Merrill Lynch also proposed liaising with another person on these topics. Each of Mattiske, Hughes and Argent said they would be available, Mattiske ultimately saying he would attend via video or telephone. Mattiske gave evidence that he could not specifically recall attending any meeting on 2 April 2013, but did recall more generally being involved in discussions in relation to the preparation of the financial information.

430 On 29 March 2013, Merrill Lynch circulated a further draft of the information memorandum (Hughes and Argent were not included), together with a draft teaser. The email stated Merrill Lynch intended to progress the financial section with management over the following week.

431 In around March 2013, Koenig received a telephone call from Mahoney. Mahoney told Koenig that Glencore was proposing to sell the Joe White Business and that it was undertaking a formal process to do so. Koenig told Mahoney that "his people" should contact Peter Hawthorne ("Hawthorne"),[344] Cargill, Inc's vice president of strategy & business development. Mahoney also told Koenig that Glencore was interested in selling the shareholding in Prairie Malt Ltd.

432 At around this time, Cargill retained external investment and financial advisers, namely, Goldman Sachs, KPMG and Ernst & Young.

433 In early April 2013, Argent sent an email to King, copied to Hughes and Merrill Lynch, attaching a spreadsheet. King was informed that Argent and Hughes had been working through the "sold volumes" for the 2014 financial year "to verify some of the data we are inserting into the [proposed information memorandum]". Certain details were provided in the covering email. The spreadsheet referred to the use of off-grade barley by Joe White to a level of 30 percent. It showed $3.60 per tonne was contributed

344 Hawthorne was based in Minneapolis. His role included corporate development for Cargill, Inc globally. At the time of giving evidence he had worked for Cargill, Inc for over 24 years. He was previously employed at the Chase Manhattan Bank (in petroleum finance), Bain and Company (in strategy consulting) and in other finance related positions. He has a bachelor of arts degree in economics from Brown University and a masters of business administration from Stanford University.

to the overall integrated margin (or gross margin) with respect to the 47 percent of malt sold to that time. The spreadsheet also referred to a saving of $10 per tonne. King did not ask for any source documentation underlying the spreadsheet, however he discussed it with Argent. In that discussion there was no suggestion Joe White's customers were being provided with malt that did not comply with the customers' specifications.

434 On 4 April 2013, Walt emailed a number of the senior executives in Europe, being Mahoney, Mostert, Roelfs, de Gelder and Ken Klassen,[345] as well as Mattiske and Rees. He observed that the formal launch of the sale process was close and said it was time for an internal poll concerning the final sales price for Joe White. He stated that Glencore's financial adviser's view was attached,[346] but encouraged everyone to form his own view on the value. He stated that the replies should only be provided to King and himself and that once the numbers had been received from everyone, the outcome would be circulated. Mattiske responded the same day by email copied to King. He stated that $360 million was a realistic value, however he still thought $400 million was achievable as Co-Operative Bulk and GrainCorp were extremely eager to buy Joe White and they were "looking at synergies that were not at all contemplated in [Merrill Lynch's information memorandum]". After discussing why he believed these entities were interested, as well as another potential buyer that Mattiske described as "a dark horse",[347] Mattiske settled on splitting the difference at $380 million, but noted if it were him as purchaser that he would only pay around $300 million.

435 On 6 April 2013, King sent an email to Merrill Lynch copied to numerous others, including Walt, Hughes, Argent and Deloitte, attaching a detailed mark-up of the financial section of the draft information memorandum. King stated that the attached document was from him and Glencore's accountant, which also incorporated thoughts from Walt. King invited Merrill Lynch to review the mark-ups and then call

345 Ken Klassen was legal counsel at Glencore at the time. Mattiske gave evidence that of these senior executives, in 2013 Mahoney was the most senior.

346 The document produced in evidence did not contain the financial adviser's view, but noted that the document containing that view had been deleted by Mattiske.

347 This other potential buyer was not Cargill.

him to discuss them to ensure that Merrill Lynch correctly interpreted the changes that were being suggested. The email acknowledged that "management" was yet to finalise the numbers for the 2014 financial year.

436 Every page of the attached document had suggested changes, with most pages containing numerous suggestions. On a page entitled "Cash Flow and Working Capital", it was stated that management believed $30 million was an appropriate level of net working capital for the Joe White Business. With respect to this, King's handwritten note stated that the comment was "value destructive to the tune of $3.5m!". Under cross-examination, King said he could not recall why he made this note. He accepted that it was important to convey to a prospective purchaser the particular level of working capital required to operate the Joe White Business. The statement about management's belief concerning the appropriate level of net working capital was ultimately removed and not replaced with anything which might have indicated the appropriate level of net working capital was $30 million or something similar.[348] On the same page of the draft a footnote recorded that management defined working capital as trade and other receivables, inventories less trade and other payables and provisions. It was also stated that management confirmed that "material changes" in working capital levels were primarily attributable to bulk shipments and timing of customer orders. King placed both a question mark and an exclamation mark next to this footnote. It did not appear in the final version of the document.

437 On 10 April 2013, Merrill Lynch circulated a further draft of the proposed information memorandum, together with an information request list. The covering email, which was addressed to King, Hughes and Argent, stated that upon completion of the request list and outside the financial section, the majority of the outstanding items would be resolved. King sent some comments back on the same day, stating that further comments would follow later. King also referred to a point to raise with Hughes and Argent, which was concerned with the details of the management team.

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348 It should be noted that in another passage on the same page there was reference to management's expectation of low levels of stay-in-business capital expenditure and a "relatively low net working capital requirement". These words concerning the description of the net working capital requirement remained, without specifying any estimated amount.

King provided further comments later on 10 April 2013, and yet further comments on 11 April 2013. In the covering email to the last of these comments, King stated he would appreciate Hughes' and Argent's thoughts on 3 matters he identified.

438 During cross-examination, King was taken to some of his draft changes. Although King described some of his changes as semantics, it was clear that he was sharpening the representations to be conveyed. For example, the draft provided that Joe White developed a detailed understanding of customer requirements. King amended this to read: "Joe White *is focused on* develop*ing* a detailed understanding of *specific* customer requirements …" (emphasis added). Further, instead of a statement that Joe White devoted significant time and effort to understanding its customers' product requirements, King changed "product requirements" to "product specifications".[349] In addition, King provided the framework of the 3 year projections, assisted by Argent.[350]

439 On 12 April 2013, Merrill Lynch circulated within Glencore, copied to others including Fitzgerald, Hughes, Argent and Pappas, a further draft of the proposed information memorandum. The document contained some square brackets which Merrill Lynch indicated would be cleared up over the next couple of days with the assistance of management.

440 On 15 April 2013, Mattiske, amongst others, received an email from Merrill Lynch. Neither Hughes nor Argent were included as addressees. The email attached documents ahead of "our weekly update call", including an updated version of the working group list. Together with Walt, King, Fitzgerald,[351] Mostert and Roelfs, Mattiske was included as a Glencore representative. Hughes and Argent appeared in the working list under the heading "Joe White". However, Mattiske gave evidence that the list did not represent the decision-makers or leaders; the actual sale process was driven out of Glencore in Barr and Rotterdam. He further stated that, although

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349 See further fn 390 below.

350 See par 492 below.

351 Although appearing within "Glencore, Corporate, Legal" with 2 other lawyers from Glencore, immediately under Fitzgerald's name appeared "(Viterra Legal)".

he helped to facilitate the sale, his main role was to run the businesses that were going to be kept.

441 On 17 April 2013, Lisa Jewison ("Jewison"), Cargill's business unit controller, malt,[352] sent an email to Hawthorne, Eden, Viers and the European malt general manager, Sabine Sagaert ("Sagaert"),[353] attaching assigned roles for Project Hawk that had been discussed the previous week. She confirmed that a kick-off meeting ought to be held for the team.

442 On 18 April 2013, King forwarded another draft of the proposed information memorandum to Mattiske, which was an updated version that had been distributed by Merrill Lynch earlier that day.[354] He asked Mattiske to read through it, ahead of it being finalised and to provide any thoughts or comments. In response, Mattiske said:

> I have now read the report, it is a very high quality document, I am sure your input has helped to achieve this.
>
> I am comfortable with the information you refer to below. [L]et's hope we can launch soon!

The reference to the information King had referred to lower in the email chain was concerned with the supply and demand dynamics of the barley price and its impact on the malt price; the Accumulation and Position Margin; and how the barley and malt price dynamics in 2012 had impacted on the forecasts for the 2013 and 2014 financial years. There was no suggestion by Mattiske in his email that any lack of

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352 At the time she gave her evidence, Jewison had been employed at Cargill for 21 years and was regional controller for North America. From October 2011 to March 2016, she was employed as global controller of Cargill, Inc's malt business and reported to Eden (and then Sagaert). She holds a degree in accounting from Concordia College and a masters degree in administration (majoring in finance) from the University of St Thomas. She became a certified public accountant in 1996, but no longer practises as such.

353 Sagaert's role was general manager Europe, malt. At the time she gave her evidence, Sagaert was managing director of global edible oil solutions for Cargill, Inc in Europe, the Middle East and Africa. She joined the malt business of Cargill, Inc in Europe as its general manager in May 2011. In her role as general manager, Sagaert had full responsibility of safety, engagement, profitability, overall operations, people and strategy for the malt business in Europe. She was appointed commercial manager worldwide in 2013, and then, in 2015, upon Eden's departure, was global managing director of malt for Cargill, Inc. She holds a masters degree of applied economics (majoring in marketing) from Katholieke Universiteit Leuven, and a masters of business administration from the same institution.

354 Merrill Lynch sent the email to Hughes, Argent and Mallesons, copied to King. King was asked whether he wanted to be included on a call concerning the verification process. King responded by indicating that he would not be involved, but directed that Merrill Lynch confirm afterwards that everything had been suitably verified.

familiarity with the Joe White Business adversely affected his ability to meaningfully comment on the contents of the draft, including the specific matters raised by King. However, with the exception of the Accumulation and Position Margin, Mattiske's evidence was that he did not have sufficient knowledge of the Joe White Business to test the assumptions made in the financials beyond making a general assessment as to whether they seemed reasonable.

443 In addition to verifying the Accumulation and Position Margin, on 20 April 2013, Mattiske, together with Fitzgerald, Hughes and Argent, were required to verify page 50 of the draft information memorandum. This dealt with the impact of barley and malt prices on the 2013 financial year and 2014 financial year earnings estimates. Mattiske made enquiries of Glencore Grain's trading division to "ensure" the information was correct.

444 As to Mattiske's role in the draft information memorandum more generally, he gave evidence he reviewed it and gave some feedback as to whether it was reasonable, presented well or made sense. He said he did not feel as if there was much that he could contribute. Surprisingly, even though Mattiske read the document, when it was put to him that he knew it contained specific representations about Joe White complying with customer specifications, he replied, "[n]ot specifically". He then denied knowing about them. When it was pointed out that he had given evidence that he had read the document, he then said he had answered "not specifically" because he was not involved in further presentations that were being made outside the document. This evidence was plainly unsatisfactory.

445 On 20 April 2013, Merrill Lynch circulated within Glencore and Viterra, including to Hughes and Argent, what was said to be the final version of the information memorandum. The covering email stated that Merrill Lynch would be working with management over the coming days to verify its contents. Further, any additional comments were invited.

446 Just under an hour later, Merrill Lynch sent an email to Mattiske, Fitzgerald, Hughes

and Argent, copied to King and Mallesons, stating that the verification process was required. The email stated the primary aim of the exercise was to ensure all information contained in the information memorandum was factual and that, to the extent to which questions were raised by buyers, it had the relevant supporting data. The email attached the final version of the information memorandum, together with a verification table allocating each section "to a person within Joe White/Viterra". The email continued:

> Allocations: [Hughes] and [Argent] have primary responsibility for the general business and industry information, [Argent] for the financials, and where relevant we have also included [Mattiske] and [Fitzgerald] to provide their view (e.g. accumulation margin, legal information at the end of document).

447 In response to this email, the following day a solicitor from Mallesons said that, in elaborating on the earlier email, the information memorandum did not "require 'prospectus-type' verification" and stated that "we" were not dealing with "prospectus liability". The solicitor stated that they were trying to ensure that the information memorandum was accurate by having the relevant persons focus on allocated sections to verify the accuracy. However, the solicitor also suggested that the verification table "just" provided a record of that going forward. In short, there was no suggestion to either Hughes or Argent that there might be a personal exposure to liability if the contents of the draft information memorandum were inaccurate in any way.

448 On 23 April 2013, Argent emailed Merrill Lynch stating that he and Hughes had been through the information memorandum that morning, and attached a document which contained their marked up comments. The marked up document was headed "final version" on each substantive page and included the legal disclaimer on page 1 stating, amongst other things, in substance that there would be no responsibility for the contents of the document. There were handwritten amendments throughout the document, but, with 1 exception, they were relatively minor. The exception was on page 26 where, "The success of the Procurement function is driven by the close collaboration with Sales and Marketing to ensure the customer's information is shared and continually updated" was replaced with, "The barley procurement function is

driven by the sales and marketing team, together with Technical, identifying varieties best suited to meet customers malt specifications". This page was ultimately verified by Hughes, but not by Argent. There was no evidence to suggest Argent was involved in redrafting this aspect of the document. Indeed, although the handwritten amendments all appeared to have been made with the same hand, on the face of the document (and the covering email) there was no way of discerning whether Hughes or Argent, or both of them, were responsible for the suggested changes.

449 The day before, Merrill Lynch sent an email to Mattiske, copied to King, referring to a discussion with Mattiske that evening and attaching a further draft with marked up changes with respect to the Accumulation and Position Margin. Without going through the detail, the upshot was that each of King, Hughes and Argent all agreed with the revised wording.

450 On 24 April 2013, Merrill Lynch emailed a further verification table to Hughes and Argent, asking them to sign off on the documents based on the draft information memorandum circulated the previous day. The verification table ran for 6 pages and covered each of the substantive matters contained in the draft information memorandum. Each item was required to be verified by Hughes or Argent, or both. Many of the items were noted as requiring changes. Items concerned with the business model, sales and marketing, and the procurement process "focused on meeting customer specifications" were confined to Hughes. Many of the financial items were confined to Argent. Mattiske, together with Hughes and Argent, was referred to with respect to page 44[355] and matters concerned with the impact of barley and malt prices on the 2013 and 2014 financial years' prices. Further, in addition to Argent, Fitzgerald was required to verify "Other Relevant Information".[356] None of the pages allocated to Mattiske or Fitzgerald formed part of the pleaded allegations against the Viterra Parties based on the Information Memorandum.

451 Later on 24 April 2013, Argent sent an email to Merrill Lynch stating that a change to

355 See par 530 below.

356 Fitzgerald asked Bickmore to assist him in ensuring that this information was correct.

the draft information memorandum (which was minor and concerned employee numbers) had been missed. The attached verification table was initialled with respect to numerous pages of the draft information memorandum by Hughes and Argent.[357] On 26 April 2013, yet another draft of the information memorandum was emailed by Merrill Lynch. The covering email stated it was the verified version.

452 King gave evidence that in late April 2013, Mallesons undertook a verification process of the draft information memorandum, with the assistance of Merrill Lynch, Hughes and Argent. However, King said he could not remember much about this process.

L. The selling of Joe White commences

453 Against this backdrop, steps for the sale of Joe White began in earnest in May 2013.

454 On 2 May 2013, Hawthorne received a call from his "opposite at Glencore". Hawthorne was told that Glencore was completing another deal that day, which had caused delay in starting the process to market Viterra's malt business. Glencore's position was that it wanted to deal directly with Cargill in relation to the sale of the shareholding in Prairie Malt Ltd. Some arrangements were put in place. As for Joe White, Hawthorne was informed that Merrill Lynch would be running the sale process, which would be a two-stage auction. Some details were given.[358] These included the requirement to sign a non-disclosure agreement before obtaining access to an information memorandum.

455 On the same day, Hawthorne reported on the conversation by email to a large number of Cargill employees, including Koenig, Conway, Van Lierde, Eden and Viers. The email stated that a draft non-disclosure agreement had been provided to 2 Cargill in-house lawyers based in Minneapolis for review. It also referred to approval having been given to retain Goldman Sachs as Cargill's financial adviser. Hawthorne stated that the law firm Allens would be retained as outside Australian legal counsel to assist

357 In fact, Argent also signed off on some items that only required Hughes' verification. This matter was not explored at trial and there was no evidence to suggest Argent's role went beyond that of financial controller: see further issue 125 below.

358 Eden gave evidence that Cargill had been approaching Glencore up to this time to try and deal with Glencore directly.

with the possible acquisition of Joe White, noting that Allens had also advised Cargill on the Australian Wheat Board acquisition.

456 The email referred to some individuals who would assist the Project Hawk team. Koenig was not included in the team, but he was copied into many of the internal communications between the Project Hawk team that followed. The reason for keeping Koenig informed was that Koenig knew Mahoney and it was anticipated that Mahoney could possibly contact Koenig during the sale process, or Cargill might ask Koenig to contact Mahoney.

457 The first formal instrument which set the Acquisition in motion was the non-disclosure agreement in the form of a proposed confidentiality deed. It was provided to Cargill, Inc by Merrill Lynch on 1 May 2013, along with a document referred to as the "Joe White Maltings Teaser" ("the Teaser"). The Teaser was a 5 page document, entitled "Joe White Maltings Company Introduction May 2013 Glencore", which provided a high level summary of the Joe White Business.[359] All the information in the Teaser was taken from the Information Memorandum. "Glencore" was defined in the Teaser to mean "Glencore and its subsidiaries", and they were stated as the entities who had prepared the document.

458 On 7 May 2013, Hawthorne emailed Merrill Lynch Cargill's draft of the proposed confidentiality deed, copied to Mallesons and others. Both a marked-up version and a "clean" copy were sent which contained Cargill's suggested amendments to the document provided by Merrill Lynch on 1 May 2013.

459 On 13 May 2013, Hawthorne executed the confidentiality deed that had been proffered ("the Confidentiality Deed"). His evidence was that he read the Confidentiality Deed and understood the obligations it created. There was no evidence that anyone on

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359 The material information contained in the Teaser spanned only 2 of the 5 pages of the document and was grouped into 3 topics: sales volume by geography, production capacity, and investment highlights. The information under the heading "Investment Highlights" was sub-categorised into 6 topics: largest Asia-Pacific maltster, geographic footprint well positioned for Asian growth, high quality asset base, proven effective business model, strong financial performance and highly experienced and stable management team. The third page contained a disclaimer. The Teaser was prepared by Merrill Lynch in conjunction with Glencore's business projects team in Europe.

behalf of Glencore signed this document. Events subsequent to 13 May 2013 and before 27 May 2013, and the fact that the Viterra Parties did not seek to tender any document executed by Glencore, demonstrated the document executed by Cargill, Inc on 13 May 2013 was not counter-signed by Glencore.

460 The Confidentiality Deed referred to Glencore as the "Discloser" and Cargill, Inc as the "Recipient".[360] For present purposes, it suffices to say that the recitals to the Confidentiality Deed recorded that Cargill, Inc wished to obtain access to information and Glencore had agreed to disclose or otherwise make available certain information on the terms and conditions set out in the Confidentiality Deed.[361]

461 On 14 May 2013, Merrill Lynch sent a letter to Hawthorne, entitled "Joe White – Phase 1 of the Proposed Transaction" ("the Phase 1 Process Letter").

462 The Phase 1 Process Letter began:

> Thank you for your interest in a possible acquisition of [Joe White] and the assets used exclusively in connection with the Joe White [B]usiness and for executing the Confidentiality Deed.[362] [Glencore] has appointed Merrill Lynch as its financial advisor and [Mallesons] as its legal advisor in relation to the potential sale of Joe White ("Proposed Transaction"). This letter is an invitation to submit a non-binding, indicative proposal ("Indicative Bid") for Joe White.
>
> Accompanying this letter is a copy of the Information Memorandum on Joe White. The Information Memorandum is being provided pursuant to the terms outlined in the Information Memorandum and represents Confidential Information as defined in the Confidentiality Deed.

463 With respect to the appointment of Merrill Lynch as Glencore's financial adviser, King gave evidence that a key role of an investment bank in this type of transaction was to act as an intermediary, and to run things. King was not involved in any negotiations

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360 See par 585 below.

361 The terms of the Confidentiality Deed as subsequently executed are set out in pars 585-590 below. It was common ground that, for the purposes of the issues in this proceeding, there was no material difference between the terms of the Confidentiality Deed as executed by Cargill, Inc on 13 May 2013 and the subsequent version of the Confidentiality Deed.

362 This was a reference to the document signed by Cargill, Inc on 13 May 2013. The Confidentiality Deed as signed by both Cargill, Inc and Glencore was in fact executed after 14 May 2013 and dated 27 May 2013 (see par 585 below) and see the definition of Confidentiality Deed in the Acquisition Agreement: par 1022 below. It was a term of both versions that "a document (including this deed) includes any variation of replacement of it": cl 1.4(a). For convenience, "Confidentiality Deed" in these reasons refers to either of the 2 versions depending on the context in which it appears.

with bidders directly until the final negotiations. He said it was a deliberate strategic decision of Glencore to keep the Glencore executives "in the back room and out of sight".

464 Returning to the Phase 1 Process Letter, it went on to set out the phases of the proposed transaction. Phase 1 concerned the submission of indicative bids ("Phase 1"). Phase 2 involved the completion of due diligence and potentially the making of a final bid ("Phase 2"). Under the heading "Phase 1 – Indicative Bids", the following appeared:

> As a participant in Phase 1 of the Proposed Transaction, you are invited to submit an Indicative Bid to Merrill Lynch by 2:00pm Sydney time on Friday, 7 June 2013. Your Indicative Bid should address or confirm (at a minimum) the items set out in section 3 of this letter …

465 Under the heading "Phase 2 – Due Diligence", it was indicated that, on the basis of indicative bids received, Glencore would select a shortlist of interested parties who would be invited to participate in Phase 2. Participation in Phase 2 would involve access to a virtual data room to enable access to certain information as part of the sale process ("the Data Room") and discussions with Joe White management. Following Phase 2, shortlisted parties would be invited to submit a final, fully financed binding offer.

466 Section 3 of the Phase 1 Process Letter set out the required form of the indicative bids. It required an indication of the bidder's details, proposed transaction structure and "strategic rationale" for the purchase. Relevantly, it continued on to specify that the following details were required in the indicative bid:

> *(c) Indicative Bid*
>
> The total cash consideration at completion in Australian dollars offered for Joe White (as defined in section 1 of this letter) on a debt free and cash free basis, *based on the 31 January 2013 balance sheet in Section 5 of the Information Memorandum*.
>
> Glencore has a strong preference that your Indicative Bid be expressed as a single number. If a range of values is provided it will be assumed that your Indicative Bid is at the low end of that range. Glencore will assume that your Indicative Bid reflects your best proposal. Any reasons for a likely or potential variation between your Indicative Bid and Final Bid should be noted.

(d) Methodology and key assumptions

A description of the valuation methodologies you have adopted and key assumptions underpinning your Indicative Bid (including relevant commercial, financial, tax, legal and foreign exchange assumptions) and any value drivers or additional information that would allow you to improve your offer. In particular, *you should note where these assumptions vary from information disclosed in the Information Memorandum*.

(e) Synergies

Your assumptions regarding potential synergies, the value you apply to these synergies and details of how much of this value is included in your Indicative Bid.

(Emphasis added.)

467 A number of other elements were required, including details of any conditions precedent to which the indicative bid was subject, details of proposed sources of funding, confirmation that the bidder was acting alone, and a summary of intentions for the operation of Joe White. In relation to Phase 2, it was stated that the indicative bid must include the following:

(h) Due diligence

Details of the due diligence that you would expect to undertake in the next phase of the process if Glencore decides to allow you into Phase 2 of the Proposed Transaction. Please provide details of the expected timeframe necessary to complete such due diligence prior to submitting your Final Bid, bearing in mind Glencore's objective of minimising the extent and period of potential disruption to Joe White.

468 Section 4 of the Phase 1 Process Letter, entitled "Conduct of Process", set out a number of rights Glencore and Merrill Lynch reserved "in their absolute discretion". This included the right to "restrict any party's access to confidential information or management (particularly with regard to commercial sensitivities)". At the close of the section, it stated:

> You are required to make and rely on your own investigations and satisfy yourself in relation to all aspects of the Proposed Transaction.

469 Section 5 was entitled "Other Matters" and commenced with:

> The existence and contents of this letter and all discussions, communications and information relating to the Proposed Transaction is confidential information which is subject to the terms and conditions of the Confidentiality Deed entered into by you.

M. Distribution of the Information Memorandum and related matters

470 Enclosed with the Phase 1 Process Letter was a document entitled "Joe White Maltings Information Presentation May 2013" ("the Information Memorandum").[363] On the front page of the Information Memorandum, the names of Glencore and Merrill Lynch appeared. As noted above, Merrill Lynch had been entrusted with the task of the detailed drafting of the Information Memorandum. King gave his comments with respect to various, but not all, drafts.[364] To the extent information was provided by Hughes or Argent, it was done in consultation with Merrill Lynch.

471 Hawthorne distributed the Phase 1 Process Letter to various persons within Cargill (including in-house lawyers) and Goldman Sachs, as well as Cargill 's external lawyers, Allens. In the covering email, Hawthorne referred to the strict confidentiality provisions in the Confidentiality Deed. Hawthorne directed that the documents could not be distributed without first informing Ryan Engle ("Engle"),[365] an assistant vice president, strategy and business development,[366] or Brenda Arndt ("Arndt"), a senior attorney of Cargill, Inc working in mergers and acquisitions.

472 Engle read the Phase 1 Process Letter, including the passage set out in paragraph 468 above. He also gave evidence that he understood Cargill had been required to execute the Confidentiality Deed in order to receive the Information Memorandum, and that its receipt was subject to the terms of the Confidentiality Deed. Equally, Khai Le Binh ("Le Binh"),[367] project team leader in strategy and business development, gave evidence he believed he read the Phase 1 Process Letter. He said that he had

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363 There had been some further minor changes by Deloitte made after 26 April 2013, but nothing of moment. As to the minor changes, on 9 May 2013 Argent said he had nothing to add.

364 King said he regarded the Information Memorandum as marketing material.

365 Engle had previously worked at Morgan Stanley and in private equity firms before joining Cargill, Inc on 29 April 2013. He holds a masters of business administration from the Columbia University Graduate School of Business and a bachelor degree in accounting from the University of Notre Dame. He is no longer employed at Cargill.

366 Strategy and business development was a standalone department which serviced Cargill's business units as required: see par 297 above.

367 Le Binh joined Cargill in 2009, and has worked in Europe and the United States of America. He holds a masters of business administration from the business school of Northwestern University in Chicago and a masters degree in telecommunications from Telecom Paris Tech in France.

understood that, regardless of what was contained in the Information Memorandum, Cargill was required to conduct its own investigations and satisfy itself in relation to all matters. He further understood that the material in the Information Memorandum was being provided on the terms contained in it.

473 The Information Memorandum contained details of the historical performance of Joe White, together with forecasts.[368] In relation to the reporting of past results, King expected them to be utilised by a purchaser, but did not accept it was critical information upon which a prospective purchaser would rely in light of the disclaimer contained in the Information Memorandum. He said such figures were provided to give an impression of the Joe White Business. He further stated that, as part of Phase 2, prospective purchasers could conduct due diligence to ascertain for themselves the historical financial performance.

474 Speaking more generally, King gave evidence that whilst prospective purchasers were dependent upon company accounts provided during the sale process, the financial information in an information memorandum was often adjusted to show the business in a more favourable light.[369] In the case of Joe White, he said it was also necessary to make adjustments to allow for the discontinuance of the relationship between Joe White and Viterra.

475 The first page of the Information Memorandum contained the "legal disclaimer". Disclaimers are customary in information memoranda.[370] In light of the issues raised in this case, it is necessary to set this disclaimer out in full:

> *This document* has been *prepared by Glencore and its subsidiaries (**Glencore**)* to provide background information to assist the recipient in deciding whether to further consider the possible acquisition of Glencore's interest in the malt business trading as "[Joe White]" (**Proposed Transaction**).
>
> This document is being *provided on a confidential basis to selected recipients*. In accepting this document, each recipient agrees for itself and its related bodies corporate and their respective directors, officers, employees, agents,

368 See further par 492 below.

369 King said this involved excluding "one-off non-reoccurring exceptional items" to get a better picture of the underlying profitability.

370 Evidence to this effect was given by a number of Cargill's witnesses, including that Cargill itself used disclaimers when acting as a seller.

representatives and advisers (together, the **Recipient**) that it is *provided on the terms and conditions of this disclaimer*.

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>
> (Emphasis added in italics.)

476 As is apparent from the first line of this extract, throughout the Information Memorandum "Glencore" was defined to be a reference not only to Glencore but also "its subsidiaries". This could not sensibly be understood to refer to all of Glencore's subsidiaries, as many of them had nothing to do with the proposed transaction. But each of Viterra Ltd, Viterra Operations and Viterra Malt were expressly referred to in the Information Memorandum and were subsidiaries with an "interest in the malt business trading as 'Joe White Maltings'". Thus "Glencore", as defined, expressly contemplated these subsidiaries.[371]

477 To the extent the Viterra Parties suggested "and its subsidiaries" in this definition was a reference to Joe White, and Joe White alone, this must be rejected for 3 reasons. *First*, the inclusive language was in the plural; there was no suggestion at trial that there

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371 This meaning of Glencore may not have been universal throughout the Information Memorandum. For example, "Glencore or any of its affiliates or subsidiaries" might have contemplated a narrower meaning of Glencore was intended in this instance. However, nothing turned on this; unless the particular context required it, Glencore in the Information Memorandum had the broader meaning described above. (Glencore was also defined in the glossary as "Glencore International plc", but as acknowledged in closing, this was an error. The court was informed that a company by that name did not exist.) For completeness, it is noted that there was an overlap between the definitions of "Glencore" and "Glencore Group". However, Glencore Group was a wider definition and the extent to which it referred to Glencore's subsidiaries that did not detract from the definition of "Glencore" unambiguously including its subsidiaries.

had been a mistake by not making reference to subsidiaries in the singular. *Secondly*, Joe White did not have an "interest in" what was to be sold; it was the very subject matter of the sale. These first 2 points follow from the language itself, and of themselves make the position clear. But, for completeness, *thirdly*, Joe White was defined separately as part of the business overview as "Joe White".

478 Notwithstanding the difficulties with construing "Glencore" in the Information Memorandum to have a narrow meaning, the Viterra Parties submitted precisely which subsidiaries were involved in the preparation of the Information Memorandum was a question of fact, and that Joe White was the only relevant subsidiary. It was submitted the sale process was conducted by Merrill Lynch "primarily on behalf of Glencore". There are a number of responses to this.

479 *First*, the reference to "primarily" in this submission effectively conceded the sale process was conducted on behalf of persons beyond Glencore. This concession was unavoidable in light of the express statement in the Information Memorandum that Merrill Lynch was acting for Glencore on the same page and as part of the disclaimer that "Glencore" was defined to mean "Glencore and its subsidiaries".

480 *Secondly*, the question as to what was being represented was to be determined based on what was stated in the Information Memorandum, properly understood in the relevant context. As already stated, to confine the words "and its subsidiaries" to Joe White would be contrary to the express use of the plural. Further, it was the 3 Viterra entities (all of which were subsidiaries of Glencore) which were intended to be the "Sellers", and it was those companies who had been, collectively, the owners of what was to be sold. Furthermore, the Information Memorandum itself referred to various matters concerning Viterra's business, rather than being strictly confined to the Joe White Business;[372] another means by which it was confirmed information was being provided by Viterra as well as Glencore.

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372 For example, references were made to "the Viterra barley procurement policy", employees of Viterra (amongst others) not being contacted, Viterra Malt being the proposed seller of the shares in Joe White, the removal of intercompany charges from both Glencore and Viterra, Viterra's merchandising business, Viterra's grain handling business, and so on.

481 In short, whatever might have been the history as to how the Information Memorandum was prepared and finalised, Cargill had no knowledge of such matters. It was not credible to suggest the definition should be read down because of some internal process of Glencore and Viterra, about which Cargill did not, and could not have objectively been expected to know anything (beyond what was stated in the Information Memorandum itself).

482 *Thirdly*, as a matter of fact, information was provided by Viterra. Even leaving aside that Hughes and Argent were Viterra Ltd's employees, Mattiske was provided drafts of the Information Memorandum, provided feedback (albeit he asserted it was not much)[373] and was involved in discussions concerning the financial section of the Information Memorandum. Mattiske also accepted he had ultimate responsibility for Viterra collating the required information, and relied on Hughes and others to perform this task.[374] Further, King gave evidence that the operational level of Joe White fell within Mattiske's remit and that, to the extent decisions needed to be made in relation to the Joe White Business in conjunction with the sale process, Mattiske would have made them. Furthermore, throughout this involvement, Mattiske was a director of each of the Sellers. Moreover, and in any event, Fitzgerald was directly involved in, and took responsibility for, the preparation of the Information Memorandum. As a senior officer of Viterra, he was plainly acting on behalf of those companies as the Sellers, in attending meetings and assisting with respect to the Information Memorandum (while acting for Glencore as well).[375]

483 No doubt, it was Glencore who was in control. It ultimately had the say in what was included in the Information Memorandum and was principally responsible for conducting the sale process. But, as was expressly stated in the Information Memorandum, this was not to the exclusion of Viterra.[376] Further, it is important to

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373 Compare, for example, pars 113, 367, 378, 383-386, 388, 392-393, 396-397, 404, 406, 418, 429, 440, 442-444 449 above and 828 below.

374 See par 393 above.

375 See par 440 above.

376 Plainly at all times, through Mattiske and Fitzgerald amongst others, Viterra knew of, and assented to, the sale process being conducted. See also cl 2.1 of the Confidentiality Deed, which provided that Glencore would procure its Representatives (which included Viterra) to disclose information to Cargill: see par 590 below.

record that, notwithstanding the written submissions, in closing oral submissions senior counsel stated it was not the Viterra Parties' case that Joe White (as opposed to Hughes and Argent acting at the request of Glencore) had responsibility for the preparation of the Information Memorandum. The Viterra Parties' position was that overall it was Merrill Lynch who was responsible for the preparation.

484 The Viterra Parties submitted that the terms of the disclaimer did not give rise to Glencore approaching the task of preparing the Information Memorandum in a cavalier fashion. The Viterra Parties accepted it was understood that potential buyers were to be provided with accurate and complete information about matters material to the conduct of the Joe White Business. Indeed, Mattiske's evidence was that he considered Glencore was under an obligation to provide accurate and complete information.[377] Mattiske said the obligation was not subject to any qualifications.

485 Not surprisingly, those who received the Information Memorandum and related documents at Cargill chose to read the contents at varying levels of detail. For example, Hawthorne read the disclaimers, and took them seriously. Some also read the disclaimers or parts of them, or chose not to read them but proceeded on the assumption that the Information Memorandum was being provided on the basis that Cargill had to conduct a proper due diligence in respect of the material contained in it.[378] Further still, some chose not to read the disclaimers and left the detail and the legal consequences to the lawyers. Also not surprisingly, some could not recall whether or not they read them.

486 In response to a proposition put to him in cross-examination that the disclaimers meant that whatever was in the Information Memorandum could not be relied upon and that Cargill had to make its own investigations and verify the accuracy itself, Le Binh gave evidence that the document was provided by a very reputable investment bank, Merrill Lynch, and the proposed transaction was a "Wall Street deal", so he proceeded with a bias that the information contained in the Information

377 See also par 365 above and pars 494-498 below.
378 See, for example, par 643 below.

Memorandum was reliable. His evidence was that Cargill was looking at the Information Memorandum to understand the Joe White Business better and whether or not it was a strategic fit, and then assess whether or not Cargill wanted to proceed with a bid. He said in the Phase 1 stage, Cargill relied on the information provided to it. As for Phase 2, he said he knew Cargill had to investigate and verify for itself the truth and accuracy of the contents of the Information Memorandum.

487 In a similar vein, Eden gave evidence that he understood the Information Memorandum did not displace the requirement for a due diligence; that he read the Information Memorandum in order to decide whether Cargill was going to make an offer which would get it to Phase 2 and enable Cargill to conduct due diligence; and that the purpose of the Information Memorandum was to provide Cargill with information to decide whether to make a bid and at what level. He further understood that the due diligence process would enable Cargill to examine whether generalised statements about the proven effectiveness of Joe White's business model, other generalised statements and specific statements, were substantially true or not. Eden accepted that there was no intrinsic measure in the Information Memorandum that supported such statements. There was no dispute from any witness with whom the subject was raised that when reading the Information Memorandum it was understood that Cargill would be required to conduct a due diligence if it were part of Phase 2 in order to make an assessment for itself of the Joe White Business.

488 Returning to the contents of the Information Memorandum, the introduction contained a "Business Overview", which provided some details about the history and size of Joe White. It stated that Joe White had an annual production capacity of 550,000 tonnes and operated 7 malt plants in 5 states across Australia[379] and that the plants were strategically located in close proximity to Australia's premium barley growing regions, customers' breweries, and international ports and other transport. The plants were said to be modern, well capitalised, state-of-the-art facilities following an

379 The plants were: Cavan and Port Adelaide in South Australia (where the head office was also located); Tamworth and Minto (recently constructed) in New South Wales; Delacombe, Victoria; Devonport, Tasmania; and Perth, Western Australia.

investment of $200 million since 2006. It further stated that capacity utilisation over the previous 3 years had averaged 94 percent.

489 The introduction stated that 78 percent of Joe White's annual sales were into overseas markets. It was suggested Joe White was well positioned to service the growing demands of the Asian malt market, and that it had leading market positions in South Korea, Thailand, Vietnam and the Philippines.

490 The Information Memorandum stated that the Joe White Business model was focused upon developing relationships with key global and regional brewers "underpinned by Joe White's high quality product and tailored service offering". In emphasising the strong relationship Joe White had with its customers, it was stated that the average length of its relationship with its top 10 customers was over 25 years. Eden's evidence was that he had a pretty good idea at a certain level about the Joe White Business and that some of the information disclosed was very close to Cargill's pre-existing knowledge of the Joe White Business. He said it gave him a good deal of confidence in Cargill proceeding with the transaction.

491 Under the heading "Investment Highlights", the Information Memorandum then set out details about the Asia-Pacific market, and repeated that Joe White was well positioned to take advantage of the anticipated growth in this region. The other highlights included a high quality asset base, a proven effective business model (which was said to be underpinned by a commitment to quality and adhering to specific customer requirements), a track record of strong financial performance and a stable management team with deep industry experience. Again, Eden's evidence was that the information was consistent with what Cargill already knew.

492 The Information Memorandum contained "Key Financial Highlights", setting out the sales volumes and malt margins. It also recorded earnings before interest, tax, depreciation and amortisation ("Unadjusted Earnings") and capital expenditure, actual results for financial years 2010 to 2012, and forecasts for financial year 2013 to 2016. King gave evidence that the historical financial information was taken from a

"vendor assistance pack" created by Deloitte, whereas he personally had a hand in the budget for the 2013 financial year, and the annual future projections for the 2014 to 2016 financial years. King developed the framework for the financial model that was used. In this regard, he was assisted by "input" from Argent and Hughes. It was estimated that Joe White's Unadjusted Earnings for the 2013 financial year would be $25 million, down from actual Unadjusted Earnings in 2012 of $36 million (which earnings performance was said to have been achieved through an expansion of malt margins and a disciplined approach to cost reduction). The decline was explained by reason of Joe White being impacted by low malt margins attributable to a dislocation between Australian and European Union barley prices and the "Viterra barley procurement policy". It was stated that earnings were expected to recover from the 2014 financial year onwards to reach Unadjusted Earnings of $44 million by the 2016 financial year.[380]

493 In providing the projections, King said he intended to present the Joe White Business in the best possible light, describing the projections as realistic and achievable, but optimistic. As King himself described it, he exchanged numerous emails with Argent working on the financial projections with an intention of trying to achieve the highest price possible. In acknowledging his understanding that any purchaser would be focused on what it thought was reasonably achievable in the future, he stated that sophisticated purchasers always looked to historical financial performance as a benchmark for future performance. He, quite correctly, further accepted that, for this reason, it was "so important" to get the historical information right.

494 Under cross-examination, King was asked a series of questions concerning the role of a vendor during a sale process. On the question of what was being represented by the provision of historical financials, King understood a vendor was implicitly representing that, subject to market forces, and all other things being equal, the business was capable of repeating the reported results. Further, King acknowledged that when it came to valuing a business when using, for example, a discounted cash

380 See further par 563 below.

flow model, it was important the inputs were correct, as "100 percent … rubbish in, rubbish out applies".

495 King agreed that, if the financial performance, whether good or poor, for a particular year was "a one-off", it would be incumbent on the vendor to give an explanation and provide a proper picture of the business. Further, King accepted that if a practice existed within a business that had a material bearing on the profitability of the business on an ongoing basis, then that practice should be disclosed by a vendor, provided it did not need to be disclosed because it was standard industry practice.

496 When specifically asked about a practice of using gibberellic acid in the production of malt to effect an increase in capacity of 20 percent, King said he would expect the practice to be disclosed in the Information Memorandum if it was out of the ordinary. He also agreed that if customers prohibited the use of gibberellic acid and such a practice existed despite the prohibition, it should be disclosed.

497 Having given this evidence, King then distinguished between what he thought was required to be disclosed in an information memorandum, which he described as a stage gate to a narrowing field for a broader due diligence, and a more detailed due diligence process where a prospective purchaser has the opportunity to delve into, and understand in more detail, how the business operates. He agreed that, at the due diligence stage, it was very important that any practices of the nature referred to above be disclosed by a vendor if the vendor knew about them.

498 King was also cross-examined by Hughes' senior counsel about what a purchaser would be expected to do as part of a due diligence. He gave evidence that, if a purchaser were to discover something that was not in accordance with what was expected, it would ask a question with the expectation of an answer and, if necessary, supporting documentation. He agreed with the proposition that if a laboratory testing policy were relevant and different to the policy of a purchaser, the purchaser would call for the policy.

499 Returning to the Information Memorandum, the "Sales Process Overview" section

suggested Glencore had undertaken a strategic review of Viterra's global operations since acquiring Viterra in December 2012 and had decided to undertake the sale process referred to in the Information Memorandum.

500 Anyone interested in acquiring Joe White was directed to make enquiries through Merrill Lynch. In that regard the following was stated:

> Shareholders, officers, Management and employees of Glencore, Viterra, Joe White, its subsidiaries, suppliers, customers and other third party service providers *should not be contacted* about this opportunity *under any circumstances* without Merrill Lynch's prior consent. Glencore specifically reserves its right to cease all discussions and immediately demand the return of all confidential information and documentation from any party Glencore reasonably considers has breached *this directive*, or has breached the spirit of this requirement.
>
> (Emphasis added.)

As part of this overview, the corporate structure was set out indicating Glencore owned Viterra Malt, and Viterra Malt owned Joe White.[381] Next to the diagram of the corporate structure it was stated that the proposed transaction was the sale of 100 percent of the issued capital of Joe White, together with a transfer of any assets not owned by Joe White but which were used exclusively in connection with Joe White.

501 The next section of the Information Memorandum was entitled "Investment Highlights". The 6 pages of highlights spoke of Joe White in very positive terms. Under a heading "Largest Asia-Pacific Maltster" reference was made to Joe White having over 60 percent of Australia's malt capacity. After referring to domestic and export customers (the latter representing 78 percent of sales), various other details of Joe White's markets were provided. In identifying opportunities for the Joe White Business, the Information Memorandum referred to increased sales in the Japanese market following the recent emergence of new Australian barley varieties favoured by Japanese buyers.

502 Under a page entitled "High Quality Asset Base" various details were given about Joe White's assets and capital expenditure. Eden's evidence was that the details were

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381 There was no reference to the intermediaries of Viterra Ltd and Viterra Operations between Glencore and Viterra Malt.

consistent with his "understanding, belief or knowledge".

503 In stating that Joe White had a high quality asset base, reference was made to modern, well-capitalised, state-of-the-art manufacturing facilities and a history of targeted maintenance and strategic capital expenditure programs across all production facilities, as well as a disciplined approach to capital investment. This was said to have resulted in low future capital needs in the short to medium-term, with approximately $5.5 million per annum required over the following 4 years.

504 As to Joe White's "Proven Effective Business Model", it stated that Joe White was:

> focused on *ensuring* its customers receive the *highest quality malt* to meet their *exact specifications and requirements*.
>
> (Emphasis added.)

In order to achieve this, it was stated that Joe White ensured that quality remained the key consideration across each of its key operational functions and procurement of barley was focused on the selection of "high quality barley that *best meets customers' specifications*" (emphasis added). It was stated that Joe White had access to all of Australia's key barley growing regions and that seed research and development provided customers with exclusive rights to premium barley varieties.

505 Under the same heading, Joe White's production was addressed. This was said to be underpinned by state-of-the-art manufacturing facilities consistently producing high quality malt. The Information Memorandum recorded that both "[t]echnical analysis and "strict quality control procedures *ensure* customer specifications are consistently met" (emphasis added).

506 On the same page some customer details were given, though individual customers were not identified.[382] The information included that for the previous 3 financial years

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382 An internal analysis listed the top 10 customers (from largest to smallest) as: Asia Pacific Breweries Group (located in various places in Asia), Lion Nathan (Australia), Oriental Brewery (South Korea), SAB Miller (South Africa), Boon Rawd (Thailand), Hite (South Korea), San Miguel Corporation (Philippines), Beer Thai (Thailand), SABECO (Vietnam) and the Nestlé Group (Singapore). This document also contained the tonnes sold and the margins achieved. It was not provided to Cargill before Completion.

Joe White's top 5 customers represented between 60 to 68 percent of total revenue, and that the top 10 customers represented approximately 90 percent throughout that period. The average length of the relationship with the top 10 customers was stated to be 25 years.

507 King said he reviewed each of the statements dealing with the business model, but made no enquiries himself as to the source of the relevant information. He did not seek to verify them with Hughes. He gave evidence that the 2 charts on the page, concerned with revenue by customer and the length of time customers which had been supplied by Joe White, were enough to satisfy him as to the accuracy of the statements made. In short, King left the drafting of this information and any underlying factual verification to Merrill Lynch. Further he had Mattiske read its contents and provide feedback.[383]

508 Under the heading "Strong Financial Performance" appeared the actual and forecast margins for malt sales for the financial years from 2010 to 2016. In relation to the actuals, the malt margin was recorded as $221, $231 and $234 from 2010 to 2012. The forecast for 2013 had the margin dropping to $204, before increasing to $221, $233 and $235 for 2014 to 2016. It was stated that the margins and Unadjusted Earnings for 2012 were achieved despite challenging global economic conditions, variations in volumes sold to customers, a strong Australian dollar and significant cost pressures. The same reasons as previously stated were given for the decline in performance for 2013.[384]

509 Emphasis was also placed upon the highly experienced and stable management team. In particular, Hughes, Argent and Wicks were identified as persons with significant industry experience, and either all, or the majority, of their experience was at Joe White.[385]

510 The next section was concerned with an overview of the malting industry. It was observed that beer consumption was the primary driver of malt demand. The

383 See par 442 above.
384 See par 492 above.
385 At a later part of the Information Memorandum, reference was also made to the management structure and the "exceptional management team".

expectation of high growth in the Asian markets was referred to, as was Joe White's significant market share.

511 During the trial, there was no suggestion that Cargill, Inc was not already fully aware of the industry information contained in this section of the Information Memorandum.

512 In the "Business Overview" section, a full page was dedicated to "Quality and Technical Capability", which was said to underpin the Joe White Business model. In this regard, the following was stated:

> - Joe White has an *unrelenting focus on quality* across all areas of its business to *ensure it meets customers' requirements*
> - Knowledgeable technical sales staff manage each customer relationship through regular site visits and *transparent communication*
> - Co-operative technical projects with customers include comprehensive technical training and ongoing education
> - Co-ordination of Procurement and Production provide *traceability from malt delivery back to grain receipt*
> - *Stringent internal protocols and control procedures* are in place across the entire production cycle
> - Regular *compliance and audit* of all production facilities is undertaken
> - Each production facility is ISO9000 and ISO22000 compliant
>
> (Emphasis added.)

513 As to the reference to being "ISO 9000 and ISO 22000 compliant", this related to standards set by the International Organisation for Standardisation. The standards are concerned with quality management systems and food safety management systems.[386] Testi monitored Joe White's compliance with ISO 22000, which included systems for Certificates of Analysis. She also assisted with external and customer audits.[387] Eden's evidence was that ISO compliance and certification really meant something to him. He understood it meant that Joe White had documented quality

386 See further fn 664 below.

387 Customer audits included questionnaires. Testi consulted with Stewart, who reviewed the answers before they were sent to the customer.

processes and was following them. He also said it demonstrated management's commitment to quality, a strong customer focus and a systematic approach.[388] Eden's understanding of the contents of the Information Memorandum must be understood in the context that he gave evidence that he was aware Glencore had only relatively recently received regulatory approvals to deal with the Joe White Business and, apart from its involvement with Prairie Malt Ltd, was not involved in malting. Accordingly, he concluded that Glencore was relying on information supplied from within the Joe White Business.

514 Under a subheading referring to sales and marketing, it was stated that a "top-down approach" was adopted which included that:

> - Joe White is focused on developing a detailed understanding of *specific customer requirements* with respect to volume demand, consistency, certainty of supply and innovation[389]
> - Customer segmentation is undertaken based on this detailed understanding and specialist Sales and Marketing staff are deployed to *ensure customer requirements are met*
> - [Joe White]'s strong track record of contract renewal demonstrates the depth of customer relationships and quality of the service offering
>
> (Emphasis added.)

515 With respect to procurement, it was stated that Joe White focused on the selection of high quality barley that best met customer specifications. It was stated that "Glencore grain merchandising" was involved in managing the sourcing of barley on behalf of Joe White.

516 As for production, it was stated that the "[b]est-in-class manufacturing facilities consistently produce high quality malt". Under this, the following was stated:

> - Technical analysis and strict quality control procedures *ensure customer specifications are consistently met*
> - Efficient and automated production facilities to minimise manufacturing costs

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388 See further fn 248 above.

389 An earlier draft stated "Joe White develops a detailed understanding of customer requirements …". King inserted the words "is focused on", and the word "specific" before "customer requirements".

- Strategically located manufacturing facilities minimise freight costs and delivery times
- Well maintained and capitalised assets with low future capital requirements

(Emphasis added.)

517 It was also stated that the sales and marketing of Joe White drove the business model, and that Joe White utilised a 3 stage process to "understand and satisfy each customer's unique requirements". It was further stated that Joe White's success was "based upon its strong commitment to consistently meet the product specifications of its customers". As part of this 3 stage process, Joe White was said to devote "significant time and effort to understand its customers' product specifications".[390]

518 A full page of the Information Memorandum was focused on Joe White's long-term relationship with key customers, with various customers being identified.[391] An equal amount of the document was dedicated to the procurement process. This page emphasised that the process resulted in customer specifications being met. It stated that the 3 components of the process were understanding customer specifications, sourcing barley from a wide range of growers and growing trading houses, and providing ongoing customer support and research and development. Eden accepted under cross-examination that the statements on this page were rather generalised observations.

519 In relation to customer specifications, it was stated that the sales and marketing function enabled Joe White to develop an in-depth understanding of the malt required by each customer to optimise the production process and ensure consistency of the final product. Further, it was stated based on Joe White's understanding of required specifications, barley varieties and appropriate sources could be identified. Finally, it

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390 An earlier draft referred to understanding Joe White's "customer product requirements", but King changed "requirements" in this phrase to "specifications". King said he did this because specifications sounded a little more sophisticated: cf par 303 and fn 266 above.

391 The domestic customers identified expressly were Lion Nathan, Coopers, SAB Miller and Nestlé. The international customers identified expressly were SAB Miller, Sapporo, Oriental Brewery, Asahi, San Miguel Corporation, Carlsberg, Kirin and Thai Beverages. While Eden gave evidence that, as a result, Cargill had a pretty good idea who Joe White's customers were, he said Cargill was not able to confirm exactly who the customers were to know the length of the relationship.

was stated the barley procurement function was driven by the sales and marketing team, together with the technical team, resulting in identifying varieties best suited to meet customers' malt specifications.

520 As for barley sourcing, it was stated that Glencore Grain currently managed the sourcing of barley on behalf of Joe White. It was stated that after completion of the transaction, Joe White would have the ability to directly source barley from a wide range of barley growers and grain trading houses. As to the handling of barley once purchased, it was stated that each of the production facilities utilised on-site storage facilities to manage short-term inventory requirements, with any longer term storage provided by third parties.

521 In relation to the "Ongoing Customer Support and [Research]&[Development]" component, a specialist technical team of Joe White was referred to. Customers were said to be supported by regular site visits and discussions to ensure product specifications and other requirements were being met. Research and development activities were stated to include working collaboratively with customers and barley breeders to develop new barley varieties and provide opportunities for product differentiation.

522 On the issue of technology, later in the Information Memorandum it was stated there was an ongoing investment in technology to build a competitive advantage. While dealing with this topic, it was stated that Joe White's high-quality manufacturing assets had an outstanding reputation for product uniformity, consistency and an ability to produce to a customer's exact specifications. The reputation was said to have been built in part on the commitment to improve the malting process and enhance plant quality through technological investment. Joe White was said to have focused on a number of key areas, including ensuring that processes were in place to produce consistent and uniform end products, as well as creating state-of-the-art malt analytical laboratories to ensure the highest level of quality assurance.

523 In the financial section of the Information Memorandum entitled "Financial

Overview", the basis of the preparation of the financial information was identified. It was stated that the section comprised:

> – Pro Forma normalised profit and loss accounts for the three years ending 31 October 2012 (FY10A, FY11A and FY12A),[392] (the "**Historical Period**") and the first three months of actual trading for FY13 being November 2012 to January 2013 ("**YTD13A**").
>
> – Forecast profit and loss accounts ("**Forecast Financial Information**") for the first four years ending 31 October 2016 (the "**Forecast Period**").
>
> – Pro Forma balance sheet and cash flow statements for the Historical Period and YTD13A.

524 In further explaining the basis of preparation, it was stated that Joe White had not historically prepared standalone statutory financial statements. For this reason, information for the Historical Period had primarily been sourced from the general ledger and trial balance data extracted from the Administration System.

525 Furthermore, it was stated that the financial information in the Forecast Period had been prepared by Joe White management using "a bottom-up, plant-by-plant approach including consideration of [Joe White]'s historical operating performance, current market position, existing customer contracts for volumes to be delivered over the Forecast Period and [Joe White]'s future growth prospects".

526 Next, reference was made to a number of pro forma normalisation adjustments that had been made in order to "present the historical financial information on a comparable basis over time and to reflect the financial information of [Joe White] as a standalone business". It was stated that the adjustments that had been made would be "available in full in the second phase", and included:

> – Elimination of non-recurring items …
>
> …
>
> – Removal of intercompany charges from Glencore/Viterra for shared services provided to Joe White including … The financial information presented in this section excludes the impact of these costs on a

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392 Although these abbreviations appear to refer to actuals, because it was a normalised reporting, the figures were not those actually contained in the profit and loss accounts for the respective years. King gave evidence that, by stripping out non-recurring items and presenting "clear historical financial numbers … a truer representation of the underlying profitability of the business" was provided.

standalone basis. Management estimates the cost of these services to be $2m per annum however, this cost could be reduced if undertaken as part of a larger shared services function.[393]

- Addition of incremental margin (referred to as the "**Accumulation and Position Margin**") which management estimates will be available to Joe White if it is free to undertake all barley procurement functions on its own account. This adjustment ensures the margin is applied historically on a consistent basis for the full allocation of profits to Joe White. Refer to page 44 for a more detailed explanation.

527 Adjacent to a pro forma "normalised" profit and loss summary for the 2010 to 2012 financial years, together with the actuals known for 2013, the following was stated:

> Management's primary focus during this period has been on increasing malt margins, rather than sales revenue, as malt pricing is principally driven by malting barley prices. Malt margin reflects the difference between the price at which malt is sold to customers and the cost of acquiring the volume of barley required to produce that malt.

528 Immediately below the profit and loss summary were details of production capacity, production utilisation (expressed as a percentage), production volumes, sales rates (expressed as a percentage) and sales volumes for each of the periods identified.

529 Eden gave evidence that Cargill had had a number of people studying this page carefully. Eden said it was confusing with the normalisations and the splitting of profits between "Viterra Grain" and Joe White,[394] and required a detailed look at the accounts "versus what was said" on this page. Eden said as a result of Cargill's detailed examination during the Due Diligence,[395] it was considered the margin of $15 per tonne for the Accumulation and Position Margin could be achieved, or perhaps sometimes be even better.[396]

530 On page 44 of the Information Memorandum, the Accumulation and Position Margin was discussed. Diagrammatically, it was illustrated that for each of the financial years 2010 to 2012 and the 2013 year to date, in excess of $15 per tonne had been "Earned by Viterra/Glencore". An explanation was given as to how a portion of the

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393 The amount of $2 million was provided to King by Argent on 4 March 2013, after reviewing the position with Hughes.

394 Up until Glencore acquired Viterra, the barley supply contracts were between Viterra Ltd and Joe White.

395 See par 1022 below.

396 The Viterra Parties submitted that by this evidence Eden stated that Cargill did not rely upon what was contained on this page of the Information Memorandum. In fact, that was not what he said.

Accumulation and Position Margin had been received by Joe White. It was further explained those profits had been removed as part of the pro forma normalisation adjustments, coupled with a replacement to reflect the additional margin that would have been available to Joe White as a standalone business. On the basis that the actual margin for each of the reported periods had exceeded $15 per tonne, the Accumulation and Position Margin was stated to be a conservative assumption.[397]

531 As part of the summary of the historical financials, it was stated that Joe White had generated stable earnings despite challenging global economic conditions, variations in volumes sold to customers, a strong Australian dollar and significant costs pressures. The Unadjusted Earnings for the financial years 2010, 2011 and 2012 was recorded as $37.1 million, $36.6 million and $36.4 million respectively, with the earnings per tonne average at around $60 for each year. However, the earnings per tonne for the 2013 financial year to date were down markedly, at $39.30 per tonne.

532 Details were also provided about production capacity for each year, which was reported to be 91.5 percent, 93.5 percent, 97.9 percent and 95.2 percent respectively. For 2010 to 2012, it was stated that the percentage of malt produced that was sold was 104.1 percent, 97.9 percent and 97.8 percent. Before "normalisation", the year-to-date percentage for 2013 was 86.3 percent.[398]

533 It was recorded that management's primary focus had been on increasing malt margins rather than sales revenue, as malt pricing was principally driven by malting barley prices. It was stated that the malt margin reflected the difference between the price at which malt was sold to customers and the cost of acquiring the volume of barley required to produce the malt. The Information Memorandum went on to explain how the malt margin had increased per tonne despite lower sales volumes. The key drivers in the increased malt margin were said to include negotiation of improved contract terms with customers and reduced volume of lower margin bulk

397 See further par 816 below.

398 For the full details of the summary of the historical financial results as reported in the Information Memorandum, see annexure B to these reasons.

shipments.

534 The Information Memorandum contained a summary of forecast financial information. In addition to specific figures as forecasts for each of the financial years from 2013 to 2016,[399] a written explanation was provided as to why the financial performance was expected to improve in the upcoming years.

535 A whole page was dedicated to the malt margin contraction for the 2013 financial year to date. A $14 million loss in malt margins, resulting from a fall in malt margin per tonne from $234 to $204, was said to be the result of higher Australian barley prices relative to the European Union prices, coupled with Viterra's barley procurement policy resulting in Joe White entering into a number of contracts with materially lower malt margins, and resulting in the foregoing of volumes due to lack of price competitiveness. In addition, it was said there were higher barley prices in Western Australia and New South Wales, because of shipping related matters and unseasonably wet conditions respectively.

536 Also as part of the financial overview, cash flow and working capital were addressed. There was no reference to management's belief that $30 million was an appropriate level of net working capital.[400] On a page entitled "Capital Expenditure" both historical information and forecasts were given in relation to capital expenditure, including breakdowns concerning the works in Perth and Minto in previous years. It was forecast that $7.1 million would be spent in the 2013 financial year and $5.1 million in the 2014 financial year on maintenance. In addition, it was stated that a disciplined approach to capital investment and maintenance expenditure had created low future capital needs in the short to medium term. Further, it was recorded that management had forecast approximately $23 million of maintenance capital expenditure over the following 4 years, with an average of $5.2 million for the 2014 to 2016 financial years.

537 The last section of the Information Memorandum concerned management and

399 For full details of the summary of forecasts, also see annexure B to these reasons.

400 See par 436 above.

corporate information. After speaking of 7 members of senior management (including each of the Third Party Individuals) in positive terms, it was noted that all 147 employees (most of whom were full-time) were employees of Viterra Ltd. As for "head office functions", it was stated that they were currently being provided by Glencore. With respect to human resources, it was stated that a range of related functions were provided by Glencore, including recruitment, performance evaluation and management, employee relations and resource planning, and management of group policies and procedures. In relation to safety, health and environment, it was stated that core responsibility rested with the senior management of Joe White but that Joe White received support from Glencore on an ongoing basis to fulfil the relevant obligations. However, it was noted that the current manager of safety, health and environment sat with Glencore. As for the Administration System, it was noted that Joe White used the "SAP-based IT system" which was provided by Glencore, and it consolidated all of the financial information of each business unit. Legal services were stated to be provided by Glencore, whereas primary accounting and finance functions were recorded as being performed within Joe White. That said, it was stated the Glencore provided taxation, payroll and cash management functions for Joe White.

538 In summary, the Information Memorandum presented the Joe White Business in very positive terms despite its performance in the first few months of the 2013 financial year and its underlying issues. However, before leaving the Information Memorandum, it is instructive to note what it did not contain.

539 *First*, it said nothing about the Co-Operative Bulk Agreement being the subject of a termination notice. This was explained by King on the basis of his understanding in March 2013 that it was "not really a dispute".[401] In an email he sent at that time he said that there was only a single piece of outstanding litigation "of which there is a memo in the [Data Room] which bidders will get to see in the second phase".[402] He

401 Viterra maintained a litigation register, which was updated on the instructions of Viterra's legal counsel. Bickmore gave evidence she could not recall giving any instructions to update the register with respect to the dispute under the Co-Operative Bulk Agreement.

402 King said he was not involved in any decision not to include details of the dispute in the Data Room. In fact, he believed that it had been.

gave evidence that he believed he had spoken to Mattiske about it, and vaguely recalled agreeing the dispute was not material. In contrast, Mattiske said he did not know about any disagreement with Co-Operative Bulk before the Information Memorandum was circulated. In fact, Mattiske had been informed of the disagreement before the Information Memorandum was complete.[403]

540 *Secondly*, no mention was made of any of the Operational Practices, or the risks to the Joe White Business if they were disclosed to customers or to cease, or both. In this regard, there was no suggestion of any inability to meet customers' specifications or to procure the correct barley varieties; quite the contrary.

541 *Thirdly*, and further to the second point, no reference was made to the purchase of off-grade barley in explaining how margins in excess of $15 per tonne had been achieved historically or how an Accumulation and Position Margin of $15 per tonne would be achieved in the future.

542 *Fourthly*, in addition to the absence of any reference to the Operational Practices, there was also no reference to matters being withheld from auditors or that "compliance" did not include disclosing to Joe White's auditors or customers the actual procedures in place.

543 Returning to Project Hawk, various Cargill workstreams considered the Information Memorandum.

544 On 17 May 2013, Goldman Sachs sent an email to a large number of Cargill employees, as well as Allens. The email attached a working draft summary of information from the Information Memorandum,[404] together with a working group list. The email noted that the summary did not contain any of the industry or market information contained

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403 He was sent an email by Merrill Lynch on 25 February 2013 which attached "a summary of potential items that have been identified during the course of our work which may be useful to discuss with [Merrill Lynch]" (which was a further email to the email referred to at par 395 above). The summary referred to the "Storage contract in Perth" and noted a dispute existed in relation to it. The summary also stated that consideration should be given as to how the existence of the dispute should be managed during the sale process.

404 The Viterra Parties' submissions recorded that the summary was not produced as part of the Cargill Parties' discovery as it was the subject of a claim for privilege.

in the Information Memorandum because Goldman Sachs assumed, presumably correctly, that Cargill would have better knowledge than Goldman Sachs of the industry, the malt market, and how the Joe White Business would interact with Cargill's existing operations and customer base.

545 Le Binh was cross-examined about Goldman Sachs' assessment. Le Binh gave evidence that Cargill had a good knowledge of the malting industry and market, but he did not know the extent of Cargill's knowledge at that time about how the Joe White Business would interact with Cargill's business. Engle understood Goldman Sachs to be referring to the expectation that Cargill would apply its knowledge of the malting industry, the malting market and how the Joe White Business would interact to better inform some of its projections.

546 On the same day, Engle circulated a preliminary work plan. The key areas of work leading up to the indicative bid included a review of the Information Memorandum. Responsibility for this task was given to both Cargill and Goldman Sachs. It involved identifying and analysing commercial arrangements, business viability, market situation and outlook as well as the business plan. Further, the focus was to identify key operational assumptions that underpinned the forecasts. In short, the Information Memorandum was used to underpin the initial preparation and work in ascertaining at what amount any indicative bid might be set. More specifically, the financial information in relation to "actuals" for the financial years reported upon was used as the base material in the deal model. As for the forecasts, Jewison's evidence was that they were examined, interrogated and discussed by various members of the Project Hawk team, depending on their expertise, and were ultimately changed as Cargill considered appropriate.

547 The covering email to the preliminary workplan listed the workstreams for Project Hawk. The 7 workstreams, being commercial and operations, accounting and financial, synergies, structuring/financing, valuation, legal, and regulatory aspects, each had persons allocated to them on a provisional basis. Engle invited suggestions with respect to the composition of these workstreams.

548 On 21 May 2013, a meeting was held between Goldman Sachs and Cargill representatives, including Le Binh, Engle, Hawthorne, Sagaert, Jewison, Eden and Viers. At this meeting, commercial and valuation workstreams were discussed. Although the list was described at trial as very preliminary and incomplete, as a result of the meeting Goldman Sachs listed various commercial issues that needed to be attended to in relation to the possible acquisition of Joe White. That list included needing to "diligence" Joe White's customer relationships and the nature of the contracts with respect to locked-in pricing, and to further examine the concentration of Joe White's customer list (it was noted that the top 5 customers comprised approximately 60 percent of revenue).

549 With respect to procurement, the incremental margin of $15 per tonne was recorded in the list as a key observation that needed to be "diligenced" in Phase 2. Further, it was observed that the Information Memorandum specified only 2 plants had been shut down since Minto was commissioned. Reference was made to rumours that 3 plants were supposed to be shut down and the need to test whether there were plans to close additional operations.

550 It was recorded that Cargill needed to consider areas in which it could reasonably extract productivity improvements.

551 In relation to valuation, it was stated that Cargill would look at analysing the Joe White Business on a project internal-rate-of-return basis. Cargill indicated during the meeting that it would like input from Goldman Sachs on how competitors would look at both the cost of capital and potential trading comparables.

552 In addition to some other matters Goldman Sachs was to contribute to, it was agreed that the Joe White Business was to be viewed as a business in Australian dollars with United States dollars in revenues. It was decided that Goldman Sachs and Cargill were to build separate valuation models based on this assumption.

553 It was agreed Viers would take the lead for the commercial and operations workstream. Previously, it had been contemplated that Sagaert would lead this

workstream. In any event, this workstream consisted of Viers, Eden, De Samblanx and Sagaert.

554 Pausing here, Engle gave evidence that as project manager for the deal, he saw his role as twofold. *First*, he had an overall project management role. *Secondly*, he was to work with all workstreams to provide financial analysis on the suitability and viability of Joe White as an acquisition. As part of this function, he was required to ensure Cargill had all necessary inputs into the valuation for the purposes of calculating an indicative bid and final bid for the purchase of Joe White. In particular, Engle was responsible for ensuring that the valuation model incorporated all relevant feedback from the operational people working on the deal. Engle oversaw and managed this process, assisted by Le Binh and Patrick Bowe Jr ("Bowe").[405] Engle also worked closely with Jewison. Jewison had read the Phase 1 Process Letter, including that Cargill was required to make and rely on its own investigations. Her evidence was that she understood Cargill was required to evaluate the information provided and make its own assumptions with respect to any projections.

555 Although Eden was primarily responsible for all material presented to the Cargill leadership team and the board, Engle led the valuation analysis and preparation of the model under the supervision of Hawthorne. In order to have the food ingredients and systems platform review a proposal, it required a sponsor. Van Lierde was appointed the project sponsor.

556 Hawthorne gave evidence that there were various elements that formed part of Cargill's risk assessment. For example, because Joe White was located in Australia it attracted a lower risk profile than if it had been in Argentina. The risk profile was reduced further by reason that Joe White was a mature business, rather than a start-up. Further, part of the process in preparing inputs for the deal model in any acquisition was to look at material provided in any information memorandum from a

405 At the time of giving his evidence, Bowe was an employee of Cargill, Inc as a business development manager, but was a summer intern in 2013 in the strategy business development group from 10 June 2013 to 23 August 2013. He has a masters of business administration from Northwestern University and a bachelor of arts from Stanford University.

vendor. This case was no exception.[406]

557 On the afternoon of 21 May 2013 (Minneapolis time), Engle and Le Binh met with Viers to introduce to him the first cut of the valuation model and to discuss the various assumptions and viewpoints contained within it. They also indicated to Viers the inputs they would need from the commercial and operations workstreams to populate the valuation model.

558 On 22 May 2013, a telephone meeting was held between Jewison, De Samblanx, Sagaert, Viers, Eden, Engle and Hawthorne to discuss preliminary views on the data contained in the Information Memorandum. At this meeting, potential areas for synergies were explored. In that regard, it was decided it was necessary to speak to Cargill's grain and oilseeds supply chain to discuss synergies around exporting malting barley, freight values and other relevant matters. Issues concerning workstreams and personnel within Cargill to fill various roles were also discussed. After this meeting, Jewison circulated notes of what had been discussed in a spreadsheet entitled "Project Hawk Review of Information Memorandum".[407] The spreadsheet identified the page of the Information Memorandum being referred to, whether the matter being raised was to be considered in Phase 1 or Phase 2, matters that related to synergies, potential "Flags" or issues, and questions to be raised. In referring to the page of the Information Memorandum concerning Joe White's relationship with its customers,[408] a query was raised about what Cargill could learn from Joe White about its approach to customer relationships and that there may have been the prospect of further synergies in this regard.

559 It was anticipated that if the acquisition of Joe White were to go ahead, Cargill's grain and oilseeds supply chain could supply barley to Joe White which could give rise to synergies. Philippa Purser ("Purser"),[409] at that time business unit leader of grain and

406 See issue 20 below.

407 The notes were emailed to Goldman Sachs with the subject "Project Hawk: Questions/Issues from [Information Memorandum]" for incorporation into Goldman Sachs' "consolidated document".

408 See par 518 above.

409 Purser commenced employment with Cargill in 1991. At the time she gave evidence she was group director of premix and nutrition. In contrast to other witness statements, her witness statement did not

oilseeds supply chain, as well as country representative for Cargill in Australia,[410] was involved in obtaining information on this issue.[411] The matters to be addressed included: identifying opportunities that could broaden the grain varieties and maintain quality for supply to Joe White; using Cargill's expertise in grain procurement (which it was presumed did not exist within Joe White itself) to create revenue; and assisting the Project Hawk team with questions and information about barley prices in the context where there had been large historical fluctuations in recent times.

560 Viers could not recall the specifics of the meeting, but gave evidence that he understood that Cargill was using the data from the Information Memorandum to consider whether there were any synergies Cargill could achieve which Joe White was not achieving. In particular, the focus was upon cost savings or other benefits which might have an impact on the performance of Joe White in the long-term and on the offer price Cargill was prepared to bid in the short term. Further, Viers' evidence was that the valuation model, and subsequent versions, were consistent with the sort of issues that were raised from the Information Memorandum.

561 Late on 22 May 2013, an email was circulated to a large number of Cargill employees by Goldman Sachs providing a summary of the "weekly call". These weekly meetings were facilitated by Goldman Sachs. That summary included initial feedback that had been provided by Merrill Lynch, which stated, amongst other things, that no vendor due diligence was to be expected in the Data Room. During Purser's cross-examination, it was put to her that by this weekly meeting and the subsequent email she had been informed that Glencore had not done any due diligence on Joe White as a vendor. Purser's evidence was that she did not take being advised that a vendor due diligence not being included in the Data Room carried with it that Glencore had, itself, decided not to do a vendor due diligence.[412] Further, she did not take the

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give any details of any tertiary qualifications.

410 As Australian representative, Purser's responsibilities included understanding markets and competitors, together with staying across business opportunities and threats. Purser was not part of the core Project Hawk team.

411 Purser was not involved in putting together the deal model or valuation for Joe White.

412 See fn 321 above. But also see pars 973-974 below.

information as telling her that Glencore had no real idea about the details of the operations of Joe White. No other witness called on behalf of Cargill who was involved in this meeting was cross-examined on this email.

562 On 24 May 2013, Jewison sent an email concerning the review of the Information Memorandum. The attachment summarised proposed questions for Phase 1 and Phase 2 of the bidding process, various issues and actions, together with synergies that had been identified (although the list was not intended to be exhaustive).

563 The attachment noted that the Unadjusted Earnings forecast was a "hockey stick".[413] An action item was to review and adjust Unadjusted Earnings forecasts. Further action items included validating how growth projections compared to Cargill's internal growth projections; verifying freight rates; applying malt benchmarks to water and power detail and to benchmark capital expenditure with Cargill's internal business; understanding port storage and put-through arrangements; understanding seed research and development; requiring Joseph Christianson ("Christianson"), global merchandising and risk manager at Cargill Malt, and the Australian arm of the grain and oilseeds supply chain to validate and project barley earnings to test the incremental margin of $15 per tonne; validating what Cargill thought would happen to margins; assessing creating a single office in Australia; reviewing "all the team" and whether Cargill would retain them; assessing the impact on the Japanese market and how that would play out with 4 regions; requiring Christianson and the Australian arm of the grain and oilseeds supply chain to develop a 5-to-10 year plan on the outlook on barley; and numerous other matters.

564 With respect to synergies, a large number of matters were listed. These included matters with respect to barley varieties, barley exports, malt arbitrage, increasing volumes to Japan, freight, technology, energy, relocation of Joe White management to Melbourne, reducing the number of employees, centralising research and development and other matters. The estimated value of any synergies were listed as

413 See par 492 above. The reference to a hockey stick was a reference to actuals having recently declined only for the Unadjusted Earnings to be forecast to substantially increase in the immediately succeeding years.

"tbd", to be determined.

565 Also on 24 May 2013, Le Binh emailed a spreadsheet summarising synergies that had been discussed. He asked for the list of synergies to be reviewed with respect to both values and timing. As to the synergies that did not yet have a value, Le Binh asked for values to be inserted even if very conservatively.

566 The attached spreadsheet contained a significant amount of detail with respect to potential synergies. Le Binh gave evidence that in preparing this spreadsheet he was not questioning or seeking to verify the underlying information or data in the Information Memorandum. He rejected the proposition that all the synergies identified were based on Cargill's own assessment having independently verified the underlying facts. Rather, he said he was seeking to verify whether the synergies were likely to be true. When this topic was revisited later in his cross-examination, Le Binh said information was collected from the Information Memorandum and then an analysis was done on the potential synergies.

567 The spreadsheet listed 12 types of synergies, including new volume in Japan, additional volumes with existing Cargill customers in Asia and other regions, and additional volumes with existing Joe White customers who could not be served because of capacity limitations. When Engle was taken to this spreadsheet, he accepted that none of the 3 synergies referred to above could be found in the Information Memorandum. Le Binh was not quite as clear-cut. His evidence was that he was relying upon the information in the Information Memorandum to derive the synergies, although he accepted assumptions made with respect to additional sales were not contained in the Information Memorandum.

568 In any event, it appears much of the information concerning synergies was derived from an email sent by Viers earlier on 24 May 2013. In this email, Viers set out the rationale for a synergy value totalling $15.5 million annually. Viers also referred to the incremental margin of $15 per tonne "implied in the [Information Memorandum]" and stated that Christianson believed it was a "pretty healthy assumption".

Notwithstanding this, Viers identified the need to look at the margin further.

569 It is plain from the detail listed in the email that much of the information underlying the assumptions made with respect to potential synergies was information of Cargill and was not contained in the Information Memorandum. Le Binh gave evidence that in addition to using the information made available by "the seller", he was also relying on Cargill's own industry knowledge and experience in making assessments about forecasts. That said at this point in time, broadly speaking, Cargill must have been proceeding on the assumption that the Joe White Business was largely as represented in the Information Memorandum. Le Binh's evidence was to that effect.

570 In response to Viers' email, Engle suggested that the synergies that had been agreed upon earlier that day, totalling approximately $9 million, be kept. Engle stated that they could look at the further synergies that Viers had identified after further discussion early the following week or in Phase 2 of the bidding process. Engle suggested that presenting anticipated synergies close to 50 percent of the target Unadjusted Earnings could be seen as aggressive. Viers agreed with this suggestion. Some days later, Hawthorne concluded that Viers had presented a good list, and that going forward synergies might fall into the categories of "certain", "probable" and "potential". Feedback was provided by the deal team with respect to the synergies.

571 On 25 May 2013, Le Binh circulated the first draft of the valuation model to Viers, Eden, Sagaert and Jewison, copied to Engle and Hawthorne. That draft contained a base case model and a management case.[414] Le Binh said he discussed this iteration of the model with Engle and Hawthorne before emailing it. He directed that the documents should not be shared beyond the small group to whom it had been circulated. He invited feedback, suggested changes and questions. Engle and Le Binh had developed the valuation model from scratch.

572 Le Binh's evidence was that this draft valuation model relied upon data from the Information Memorandum. He said the estimates contained in it were very

414 Broadly, the management case was based on the information provided in the Information Memorandum without any substantial modification or independent assessment.

preliminary. It is plain on the face of the document that much of the information contained in it was derived from the Information Memorandum. That said, there were also some material differences. For example, although the net sales and malt margin figures were identical from 2010 to 2016, both the figures for Unadjusted Earnings[415] were different in and from 2014. Further, the projections in the Information Memorandum (and the Due Diligence subsequently conducted) ended in 2016, whereas the draft valuation model continued to 2023. Furthermore, Cargill utilised a discount rate it had chosen in consultation with Goldman Sachs without any reference to the Information Memorandum. Le Binh explained that the projections were based on Cargill's own assessment, based on its knowledge of the industry as well as its assessment of the information provided by the Sellers. When Le Binh was asked during cross-examination how Cargill's figure for Unadjusted Earnings for 2014 could be connected to any information provided by the Sellers, Le Binh stated there was a lot of information that was provided that was "not numbers" but that did translate into numbers.

573 In addition, the model contained significant assumptions that were to be extensively analysed and tested once the Due Diligence had properly started. Le Binh's evidence was that although the synergies of approximately $60 million were not derived from the Information Memorandum, the assessment "was based on the analysis that was based on the Information Memorandum". Further, Viers' evidence was that the synergies took into consideration that Joe White was a fully functional and legally compliant business, that complied with customer specifications and was appropriately run. Engle's evidence was that at this point in time Cargill had very limited information about Joe White. Essentially, Cargill had the data in the Information Memorandum and industry observations from Cargill's workstreams.

574 The draft deal model contained an income statement and a discounted cash flow. Engle explained why there was a discounted cash flow analysis both with and without synergies. His evidence was that, in acquisitions, buyers generally prefer not to pay

415 In relation to earnings before interest and tax, as well as earnings before interest, tax, depreciation and amortisation.

for synergies and seek to pay the price the asset is worth to the seller. The standalone base case value, without synergies, was estimated to be $243.4 million. However, he gave further evidence that, in a competitive auction process, it is probable that a buyer would have to pay for the synergies it is looking to extract. Because of this, the "with synergies" value was where much of the focus lay. At this point, the base case valuation of the Joe White Business with synergies was $302.3 million.

575 Hawthorne was cross-examined on the draft valuation. He accepted it was in "Cargill form", but bespoke for the transaction. He said it was a preliminary model, but the base case would hold through all the different models as the expected case, which he referred to as the budget case. He said as it was the first model, he believed the information embedded for the forecasts for 2014 to 2023 was available in the Information Memorandum. Had it not been available, Cargill would have extended the information that was in the Information Memorandum to cover a 10-year forecast. In this regard, he explained the base case involved variations, based upon Cargill's judgment.

576 Hawthorne was also taken to the management case, which had a standalone value calculated at $259.9 million. He explained it was different from the base case as in addition to relying on the Information Memorandum, information would be added from Joe White management presentations. However, he said it was the base case that ultimately would be presented for review and approval.[416]

577 Eden also agreed that the base case could be contrasted to the management case. However, he rejected the proposition that the base case was not built upon the information contained in the Information Memorandum. Rather, his evidence was that the base case was built from the Information Memorandum, and then other assumptions were added on to it.

578 A meeting of the food ingredients and systems platform was scheduled for 30 May 2013. With this in train, on 24 May 2013 Le Binh circulated a draft platform update for

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416 But also see par 599 below. Eden gave evidence that the management case was the case presented by him on 30 May 2013.

review. This draft contained a significant amount of information extracted from the Information Memorandum. Although it contained some of the work that had been done with respect to synergies and dis-synergies, the document was still very much an early draft.

579 On 27 May 2013, Sagaert sent an email to Le Binh, copied to Hawthorne, Eden, Engle, Viers and Jewison. She provided some feedback with respect to synergies, valuation and integration. Sagaert queried whether Cargill had enough reasons to believe the hockey stick in terms of Unadjusted Earnings.[417] Sagaert agreed during cross-examination that she was sceptical of the Unadjusted Earnings figures and wanted them assessed by Cargill.

580 In response, amongst other things, Eden said it was necessary to have a better answer on the Unadjusted Earnings drop. He asked Viers to do some work on the Australian barley crop and pricing. Eden observed that until Cargill had further detail, it would not understand what the arrangement was between grain and malting operations.

581 Eden also enquired as to how Cargill would account for the "sales general and administrative" scale benefit to the broader malt business. Eden's evidence was that this was a reference to bringing businesses together and identifying any opportunities to consolidate areas of "sales general and administrative" expenses.

582 Further, Eden said he would like to address operational synergies concerning the existing malt business from Joe White's best practices. Eden gave evidence that he was pretty impressed with the Joe White Business and thought there would be opportunities to bring some of Joe White's technical knowledge into Cargill's business. Again, Eden observed the position would not be known until Cargill had the chance to see Joe White's books and business.

583 Finally, Eden raised the possibility of moving the Joe White office from Adelaide to Melbourne and considering what synergies would flow.

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417 See pars 492, 563 above.

584 Notwithstanding that provision was made in the document for Glencore to execute the Confidentiality Deed, Glencore refrained from doing so until late May 2013. On 21 May 2013, Mallesons received final instructions from Switzerland concerning Glencore's execution of the Confidentiality Deed. As a result, an email from Mallesons to Cargill noted there had not been an exchange between the parties, and invited Cargill to re-execute the Confidentiality Deed if the proposed amendments were acceptable.[418] Cargill acted accordingly.[419]

585 The Confidentiality Deed between Glencore (as "Discloser") and Cargill, Inc (as "Recipient"), as contemplated in both the Phase 1 Process Letter[420] and the Information Memorandum,[421] in its final form was dated 27 May 2013.[422] The first page recorded certain details, including that the governing law was that of Victoria, Australia, and the recitals which stated:

> A [Cargill, Inc] wishes to obtain access to information for the Approved Purpose.
>
> B [Glencore] has agreed to disclose or otherwise make available certain information to [Cargill, Inc] on the terms and conditions set out in this deed.

586 The "Approved Purpose" was defined in the deed as "[Cargill, Inc]'s evaluation of whether to acquire [Glencore]'s Related Body Corporate's malt business". "Confidential Information" was defined as:[423]

> all Information disclosed or otherwise made available by [Glencore] or its Representative to [Cargill, Inc] or its Representative for or in connection with the Approved Purpose and all information created by [Cargill, Inc] or its Representatives in the course of carrying out the Approved Purpose including:

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418 The amendments were minor. It is unnecessary to identify them as the Cargill Parties accepted nothing was to be made of any of the differences.

419 The Confidentiality Deed recorded Hawthorne, on behalf of Cargill, Inc, executing the further document on 22 May 2013 and Glencore executing it on 27 May 2013. Hawthorne's evidence was that he also read this version of the Confidentiality Deed and understood the obligations created by it.

420 See par 460 above.

421 See par 470 above.

422 It was sent under cover of an email of the same date "[f]or the purposes of exchange".

423 Excluded Information was defined to mean information which was or became part of the public domain otherwise than through a breach of the Confidentiality Deed, as well as information Cargill could prove it already knew and information developed independently or derived from a third party. Pursuant to cl 4.1, cll 3.1, 3.2, 3.5, 4.3 and 6 did not apply to Excluded Information.

(a) information which is the proprietary or confidential information of [Glencore] or any of its Representatives;

(b) proprietary or confidential information of a third party to whom [Glencore] or its Representative owes an obligation of confidentiality;

(c) information derived or produced partly or wholly from such information including any calculation, conclusion, summary or computer modelling; and

(d) trade secrets or information which is capable of protection at law or equity as confidential information or is otherwise confidential in nature,

whether the information was:

(a) disclosed orally, in writing or in electronic or machine readable form;

(b) disclosed or created before, on or after the date of this deed;

(c) disclosed as a result of discussions between the parties concerning or arising out of the Approved Purpose; or

(d) disclosed by [Glencore], any of its Representatives or by any third person.

Further, "Information" was defined to mean:

all information regardless of its Material Form, relating to or developed in connection with:

(a) the business, technology or other affairs of the Discloser or any of its Representatives;

(b) the Approved Purpose; or

(c) any systems, technology, ideas, concepts, know-how, techniques, designs, specifications, blueprints, tracings, diagrams, models, functions, capabilities, designs, (including computer software, manufacturing processes, other information embodied in drawings or specifications) or intellectual property owned or used by, licensed to the Discloser or a Representative of the Discloser.

587 By clause 1.3, the parties acknowledged that Confidential Information was not regarded as being in the public domain by reason only that some portion of it was public, or was publicly available, which together with other Confidential Information could be used to produce any Confidential Information.

588 The remaining definitions relevant to the issues in the case were:

Loss means any damage (whether forseeable or not), loss, cost or expense

(including legal fees on a full indemnity basis) and which may arise directly or indirectly.

…

Representative of a party includes:

(a) a Related Body Corporate of the party;[424] and

(b) an officer, employee, agent, auditor, adviser, partner, consultant, joint venturer, contractor or sub-contractor of the party or of a Related Body Corporate of that party.[425]

Transaction means any transaction, acquisition or investment contemplated in connection with the Approved Purpose.

589 The general terms of the Confidentiality Deed set out various obligations, including an obligation of confidence in respect of the Confidential Information, an obligation to return Confidential Information, and various privacy obligations. The Confidentiality Deed also set out a right of Glencore to obtain injunctive relief should Cargill, Inc breach or seek to breach its terms.

590 It is necessary to set out some of the clauses of the Confidentiality Deed in full:

2 Operation[426]

2.1 Consideration

The Recipient gives the undertakings in this deed on behalf of itself and its Representatives in consideration of the Discloser agreeing to disclose and disclosing and procuring its Representatives to disclose the Confidential Information in accordance with this deed.

2.2 Discretion

Nothing in this deed obliges the Discloser or its Representatives to:

(a) disclose any particular information to the Recipient or its Representatives; or

(b) negotiate with the person or enter into any Transaction.

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424 "Related Body Corporate" had the same meaning as given to it in s 50 of the *Corporations Act 2001* (Cth), which included a holding company or a subsidiary of another body corporate.

425 Certain "Excluded Entities" were stated not to be a "Related Body Corporate", the detail of which is not material: cl 1.2.

426 Headings were for convenience and were not to effect the interpretation of the Confidentiality Deed: cl 1.7.

The Discloser and its Representatives have an absolute discretion as to the information they choose to disclose.

3 Obligation of confidence

3.1 Recipient to maintain confidence

[Cargill, Inc] agrees to:

(a) maintain the confidential nature of the Confidential Information;

(b) not disclose or otherwise provide any Confidential Information or the existence of or terms of this deed to any person except:

(i) in accordance with clause 3.2 ("Pre-disclosure obligations"); or

(ii) with the prior consent of the Discloser;

…

3.2 Pre-disclosure obligations

Before disclosing the terms of this deed or any Confidential Information for the Approved Purpose to any of its Representatives, the Recipient must:

(a) ensure that each Representative is made fully aware of the confidential nature of all Confidential Information and the terms of this deed; and

(b) only disclose the Confidential Information to its Representatives on a need to know basis.

3.3 Recipient's responsibility for Representatives' conduct

[Cargill, Inc] must procure that its Representatives do not do or omit to do anything which if done or omitted to be done by [Cargill, Inc], would be a breach of [Cargill, Inc]'s obligations under this deed or an obligation of confidence owed to [Glencore] or any of its Representatives.

…

6. Return of Confidential Information

6.1 Return, destruction or deletion of Confidential Information

[Cargill, Inc] must (at its own expense):

(a) return by delivery to [Glencore] … all documents and other materials … which contain or refer to any Confidential Information …; and

(b) delete any Confidential Information that has been entered into a computer, database or other electronic means of data or information storage …;

on the earlier of:

(c) written demand by [Glencore]; or

(d) the time the documents and other materials are no longer required for the Approved Purpose.

6.2 Exception

Clause 6.1 … does not apply to or require the return, deletion, alteration or destruction of any legal advice, internal working papers or legal opinions prepared for [Cargill, Inc] or Confidential Information retained to the extent required by law …

…

8 No Reliance

8.1 Acknowledgement

[Cargill, Inc] acknowledges and agrees that:

(a) most or all of the Confidential Information consists of data prepared in the ordinary course of business and has not been prepared with the intention that [Cargill, Inc] should rely on it in connection with the Approved Purpose or the Transaction;

(b) except where expressly identified as such, the Confidential Information has not been audited or independently verified;

(c) neither [Glencore] nor its Representatives gives any assurances as to the degree of care or diligence used in compiling or preparing the Confidential Information;

(d) [Glencore] or its Representatives may not have provided all information that may be required by the recipient to achieve the Approved Purpose or the Transaction;

(e) nothing contained in the Confidential Information constitutes an offer, recommendation or invitation by [Glencore] or its Representatives to any person;

(f) this deed does not grant to [Cargill, Inc] or its Representatives any licence or other right in relation to the Confidential Information except as expressly provided in this deed; and

(g) certain Confidential Information may have been disclosed with the consent of third parties and may be subject to conditions imposed by those parties.

8.2 No representations or warranties given

[Cargill, Inc] acknowledges that neither [Glencore] nor any of its Representatives:

(a) has made nor makes any representation or warranty, express or implied, as to the accuracy, content, legality or completeness of any Confidential Information;

(b) is under any obligation:

(i) to notify [Cargill, Inc] or its Representatives; or

(ii) to provide any further information to [Cargill, Inc] or its Representatives,

if [Glencore] or its Representatives become aware of any inaccuracy, incompleteness or change in the Confidential Information.

8.3 Recipient to make its own assessment

[Cargill, Inc] agrees and acknowledges that:

(a) it must make its own assessment of all Confidential Information and satisfy itself as to the accuracy, content, legality and completeness of the information;

(b) any forecasts or estimates in the Confidential Information may not prove to be correct or be achieved; and

(c) it will rely solely on its own investigations and analysis in evaluating the Transaction.

9 Transaction

9.1 No disclosure of discussions

The Recipient agrees not to disclose to any person without the prior consent of the Discloser or except as permitted by this deed or as it may be required to disclose by any law, order of any Government Agency or the rules of any stock exchange:

(a) the existence of the contents of this deed;

(b) the contents of any discussions between the parties relating to the Approved Purpose or the Transaction; or

(c) the fact that any discussions between the parties and their Representatives relating to the Approved Purpose or the Transaction have taken place or will or may take place.

…

9.3 Representations and warranties in relation to the Transaction

The Recipient agrees and acknowledges that unless and until there is a formal binding agreement between the Discloser and the Recipient to effect the Transaction:

(a) …

(b) the Discloser and its Representatives are not under any obligation of any kind to the Recipient or its Representatives (except for those set out in this deed) in relation to the Transaction.

10 Liability

10.1 Disclaimer by Discloser

Subject to clause 10.4 ("Representations") and any law to the contrary, and to the maximum extent permitted by law, [Glencore] and its Representatives disclaim all liability for any Loss suffered by any person using, disclosing or acting on any Confidential Information and whether the Loss arises in relation to, in connection with or as a result of any negligence, default or lack of care on the part of [Glencore] or any of its Representatives, or from any misrepresentation or any other cause.

10.2 No legal proceedings to be brought by Recipient

Subject to clause 10.4 ("Representations") and absent fraud or wilful misconduct by [Glencore], [Cargill, Inc] agrees to:

(a) not bring or institute any legal proceedings against [Glencore] or its Representatives in respect of any Confidential Information; and

(b) procure that its Representatives do not bring or institute any proceedings of the kind specified in clause 10.2(a) above.

10.3 Release by Recipient

Subject to clause 10.4 ("Representations") [Cargill, Inc] unconditionally and irrevocably releases [Glencore] and its Representatives from any liability which (notwithstanding the disclaimer in clause 10.1 ("Disclaimer by [Glencore]") may arise, whether directly or indirectly, in relation to, in connection with, or as a result of the provision of the Confidential Information or any reliance placed by any person on any Confidential Information or the non disclosure of any Information including any liability resulting from any negligence, default or lack of care on the part of [Glencore] or any of its Representatives or from any misrepresentation or any other cause.

10.4 Representations

[Glencore] and its Representatives shall be responsible for representations or obligations set forth in separate written agreements between the parties in accordance with the terms of those written agreements.

11 Benefit

[Cargill, Inc] agrees that the undertakings in this deed are given for the benefit of, and are enforceable by, [Glencore] and any of its current or future Representatives even though the Representative is not a party to this deed.

591 On 29 May 2013, Goldman Sachs provided a preliminary valuation pack to Cargill, which had been prepared separately from Cargill's valuations, and which had been updated to incorporate information received concerning synergies. The valuation

methodologies included a discounted cash flow based on forecasts in the Information Memorandum, trading multiples and transaction multiples. These last 2 methodologies were based upon an enterprise value by reference to sales and Unadjusted Earnings. The introduction noted that the forecasts in the Information Memorandum would need to be "diligenced and sensitised further" during Phase 2 of the sale process.

592 Two discounted cash flow valuations were provided. The first was based upon the forecast contained in the Information Memorandum; the second upon the same forecasts but with the benefit of information from Cargill concerning synergies. The valuations of the Joe White Business using this method were in the range of $227-347 million and $247-377 million respectively. Naturally, in ascertaining a value based on a discounted cash flow some input needed to be given by Goldman Sachs that could not be derived from the Information Memorandum, including with respect to synergies.

593 Also on 29 May 2013, Goldman Sachs sent an email to Engle providing a summary of the strategy for the bid. It was noted that Cargill intended to submit an indicative bid that would ensure participation in Phase 2, without being unnecessarily exuberant. Goldman Sachs stated that the information provided to date did not give a clear picture of Joe White's actual recent performance, in part because of pro formas being provided with respect to 3 different owners since 2009. It was further stated that pro forma normalisations made it difficult to accurately estimate the opportunity for synergies. As for the competitiveness of the bidding process, it was stated that it was expected to be highly competitive.

594 On 30 May 2013, Le Binh circulated supporting material for the food ingredients and systems platform review of the Joe White Business. Although Eden did not prepare the platform review document, he was the person who presented to the platform.[427] Engle also attended the presentation and supported Eden on the expected process

427 The document was circulated before the meeting. Eden only spoke to some of the slides during the course of the meeting, which slides were marked with a purple dot. He also had his own version on which he made notes in preparation for the meeting.

dynamics, on what Cargill could expect in the next stage, and concerning likely competitors and what they might bid. He was very enthusiastic in doing so. Eden's evidence was that it was about this time that he began to investigate on the basis that the purchase of Joe White was a real possibility.

595 The platform review stated that Cargill had decided to pursue the opportunity of acquiring Joe White as its acquisition would complete Cargill's global footprint in the key barley production areas, enabling Cargill to better serve the global brewers in the Southeast Asian market. In so doing, Cargill would create an original stronghold in the only major malting barley region and in Cargill's portfolio. It was recommended that a non-binding first round proposal be put at a price sufficient to secure participation in the second round so that due diligence could occur.

596 The first section of the platform review provided an overview of Joe White. The source of that information was identified as the Information Memorandum. In Eden's copy of the review with his handwritten notes made to assist him in his presentation, he noted that Cargill should accept the management case with reservation. Eden noted Cargill would have to peel apart the elements of value during the Due Diligence.[428] He gave evidence emphasising that the process being undertaken was just a step to get to a point where Cargill could undertake due diligence and test what had been said by management in the Information Memorandum.[429]

597 As part of the overview, it was stated that Joe White had explained its poor performance for the 2013 financial year in the Information Memorandum. In bold, it was noted this would be a key focus area in the Due Diligence. Later, and as a repetition of Goldman Sachs' observation, it was stated the Information Memorandum did not give a clear picture of recent performance.

598 The next section was concerned with the strategic fit. This section included Cargill's

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428 Eden's handwritten notes made for the purposes of the presentation were reflective of someone who was very enthusiastic about the prospect of Joe White becoming part of Cargill. There is no need to set out the detail; many of them were also made subsequently when Eden was preparing to present to the board in early July 2013: see pars 844-847 below.

429 Eden's understanding was that the Information Memorandum was the work of Joe White's management.

aspiration to be recognised as the leading global malting company and the partner of choice with its targeted customers. The critical capabilities were said to include "[o]perational excellence" and "[c]ustomer relationship management".

599 Preliminary valuations were provided for a Joe White "Management Case", the highest of which (with synergies) was $369 million at a discount rate of 8 percent. The document also considered potential competing bidders, of which there were many.

600 Next, the platform review listed risks and opportunities. Although some risks and reservations were expressed in addition to those referred to above, none of the risks concerned the possibility that the Information Memorandum might contain material inaccuracies. In addition to setting out matters already referred to above, the opportunities included increasing malting barley exports, increasing Australia's grain and oilseeds supply chain origination, lower freight rates, growing Cargill's relationship with Nestlé and entering the food malt extract market.

601 Finally, the platform review repeated the recommendation to submit a first round bid.

602 The food ingredients and systems platform leaders approved the continuation of the project.

603 As the sale process was getting underway, Joe White was continuing to experience issues with the quality of barley provided to it. Emails exchanged, in May 2013, between Youil, Evans and others reveal that Joe White was still raising concerns about meeting customer specifications using the barley supplied by Glencore Grain. Evans emphasised that, although he appreciated that Joe White was required to meet quality specifications set by customers, from Glencore Grain's business perspective it was necessary to use all the stock "before the germination is lost" and to deliver the barley to Joe White despite the fact that the results for batches already malted were "patchy" and recent parcels had "shown sluggish germination". Further, as a result of the quality of the barley delivered by Glencore Grain, it had been necessary for Joe White to "blend away some of the stock on hand". In response, Youil stated:

> I have been observing the emails going back and forth and the trouble this is causing our plants to plan and meet customer specifications. All we are asking for is visibility of the stock allocations for [Joe White] with the appropriate quality information so that we can make an informed decision on our drawdown plans.

604 The Joe White production manager in Adelaide (who was part of the email chain) thanked Youil for "weighing in to the email debate". The manager informed Youil that he had asked Youil to be copied in as the situation had been "going on for a long time and very little seems to get through to these guys" (being a reference to Glencore Grain).

605 The problems persisted. On 5 June 2013, Glencore Grain sent an email to Joe White, providing a stock allocation sheet as requested. However, contrary to the certainty Youil had sought, the email stated the allocation might alter "for a range of reasons", which were not specified. In an incandescent response from Jones, copied to Wicks, Youil, Stewart and others, he told Evans that the situation was "getting ridiculous". The email referred to Joe White having sought an allocation for months, and "when it finally [came] (last night)" it was unsatisfactory. Jones complained that the barley provided included 10,000 tonnes of old crop that had not undergone recent germination testing, asking, "What do you expect us to do? Malt this on faith!". When taken to this email under cross-examination, Evans said he thought the allocation was in accordance with the stocks Glencore Grain had (rather than what had been ordered by Joe White), but he was unsure what had been supplied. There was no evidence of any response from Glencore Grain to Jones' email, nor anything to suggest Glencore Grain altered its position.

606 Also in early June 2013, Cargill, Inc was progressing its plans to submit a Phase 1 bid for Joe White. A presentation on Project Hawk, dated 3 June 2013 and delivered to the Cargill, Inc leadership team, sought guidance prior to the submission of Cargill, Inc's first round, non-binding bid for Joe White. The presentation was given by Eden, with Engle also in attendance.

607 This presentation's executive summary stated that Cargill Malt sought to pursue the purchase of Joe White as it would complete Cargill's global footprint in the key barley

production areas and enable Cargill to better serve the global brewers in the Southeast Asian market.

608 The presentation did not specifically identify the internal rate of return sought to be achieved. However, the document did set out the historical performance of Cargill Malt with respect to return on investment. The return on gross investment,[430] being a measure of Cargill's return on its total capital expressed as a percentage, was calculated in a similar way to the approach taken in ascertaining an internal rate of return for a new investment.

609 The presentation stated that Cargill's aspirational return for its malt business was 10.5 percent. A hurdle rate of plus 2 percent was also specified. Each business unit within Cargill had a different hurdle rate (also known as a minimum acceptable rate of return on investment). If the internal rate of return on investment was equal to or greater than the hurdle rate, a project was more likely to be approved. Cargill's hurdle rate for malt was 9 percent, but with an aspirational rate of 10.5 percent. None of this information was connected to the detail in the Information Memorandum.

610 The presentation itemised the assumptions made in providing the discounted cash flow for the Joe White management case valuation. It was put to Eden during cross-examination that none of this information came from the Information Memorandum. Eden gave 2 examples to demonstrate that proposition was incorrect referring to the sales volume and the malt margin. He then acknowledged he did not believe the barley cost was from this source. He then turned to manufacturing and distribution costs, but was unable to complete his answer as he was interrupted by the cross-examiner.

611 The presentation stated that Cargill, Inc's "team" recommended submitting a first round bid at a price sufficient to secure participation in the second round. In a slide setting out proposed bid tactics, the presentation read under the heading "Situation":

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430 The acronym ROGI was used which was described to mean either return on gross investment or return on growth investment.

- Cargill should submit an Indicative Bid that ensures participation in the second (detailed) stage of the sale process, without being unnecessarily exuberant

- The information provided in stage one does not give a clear picture of [Joe White]'s actual recent performance:

  – Pro formas for the approaches of three different owners since 2009.[431]

612 The same slide recorded that the Cargill, Inc team expected the sale process to be highly competitive, and noted as a "challenge" that "[p]ro forma normalizations make it difficult to accurately estimate the synergies opportunity in Phase 1". Under the heading "Recommended Bid Tactics", the slide stated:

- Cargill should submit an Indicative bid containing a price Cargill is comfortable will reasonably secure second round participation, *expected to be >A$300M*

- *The value in the Expression of Interest will be stated as subject to confirmation via due diligence in the second stage*

- Second stage will also confirm that all key risks (e.g. regulatory, legal, [Environment, Health and Safety]) have been addressed via price adjustments or sale and purchase agreement mechanisms

(Emphasis added.)

613 The final slide before the appendix recommended a bid between US$320 million and US$350 million for the Joe White Business.[432]

614 The Cargill leadership team agreed with the recommendation. It was discussed whether the indicative bid should be higher, given that it was expected further synergies would be uncovered and Cargill wanted to submit a competitive bid to ensure progression to Phase 2. The Cargill leadership team decided to leave the decision as to the actual figure of the indicative bid to the core team.

615 Meanwhile, Glencore, Merrill Lynch and Mallesons were preparing the Data Room. A meeting was organised to be held on 5 June 2013 at Joe White's office in Adelaide to discuss the proposed contents. On 4 June 2013, Fitzgerald asked Joshua Wilson-

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431 Presumably a reference to ABB Grain, Viterra and Glencore.

432 The recommendation also proffered that a bid of US$15 million to US$18 million was appropriate for Glencore's 42 percent share in Prairie Malt Ltd: see par 345 above.

Smith ("Wilson-Smith"), legal counsel for Viterra,[433] to attend, as Fitzgerald was not going to be available. Wilson-Smith duly attended, which was his first substantive involvement in the sale process.[434]

616 Also at the meeting were a senior associate from Mallesons, Kate Lindner ("Lindner"),[435] Hughes, Argent and representatives of Merrill Lynch. There was very little evidence about what was actually discussed. The following day, Merrill Lynch sent an email to Fitzgerald, Wilson-Smith, Argent and Lindner, copied to Hughes, King and others, attaching a proposed index for the Data Room. The email suggested the steps for "each document and responsibility" had been discussed the previous day. Further, it stated that the exercise should be finalised in a meeting early the following week to have "*Glencore* sign-off by … 12 June" (emphasis added).

617 The attached draft index, entitled "Data Room Information Log", contained a table with the following columns: "Document", "Redaction (Y/N)", "Include in Black Box?", "Comment", "Responsibility", and "Uploaded/Finalised". Various types of documents were listed, with varying degrees of specificity.

618 The table indicated that Mallesons was to follow up with Glencore on the level of disclosure of key customer contracts (which attracted "Y" in the "Include in Black Box?" column) and that "Viterra Legal"[436] was to follow up on disclosure of "Company Policies" (which, according to the table, were not to be redacted or included in the black box).[437] As at that date, the table indicated that none of those documents had been uploaded or finalised.[438]

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433 Wilson-Smith reported to Fitzgerald.

434 Around this time, Wilson-Smith was expecting a child and had a limited involvement in matters relevant to this proceeding for approximately a month.

435 In 2013, Lindner had approximately 6 to 7 years post-admission experience working in mergers and acquisitions (and another 5 years of experience in this field when she gave her evidence).

436 Specifically Fitzgerald and Wilson-Smith.

437 Company policies fell into 2 categories, being safety, health and environment, and "Other".

438 Hughes was not allocated any responsibility in relation to the classes of documents identified. Argent was referred to on 11 occasions, including in relation to "Viterra Malt Strategy Documents". Wicks was referred to once, in conjunction with Argent, concerning the standard terms and conditions of customer contracts. However, the vast majority of documents were allocated to Lindner.

619 According to King's evidence, in a transaction of this nature the provision of a data room to prospective purchasers was standard practice.[439] He agreed that a data room should contain all information that would be material to the way in which the business being sold was conducted. According to an action plan prepared in January 2013,[440] Roelfs, Walt and Mattiske were "in charge" of populating the Data Room.[441] However, King said this document was produced before the process really got underway, and the responsibility for overall oversight of what went in the Data Room "was a fluid thing".

620 Further, from early on it was agreed that Hughes and Argent would review what was to be included in the Data Room. That said, King made it clear that it was "up to us how much information we provide[d] to the buyers".[442] It was plain from the context in which this statement was made, that King was keen to ensure as much information as reasonably possible could be disclosed, consistent with confidentiality obligations and sensitivities. Further, King acknowledged that, as a former investment banker, he was effectively "schooling" Argent on the process. Although he did not witness it happening himself, he understood that Merrill Lynch, Mallesons and Fitzgerald uploaded documents to the Data Room.

621 Lindner gave evidence that the majority of the Data Room had been prepared when she became involved. She said she took her instructions from King, who was the most senior person instructing her, but did not know from whom he was taking his instructions. During cross-examination, she rejected the proposition that King had the final call on the documents to be included in the Data Room. In doing so, she gave evidence that documents came straight from "Viterra legal" and that King was not involved in deciding whether or not all those documents were included. On the issue of redaction, Lindner gave evidence that it was a very common practice to redact

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439 This evidence was supported by other evidence given during the trial.

440 See par 367 above.

441 King did not recall having discussions with anyone from Joe White about what documents were to be placed in the Data Room, and did not know who made contributions as to the content of the Data Room.

442 King said the reference to "us" was not a reference to Glencore itself, but to the "collective on the email exchange", however it was ultimately Glencore's decision: see par 616 above.

customer names in "stage 1" of a data room.

N. Cargill's indicative bid

622 On 7 June 2013, Cargill, Inc submitted a non-binding indicative bid of $330 to $360 million to acquire Joe White ("the Cargill Indicative Bid"),[443] with the acquiring entity to be "via a wholly-owned Australian subsidiary".[444] Hawthorne sent the covering email to Merrill Lynch, stating Cargill was enthused to consider the potential acquisition of Joe White. Hawthorne stated that Cargill believed Joe White had a strong strategic fit with Cargill and its global malt, grains, and broader food ingredients businesses. In seeking to demonstrate Cargill, Inc was a serious contender, Hawthorne stated that for the 2012 fiscal year, Cargill, Inc had realised revenues that exceeded US$133 billion. Further, he informed Merrill Lynch that Joe White had previously impressed Cargill in interactions and by reputation in the marketplace. Hawthorne said Cargill would be keen to welcome the Joe White leadership team into Cargill, and offered extended career opportunities that Cargill's global malt business and other businesses were able to provide. Needless to say, Cargill was not shy about its enthusiasm in securing the Joe White Business.

623 Save for the amount specified as a range, the Cargill Indicative Bid was in the form requested by the Phase 1 Process Letter. It stated that Cargill, Inc's strategy was to continue to grow its global presence and customer relationships. Further, it stated the opportunity to combine Joe White's "footprint" was highly complementary to Cargill, Inc's existing global malt business. It continued:

> **(c) Indicative Bid price**
>
> *Based on our review of the information* contained within the [Information Memorandum] and [the Phase 1 Process Letter], our Indicative Bid comprises total cash consideration of A$330 – A$360 million, assuming that the Proposed Transaction Structure is effected. Our Indicative Bid is provided in the form of a range in part due to the challenges of estimating potential synergies based on the limited information provided to date. *We intend to refine our valuation with*

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443 According to the Phase 1 Process Letter, it was to be assumed the Cargill Indicative Bid was $330 million: see par 466 above.

444 Beyond this description, Cargill Australia was not expressly identified.

an expectation that we could enhance our value based on more detailed information provided in Phase 2.

This Indicative Bid consideration is proposed on the assumption that [Joe White] and the other assets used in the Joe White [B]usiness are transferred to Cargill on a debt free and cash free basis at completion, along with adequate working capital to operate the business in the current market environment.

(d) Methodology and key assumptions

Cargill has *based its Indicative Bid on the information and forecasts* contained within the [Information Memorandum] and the [Phase 1 Process Letter]. In submitting this Indicative Bid, *Cargill assumes that the information provided by Glencore, Joe White and Merrill Lynch is true and accurate and supported by due diligence findings*. Furthermore, *we assume* that Joe White is being acquired on a going concern, steady-state basis *without issues* such as contingent liabilities, unusual terms and conditions in key contracts, outstanding litigation, *or any other matters that could result in a material adverse change to Joe White's business or significantly affect the value of Joe White*. Cargill has assumed that "the assets used exclusively in connection with the Joe White [B]usiness" comprise all of the material assets used in the conduct of the business and/or included as assets in the summary pro forma balance sheet.

Our Indicative Bid reflects our preliminary view of the value of Joe White using various methodologies, including discounted cashflow analysis, precedent transactions and trading comparables. For the purposes of our Valuation, *we have based our analysis on the pro forma [Normalised Unadjusted Earnings] provided in the [Information Memorandum]*.

(Emphasis added.)

Cargill concluded this section of the letter by reserving its right to vary its valuation assumptions in making any final offer.

624 Under the heading "Due diligence", the Cargill Indicative Bid read as follows:

In Phase 2 of the sale process, if selected, we would expect to undertake a level of due diligence customary for a transaction of the nature and scale of Joe White. This would include due diligence on the operations and business of Joe White, as well as due diligence in respect of Joe White's financial, tax, legal, [human relations], [information technology], environmental and [occupational health and safety] matters.

As is usual, *we would expect to have access to all material information related to Joe White*, and to be able to submit questions and receive answers from Glencore and its advisers. We would also expect to undertake site inspections and to receive a presentation from Joe White's management.

Cargill anticipates that, subject to information being reasonably available, it will need 5-6 weeks to complete its Phase 2 due diligence and prepare a Final Bid.

(Emphasis added.)

625 The Cargill Indicative Bid was signed by Hawthorne for and on behalf of Cargill, Inc.

626 Merrill Lynch received a total of 9 bids. Co-Operative Bulk was the highest of these at $350 million.[445] In emailing the details of all the bids to Glencore, Merrill Lynch stated it went without saying that the information had to be treated as confidential "in order to play the parties selected for round 2 off one another". Consistent with King's expectations,[446] most of the bids were from potential strategic buyers. Only 1 bidder was a financial bidder from a private equity firm, which firm made an offer of $160 million to $180 million.

627 Shortly after the Cargill Indicative Bid was submitted, Goldman Sachs contacted Merrill Lynch. Goldman Sachs stated to Merrill Lynch that Cargill had already committed significant resources to the transaction and was keen to progress the opportunity. It was indicated that Cargill was ready to commence Phase 2 immediately. An explanation was given as to why Cargill provided a range rather than a specific figure, namely because many of the synergies Cargill saw as available were unable to be quantified precisely from the information contained in the Information Memorandum.

628 Goldman Sachs informed Merrill Lynch that Cargill was still very keen to have a better understanding of a number of matters, including the type and extent of information available for the Due Diligence (especially with respect to environmental issues and financial reporting), the form any redacted information would take, and the "other assets" and employees to be transferred to Joe White and the possible liabilities associated with such transfers. This detail was conveyed in an email from Goldman Sachs to Hawthorne, and further circulated within Cargill including to Conway, Van Lierde, Eden and Engle. No exception was taken to the enthusiastic approach taken by Goldman Sachs.

629 When taken to the email from Goldman Sachs during cross-examination, Engle rejected the suggestion that the matters listed by Goldman Sachs concerning what

445 See par 622 above.
446 See par 390 above.

Cargill wanted to know represented Cargill's priorities for Phase 2. He said they only represented a portion of the priorities.

630 No doubt anticipating Cargill would be invited to participate in Phase 2, on 10 June 2013, Goldman Sachs emailed Engle attaching a draft due diligence question list which had been discussed the previous week. The email stated that the list included questions provided by Cargill, in addition to others Goldman Sachs believed were relevant. Goldman Sachs asked Cargill to prioritise the questions, noting that they were mindful that there might be a question limit as part of the Due Diligence.[447]

631 The next day, Engle forwarded the draft question list to members of the Project Hawk team and suggested everyone in the team review the list and assemble additional questions depending on the individual's speciality. Engle stated that Merrill Lynch might limit the number of questions, and accordingly Cargill should prioritise its requests.

632 On 11 June 2013, an email was sent by the operations lead for North and South America to Eden, Jewison and Viers concerning Certificates of Analysis, in which he stated that he had received some feedback from Hermus. The operations manager stated that he would keep working on the plan that had been agreed to try and sell a batch of malt as a generic blend to a particular Brazilian brewer or others. Eden's evidence was that, although he could not remember the actual circumstances, the reference to a generic blend indicated to him that Cargill had a mixed-up blend, so the varieties that had been used were unknown. He further explained that, at times, Cargill would have malt that was "off-spec" and would be looking for a customer who would accept it. Based on the contents of the email, Eden suggested that 1 region was trying to sell the malt to another region.

633 The email chain commenced with an email from Hermus, in which it was recorded that a Cargill malting plant in Argentina had problems with a "rounding rule"[448] as

447 In fact, a right to limit questions was part of the process: see par 652 below. However, there was no evidence that any limit was imposed.

448 This was referred to in the email as a rule by which results were rounded to whole figures. In this

the plant blended up to 5 percent of old crop malt which was not mentioned in the Certificates of Analysis.[449] It was suggested by Hermus that such a practice needed to be discussed at the level of the malt leadership team because the guiding principles in the Cargill Code might have been compromised. Hermus' email referred to Cargill Malt having started automated printing of Certificates of Analysis from Cargill's malt plant production system, MaPPS. He stated that it had been decided to print some disclaimers at the bottom of the Certificates of Analysis to indicate which parameters were calculated and which were the result of laboratory analyses.

634 Further, in relation to bills of material (which indicated varietal composition by way of percentage, as well as the crop year), Hermus noted the percentage was also the result of a calculation in MaPPS and there was a need to add a disclaimer to the effect that varietal composition was calculated and not physically analysed on each delivery. When Viers was taken to this part of the email chain during his cross-examination, he explained that physically analysing for barley varieties was a very complex and long process of deep chemistry that was not practical in the industry. In relation to reporting varietal composition, Viers gave evidence that it was necessary to secure the right varieties, maintain them through the system and to use them to produce the malt to the customer's requirements, rather than physically analyse for varieties at the end of the process.[450]

635 The penultimate email in the chain, sent 10 days later and directed to an employee of "Cargill Malt Commercial", was from Viers, who simply stated "[anything] new here". In response to Viers, a conference call was suggested to set the next steps. Viers was asked what he meant by his comment on the email chain. He rejected the

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particular instance, it had the consequence that totals did not then amount to 100 percent which created issues for a specific customer.

449 When Eden was taken to this part of the email during cross-examination, it was put to him that it was within Cargill's guidelines not to mention 5 percent of old-crop malt being used. His response was that it would have been within customer guidelines. However, this was clearly speculation on his part as he could not remember the detail or it being discussed by the malt leadership team (of which he was in charge). Further, he accepted that Cargill's guidelines would not be compromised if the customer had agreed to the use of old-crop malt.

450 To avoid any confusion, there was no suggestion in this email chain that the individual specifications were being misreported or that the barley being used was anything other than the variety required by the customer. The issue raised was confined to the use of old crop barley in combination with the then current crop, without disclosing the fact.

suggestion that using 5 percent of old-crop barley without disclosing it was something done within the Cargill organisation. Further, his evidence was that, in making this comment, he was enquiring as to whether or not there was anything new around the discussion of this topic.

O. The sale process progresses, including due diligence

636 On 12 June 2013, Hawthorne, Eden, Engle and Viers had dinner with Glencore executives in Minneapolis, to discuss the sale of the Prairie Malt Ltd shareholding. A meeting was held the following day on the same issue.

637 On 14 June 2013, representatives of Cargill and Glencore met again to discuss the possible purchase of Glencore's 42 percent shareholding in Prairie Malt Ltd. This was the first time that Engle met Walt.

638 At the end of the meeting, Walt stated that Merrill Lynch would be contacting Goldman Sachs to inform it that Cargill would be invited to be part of Phase 2 of the bidding process for the Joe White Business. Walt stated he thought Cargill, Inc was a very logical buyer. He also foreshadowed various aspects of Phase 2, including a proposed management presentation to take place in Sydney and the ability to visit a Joe White plant.

639 Also on 14 June 2013, Merrill Lynch confirmed by letter that Cargill, Inc would be invited to participate in Phase 2 of the Proposed Transaction ("the Phase 2 Process Letter"). The Phase 2 Process Letter set out an overview of Phase 2, which was to include access to the Data Room, a question and answer process, a management presentation, tours of Joe White sites in Sydney, Adelaide and Perth, and the provision of a draft share purchase agreement. It was stated that Phase 2 included each of these processes in order to assist Cargill in making its final bid. The Phase 2 Process Letter stated that all Phase 2 information was also subject to the Confidentiality Deed.

640 Under the heading "Due Diligence Information", the Phase 2 Process Letter stated:

(a) Virtual Data Room and Q&A Process

> You will be provided access to commercial, financial and legal information for Joe White through [the Data Room].
>
> Please provide the relevant details of each person you would like to have access to the [D]ata [R]oom by completing and returning by e-mail the table attached as Appendix A to this letter. We have asked you to identify a "Nominated Representative" who will be the primary point of contact for any issues regarding the [D]ata [R]oom and the only person who can approve submission and prioritisation of questions for the due diligence Q&A process. Once we have received the completed table, you will be provided with login details and Q&A and [D]ata [R]oom protocols. The [D]ata [R]oom will be accessible from Monday, 17 June.

641 The Phase 2 Process Letter went on to set out arrangements for the management presentation, which was scheduled on 26 June 2013 at Mallesons' office in Sydney, and the site visits of Joe White's Sydney, Adelaide and Perth malt plants, which were scheduled for 26, 27 and 28 June 2013 respectively. In respect of both the management presentation and the site visits, the letter stated that in order to "avoid any misunderstanding on the day", audio or visual recordings would not be permitted.

642 The Phase 2 Process Letter requested that the final bid be submitted to Merrill Lynch by 2:00pm on 29 July 2013 and be expressed as a single number. It was stated that a draft share purchase agreement would be provided to Cargill approximately 3 weeks before the final bid was due. Cargill was told that its final bid should include its proposed share purchase agreement based on the draft provided in a form that Cargill was prepared to sign (with mark-ups of any amendments). It was stated that if there were proposed amendments, these would be factored into the assessment of Cargill's final bid. The bid was expected to be unconditional and capable of acceptance. However, the following was also stated:

> To the extent that there are any outstanding due diligence items for which you require final confirmation, these should be identified in your Final Bid, however, unresolved areas of due diligence may place you at a competitive disadvantage to other bidders. Confirmatory due diligence in relation to any documents that have been withheld or redacted will be provided only to a preferred bidder following the submission of Final Bids.

643 The Phase 2 Process Letter recorded that Glencore and Merrill Lynch reserved the

rights previously reserved in section 4 of the Phase 1 Process Letter,[451] and then stated:

> …
>
> You are required to make and rely on your own investigations and satisfy yourself in relation to all aspects of the Proposed Transaction.[452]
>
> **6. Other Matters**
>
> You are reminded of *your obligations under the Confidentiality Deed*. The existence and terms of this letter are "Confidential Information" for the purposes of that Confidentiality Deed. You should not speak with the media or any other person, *including another potential Counterparty*, under any circumstances regarding the Process or your participation in it.
>
> *No contact is permitted with any of Glencore or its related bodies corporate (including Joe White), or any of their respective officers, employees, customers or suppliers regarding the Proposed Transaction without the prior written consent of Merrill Lynch*, which may be withheld in its absolute discretion.
>
> (Emphasis added.)

644 The Phase 2 Process Letter required that any further information concerning Phase 2 was only to be obtained by enquiries to Merrill Lynch. Further, it set out the next steps to be taken, being the proposed management presentation and site visits, and included an appendix dealing with site visits. It identified prohibited conduct for the site visits as follows:

> No communication is permitted with anyone outside of the designated guide or Merrill Lynch chaperone, and similarly, you will not be permitted to take any photographs or recordings on the site visit.
>
> You will not be permitted to ask any questions that are not strictly related to the technical aspects of the plant, including but not limited to the following:
>
> - Transaction process-related questions
> - Other bidders that have visited the site
> - Finance/cost related questions (eg [Unadjusted Earnings] per tonne, manufacturing cost per tonne)
> - Specific plant customers
>
> We remind you that all information provided during the site visits are (sic)

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451 See par 468 above.

452 Evidence was given by each of Hawthorne, Engle and Jewison that they read the requirement for Cargill to make and rely on its own investigations. Hawthorne's evidence was that this requirement was not unusual in this kind of letter. Van Lierde could not recall reading the Phase 2 Process Letter, but acknowledged he probably did.

subject to the Confidentiality Deed that you have signed.

645 In closing submissions, the Viterra Parties emphasised the fact that reference was made to Glencore and not Viterra throughout the Phase 2 Process Letter. Indeed, it was submitted that Viterra was not referred to at all, despite the Phase 2 Process Letter referring to "Glencore or any of its related bodies corporate (including Joe White), or any of their respective officers, employees, customers or suppliers …". Plainly, such language included Viterra and the employees of Viterra Ltd.[453] In any event, the point is of little moment. For reasons discussed elsewhere,[454] Viterra was plainly part of the sale process even if the process was being conducted at the direction of Glencore.

646 After receipt of the Phase 2 Process Letter, Cargill began conducting due diligence, both formally and informally. Cargill was not informed about the number of other bidders who had been invited to participate in Phase 2.

647 In response to the Phase 2 Process Letter, Engle sent an email to a large number of Cargill employees involved in Project Hawk. Having referred to various details with respect to Phase 2, it was stated that after "functional leads" had had access to the Data Room a plan would be coordinated to work through the information available. Engle also referred to the ability to ask questions of "the seller", and directed the addressees to keep that in mind when reviewing the materials.

648 Engle attached the team chart for Project Hawk. Team leaders were listed in bold type. De Samblanx was listed as the lead for manufacturing and technology.[455] Purser was listed as the supply chain lead with Christianson. Hermus was listed as the lead for food safety, quality and regulation with Jean-Philippe Tournoy, the operations manager for malt in the "Americas".[456]

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453 There was no evidence of the existence of any employees of Viterra Operations or Viterra Malt.

454 See, for example, pars 457, 475-482 above and par 711 below.

455 De Samblanx gave evidence that as manufacturing technology lead he was required to look at the operational side of the Joe White Business. That did not involve considering the commercial side of any bid. At the time of this appointment, he knew very little about Joe White. Although he was aware of its existence, he did not know any specifics about the Joe White Business. Further, he had had no experience with the Australian malt market and did not possess any knowledge of Australian barley varieties.

456 Of these 2 names, only Hermus' appeared in bold.

649 On 15 June 2013, Engle emailed Goldman Sachs a revised question list that incorporated comments received up to then from the Project Hawk team. Engle noted that he had been through the list and classified Cargill's "top 40'ish High Priority questions" in a new sheet in the spreadsheet. Engle suggested that they continue to build out that new sheet so that it would contain the questions that would actually be sent. Plainly, it was contemplated that it was not intended to forward all questions formulated by all the Project Hawk members.

650 Meanwhile, Glencore was finalising matters to enable the Due Diligence to occur. On 17 June 2013, a protocol for the Data Room was put in place ("the Data Room Protocol"), which was required to be followed by Cargill and those who were authorised to access the Data Room.[457] It provided the Data Room was to be open from 17 June 2013 until 29 July 2013. It prescribed the first and last dates for the question and answer process was to be 17 June 2013 and 26 July 2013, though Glencore[458] reserved the right not to provide any answers to questions put after the proposed management presentation had been completed.

651 According to the Data Room Protocol, by accessing the Data Room, the Authorised User[459] acknowledged and agreed that she or he had read the Confidentiality Deed and agreed to its terms.[460] The Data Room Protocol expressly prohibited any contact with Glencore and its Related Bodies Corporate, its employees, customers or financiers other than in accordance with the Data Room Protocol.[461] Glencore was permitted to vary any of the processes, procedures and timing set out in the Data Room Protocol at any time without notice and without giving reasons.[462] As to confidentiality, the following was provided:[463]

> All Material is confidential and provided subject to:

457 Clause 1.
458 Defined as "Glencore International AG [that is, Glencore] and its Related Bodies Corporate".
459 Authorised User was defined to mean an individual nominated by a prospective purchaser who had been granted access to the Data Room by Glencore: cl 9.3.
460 Clause 2.1(a).
461 Clause 2.2.
462 Clause 2.7.
463 Clause 3.

(a) the Confidentiality Deed and any arrangements entered into pursuant to the Confidentiality Deed;

(b) the terms set out in the [Phase 1] Process Letter;

(c) the terms of this protocol and any disclosures displayed in the Data Room; and

(d) the terms set out in the Information Memorandum and all disclaimers and acknowledgements in the Information Memorandum.

Only persons who are permitted to receive confidential information under the Confidentiality Deed may access the Data Room and the Material. The Invitee must ensure that all of its Authorised Users are familiar with the confidentiality obligations under the Confidentiality Deed.

652 The Data Room Protocol reserved to Glencore various rights in relation to questions submitted by Nominated Representatives of Cargill.[464] The rights reserved included not responding to any question or request for documentation; limiting the number of questions that may be submitted; and requiring questions to be prioritised into "high", "medium" and "low".

653 Further, Cargill and its Authorised Users were required to avoid loss, theft or unauthorised use of their credentials permitting access to the Data Room.[465]

654 In addition to reliance upon the disclaimers contained in the Information Memorandum, the Data Room Protocol also contained its own disclaimer,[466] as follows:

> To the maximum extent permitted by law, [Glencore], [Merrill Lynch], [Mallesons] and each of their respective related bodies corporate and associated entities and each of their respective officers, employees, associates, agents, contractors and advisers (together "**associates**"):
>
> (a) do not make any representation, guarantee or warranty, express or implied, of any Material or any other information (including by (sic) not limited to any forecast, projections or forward-looking statements made available to the Invitee or any Authorised User or to any person as part of or in connection with the Proposed Transaction) made available in whatever form to the Invitee or the Authorised Users during or in connection with the Proposed Transaction;
>
> (b) do not accept any responsibility for any liability incurred in connection with any Invitee's or Authorised User's physical use of the Data Room

464 Clause 6.
465 Clause 7(a).
466 Clause 8.1.

> and, (sic) to the maximum extent. This includes, but is not limited to, the transmission of any computer virus.

655 Liability for "Non-excludable warranties" was limited to resupplying, or the cost of resupplying, the relevant service.[467] The Data Room Protocol contained an acknowledgement that any Invitee or Authorised User would rely on their own independent assessment of any information, statements or representations contained in the Material. It was a further requirement to acknowledge that there would be no reliance upon any representation, guarantee or warranty (express or implied) by any of Glencore, Merrill Lynch, Mallesons or any of the respective associates.[468]

656 The Data Room Protocol also set out a number of procedures with respect to the Data Room.[469] These included that only Authorised Users were able to access the Data Room, who were required to acknowledge their access was subject to the Data Room Protocol when logging into the Data Room.[470] It was stated that a breach of the Data Room Protocol was a serious matter and that an Authorised User could be excluded if a breach occurred.[471] Further, it was a matter for Glencore and its Related Bodies Corporate, at their discretion, as to which documents were made available in the Data Room. It was expressly provided that nothing obliged Glencore to disclose any particular information. Indeed, Glencore had an absolute discretion as to the information it chose to disclose, and to whom,[472] as well as the use to which the information could be put.[473]

657 The Data Room Protocol also contained the procedures for the question and answer process ("the Q&A Process").[474] An administrator was appointed to conduct this process.[475] It was stipulated that all questions relating to the Data Room or any

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467 Clause 8.2.

468 Clause 8.3.

469 Schedule 2. Glencore and its Related Bodies Corporate, Merrill Lynch and Mallesons (and their respective associates) had the right at any time to vary the terms of the Data Room Protocol, together with the procedures and processes for accessing the Data Room: schedule 2, cl 9.

470 Schedule 2, cl 1.1.

471 Schedule 2, cl 1.5.

472 Schedule 2, cl 2.

473 Schedule 2, cl 5.

474 See also the definition in the Acquisition Agreement: par 1022 below.

475 Ken Iwata of Mallesons was specified as the Data Room Administrator.

Material had to be made in accordance with the Q&A Process set out in the protocol.[476]

658 The Q&A Process provided that all questions relating to the Data Room or any Material were required to be made online. It was provided that if communication through this process "would be inappropriate (for example, in relation to Blackbox Material)",[477] then a nominated representative would be able to direct the communication to the "Q&A Administrator(s)", and only that person or persons.[478] It was further provided that Glencore and its Related Bodies Corporate would determine in their absolute discretion whether or not to answer any questions and that any questions were required to meet a reasonable threshold of materiality.[479]

659 Under cross-examination, King readily acknowledged that, in addition to the provision of a data room, it is common practice in transactions involving mergers and acquisitions for there to be a question and answer process. By this customary process, a prospective purchaser is able to put questions and have them answered, with the substance of the questions and answers being recorded in writing.

660 Van Lierde's evidence was that he understood that typically documents contained in a data room for a transaction such as this carried with them that although Cargill was welcome to look at the documents included it was up to Cargill to conduct its own investigations, due diligence and analysis before relying upon the documents.

661 Merrill Lynch prepared a proposed Data Room index.[480] The final form of this index ultimately became annexure B to the Acquisition Agreement. King gave evidence that he provided comments on the proposed index, though he had minimal involvement in the specific preparation of the Data Room.

662 By the time access to the Data Room was given to prospective purchasers, for reasons

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476 Schedule 3, cl 1.

477 Blackbox Material was defined to mean "Material which [Glencore and its Related Bodies Corporate] determines is subject to additional restrictions on access (such as where particularly commercially sensitive or subject to legal professional privilege)": cl 9.3.

478 Schedule 3, cl 1(c). Q&A Administrator was defined to mean the person or persons identified as such in "the Details". In fact, the Details page did not identify a Q&A Administrator, but did name a Data Room Administrator: see fn 475 above.

479 Schedule 3, cl 4.

480 See par 616 above.

not explained by the Viterra Parties, some key documents were not included. Putting aside events in late October 2013, there is no basis to find that this was a deliberate act of consciously withholding material information; rather it seems some documents fell through the cracks when assembling the relevant materials.

663 To elaborate, Bickmore had been asked by Fitzgerald on 1 March 2013 to set up the Data Room and was provided with the categories of documents to be included.[481] In relation to any discussions she had with Joe White executives, she spoke primarily with Argent about what should be included as Argent was more available than Hughes.[482] Bickmore also spoke with staff of Viterra Ltd from the human resources, property, and safety and environment departments "amongst others in Viterra". In her discussions with Argent, documents relating to how the Joe White Business was conducted at an operational level were raised, including "sales contracts and other relevant documentation that were listed in the categories". But Bickmore did not recall discussing policy documents with Argent. Further, Argent was not involved in the creation or implementation of any operational policies. Furthermore, responsibility for inclusion of "Company Policies" was ultimately allocated to Fitzgerald and Wilson-Smith.[483]

664 Bickmore also responded to specific requests from Mallesons for additional documents and checked with the relevant persons within the Joe White Business for the documents that were responsive to the requests. From late March 2013, her

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481 Bickmore said she used a template from an earlier transaction in 2010, which she updated, somewhat spasmodically, for a period (but not up to 2013), as well as relying on external advisers for the "types of categories and the nature of the documents that we had to find". It seems this identification of categories was superseded in early June 2013.

482 Bickmore gave evidence that she first met with Argent with respect to the Data Room on 1 March 2013. She said in her discussions with Argent (without stating when these occurred) that Argent indicated he had discussed the issue of the Data Room with Hughes, but precisely what Argent had apparently raised with Hughes was not the subject of evidence. There was no probative evidence that Bickmore ever raised with Argent if Argent had made any enquiries of Stewart as to what should go in the Data Room. When she was asked during cross-examination if she did, she said she would have. When asked for any response she received, she said she could not recall. She also could not recall speaking to Stewart directly on the issue. Later in her evidence, she said she did not recall talking to Stewart about producing documents relating to technical aspects of malt production and could not recall ever considering such technical aspects. See also par 670 below.

483 See par 618 above.

involvement in this process largely ceased.

665 Bickmore gave evidence that what was to be included in the Data Room was essentially driven by Merrill Lynch and Mallesons. She said it did not occur to her that Joe White might have policies in place relating to its operations or business practices.[484] Further, Bickmore had no recollection of Argent adding any document to the index of documents that was provided; it was not Argent's call as to what went in the Data Room.[485] In short, generally speaking the role Argent fulfilled was to assist Bickmore and Wilson-Smith in obtaining the documents the subject of the initial index.[486]

666 Curiously, despite having been told by Fitzgerald in October 2013 about Cargill's allegations concerning the Operational Practices and being shocked to hear about them, Bickmore gave evidence that she was satisfied with the manner in which the Data Room had been populated because a warranty verification process had been undertaken properly.[487] Indeed, Bickmore gave evidence of her belief that the Warranty[488] verification process was very thorough. Bickmore herself was not directly involved; it seems she based her evidence on some emails she received during the process. When it was put to her that her satisfaction with the Data Room process was based on another process in which she had very minimal involvement, Bickmore responded that she guessed she was trying to say Viterra had a process, a lot of information and documents were collected and "then at the end certain warranties were made that we had produced those documents". Contrary to Bickmore's evidence, the Warranty verification process provided no basis to support the adequacy of the Data Room process.

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484 Upon learning of the matters raised by Cargill in late October 2013 relating to the Operational Practices, Bickmore gave evidence that she was shocked. Curiously, she said this did not cause her to question how the Operational Practices might have been missed as part of the creation of the Data Room.

485 Before making this concession, Bickmore asserted in her evidence that it was Argent's role to decide what financial documents went into the Data Room. On what basis this assertion was made was far from clear. Although Argent participated in obtaining documents as directed, it was clearly not the fact that he was the decision-maker or even a decision-maker.

486 See also par 958 below.

487 For a detailed account of the Warranty verification process, see pars 996-998 and issue 125.6 below.

488 See par 1022 below.

667 Further, when told about Cargill's allegations in October 2013, Bickmore "probably would have reflected on the Data Room process", but she added to her answer that this process was reliant upon subject-matter experts from Joe White. When it was then put to her that she did not speak to any of the subject-matter experts, she responded that she may have had discussions with them from time to time. There was no evidence of any probative value that she did. On the contrary, in her witness statement she gave evidence that she felt confident about the completeness of the documents because she trusted Argent. While there was no reason to question her evidence about trusting Argent, it did not follow that because of such trust somehow Argent took on the responsibility of determining what should go into the Data Room. At its highest, Argent may have had some discretion about which documents fell within categories of documents requested by Bickmore,[489] but it was Bickmore (and later Wilson-Smith) at the direction of Mallesons (and others at Viterra) who was giving the instructions.

668 With respect to the finalisation of Data Room documents in June 2013, Fitzgerald left much of the collation of those materials to Wilson-Smith (who had had no material involvement before this time). Wilson-Smith was unable to recall the precise discussions he had, beyond stating he spoke with various persons, including Argent, Youil, Wicks and Hughes, and that he asked them for certain documents. Wilson-Smith said he proceeded on the assumption that he received all the documents and information relevant to the requests.

669 As for Joe White's policies, Wilson-Smith said he was aware they existed, but did not know what they were. He conducted a search of Pulse and obtained some policies. Having done so, he spoke with Matthew Forsythe ("Forsythe")[490] and Stewart. He could not recall what was discussed. He then forwarded to Mallesons the Joe White

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489 Bickmore gave evidence that she maintained a working list of the Data Room documents and "shared versions of it" with Argent, who provided "comments on it". This vague evidence did not establish that Argent assumed responsibility or made significant decisions about what ultimately was included in the Data Room.

490 Forsythe's title was safety, health and environment issues business partner, processing malt division of Viterra (including Joe White).

policies of which he was aware as a result of this process. Neither the Viterra Certificate of Analysis Procedure nor the Malt Blend Parameters Procedure were amongst them.[491] Wilson-Smith spoke with Lindner about what policies ought to be produced. She said not to worry about corporate-wide policies across the whole business.

670 On the question of what Wilson-Smith discussed with Stewart concerning policies for the Data Room, there is no basis for drawing any inference that the relevant policies were raised with Stewart. Stewart gave uncontradicted evidence that nobody asked him whether it would be desirable to disclose the Viterra Certificate of Analysis Procedure. Further, Wilson-Smith's evidence was that he did not ask anyone for a complete list of policies that related to the Joe White Business or for policies with respect to its operations.

671 At Cargill on 17 June 2013, Le Binh circulated a due diligence template to various workstreams. The attachment did not contain any information beyond identifying the various categories to be addressed. The covering email suggested the template could facilitate the sharing of questions and issues and assist with weekly progress. Le Binh stated he wanted each lead to populate the "question" sheet every day by no later than 5.00pm and then forward it to Engle, Bowe and himself. Le Binh also requested that each lead provide their update on the progress report sheet every Tuesday by no later than 6.00pm.

672 On 18 June 2013, an email from Viers to Eden, Engle, Le Binh and Sagaert, and copied to others including De Samblanx addressed the approach that Cargill, Inc intended to take to due diligence in Phase 2. The email stated:

> It is still not clear how we are going to walk thru (sic) the [D]ata [R]oom in a methodical way… In the very short term you should get familiar with the [D]ata [R]oom and what is contained. This may change but from my

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491 The policies that were included in the Data Room totalled at least 22 in number. (It is not possible to be definitive as there were other documents listed that may have been policies but the word "policy" did not appear in the description of the document.) They included the "Viterra Malt Risk Management Policy May 2013", the "Viterra Malt Chemical Handling Policy" and the "Working on Grain in Malt Policy". The documents also included the "Viterra Malt Laboratory Standard" and the "Viterra Malt Reference Procedure".

> perspective *we need to begin to develop an understanding of what information exists and what information is missing from the [D]ata [R]oom that would be required to answer the questions around the value of this company as it stands today and what synergies can we drive to enhance the value. Secondly what info exists or is missing to assess the risk/obstacle/costs to assure we run this business by all of Cargill standards*. Again this is initially an information assessment so please catalog same, not necessarily looking for specific answers to the actual questions. Think we do this for our respective areas. Until we have further clarity.
>
> (Emphasis added.)

673 Engle's evidence was that Viers' email did not fully summarise the approach that was to be taken to the Due Diligence. Viers gave evidence that Le Binh provided guidance and direction for a methodical way to work through the Data Room.

674 As to the contents of the email, Viers accepted that the Cargill standards he referred to concerned a wide variety of matters affecting the operation of the Joe White Business. These included the way in which the malting process was actually undertaken, whether customer specifications were adhered to and whether Certificates of Analysis were provided in a manner that was conformable with those standards.

675 On 19 June 2013, Viers sent an email to a large number of Project Hawk related employees, stating he wanted to get an update out to everyone.[492] The email attached Le Binh's email of 17 June 2013, and asked that it be reviewed. Viers stated "data gaps/questions/requests/issues" would be sent each day to Merrill Lynch via Goldman Sachs.

676 As an aside, De Samblanx was recorded as being the lead for operations, and for environment, health and safety. When it was put to him in cross-examination that Hermus had responsibility for environment, health and safety, De Samblanx said this was incorrect. His evidence was that Hermus was confined to quality. De Samblanx said this involved matters such as processing conditions and gibberellic acid. Although Hermus identified a large inventory of gibberellic acid and asked questions

492 "Everyone" did not include Hermus, who was not included as an addressee.

about its use, no concerns were expressed by Hermus to De Samblanx on this issue.

677 On or around 20 June 2013, Cargill was given access to the Data Room.[493] Access was obtained by a number of Cargill employees. Exactly who gained access to which documents and when was all electronically recorded.[494] Further documents were added to the Data Room throughout the remainder of June and July 2013.

678 In her role as lead for the accounting and financial workstream, Jewison reviewed information in the Data Room regarding financial matters. She also reviewed the documents in conjunction with Cargill's financial information in order to identify questions that could possibly be put and answered.[495] In relation to the "financial data books" in the Data Room that formed part of this financial information ("the Data Books"), it was stated that the data had been prepared from "Company information", and that the primary sources had been the general ledger and the trial balance information extracted from the Administration System. It was recorded that the Administration System represented the aggregation of the "malt entities". These included Joe White, described as the main operating entity, and Ausmalt, described as the legal entity name of Viterra Malt. It was further stated that the income statements agreed with those presented in the Information Memorandum, with the pro forma and normalised adjustments summarised in the "Adjustments (summary)" worksheet ("Basis of preparation"). The cover pages of both volumes 1 and 2 of the

493 The pleadings suggested access to the Data Room was given from around 14 June 2013, but the evidence indicated it was later than this. Nothing turns on whether it was 14 or 20 June 2013 that access was given.

494 On 25 October 2018, the parties provided an agreed summary recording details of access by Cargill to the Data Room. The electronic record indicated 71 representatives of Cargill were given permission to view certain documents in the Data Room; 56 actually accessed documents, of which there were 466 in total. Those who accessed documents included Bowe, Aimee Breszee ("Breszee"), Christianson, De Samblanx, Eden, Engle, Hawthorne, Hermus, Le Binh, Purser, Sagaert and Viers, in addition to lawyers from Allens.

495 With respect to Jewison's role, she prepared the due diligence report for the accounting and finance, and insurance workstreams; reviewed and commented on proposed amendments to the draft acquisition agreement insofar as they related to accounting matters; considered the terms of the draft acquisition agreement more generally; considered responses and lack of responses to identify potential risks; attended various meetings to talk through assumptions; dealt with exchange rates; sought to validate financial information that was in the Information Memorandum and consider whether it aligned with what occurred in malt business units already; and sought to understand normalisations made concerning the Joe White Business together with what further questions needed to be asked from a finance perspective.

Data Books were headed "Viterra Malt".

679 On the same day, De Samblanx emailed some preliminary questions he had identified concerning operational matters. These supplemented questions that had already been suggested from others. Engle's position was not to engage in consideration of questions pertaining to operations as these were to be dealt with by the operations workstream.

680 A spreadsheet had been created which contained 2 worksheets: an external due diligence list; and an internal due diligence list. The external list included requests and questions concerning forecast financial information, malt margins, production volumes and capacity, barley procurement and plant and facilities.

681 De Samblanx was given access to the Data Room. In reviewing documents, De Samblanx focused on operational aspects and production capabilities of Joe White's plants. His review assisted him in preparing questions to be put to Joe White.

682 De Samblanx noticed the apparent limited barley and malt storage capacity at some of Joe White's plants when reviewing the Data Room. He observed that they were below levels of storage that Cargill generally required at its own malt plants. Cargill generally had 30 to 40 days' of storage capacity at its plants. Some of Joe White's plants had considerably less, including Minto which only had approximately 10 days' worth of storage. The only plant that appeared to have storage in line with Cargill's plants was Joe White's Tamworth plant.

683 De Samblanx appreciated that storage capacity was relevant to the production and supply of malt affecting both barley and malt production. The production input requires sufficient barley storage. Malt storage is also required to store batches separately, which can later be blended to meet different customer specifications. However, arrangements may be made for both barley and malt to be stored off-site in third-party silos or terminals. It is generally more economical to do this with barley rather than malt.

684 Further, the amount of storage required is affected by the complexity of the customer book. The greater the complexity (for example by reason of the number of customers and differing product requirements), the more storage is required to manage production and supply. Further, some customers have processes that require additional storage capacity, such as a requirement to store malt to allow it to age.

685 As a result of these matters, De Samblanx wanted to learn more about the customer book of Joe White, together with its process and product requirements. He gave evidence that he had these matters in mind when he drafted the questions for Joe White to answer. He also prepared a summary of the information from the Data Room in a spreadsheet which he was to use when visiting the Joe White plants later that month.

686 De Samblanx gave evidence that he understood Joe White exported around 80 percent of its malt. He also knew the overseas customers included Heineken, San Miguel, Nestlé and South African Breweries,[496] as well as Japanese customers. Further, at that time, De Samblanx had an understanding of Heineken's requirements. However, De Samblanx's evidence was that although he had picked up the names of some of Joe White's customers during the Due Diligence, he did not know enough to establish a customer book. That lack of knowledge included not knowing the precise customer book at a certain time at a certain plant, which De Samblanx explained was important. He gave evidence that being aware of such matters was very different to knowledge of malt volumes spread over the period of a year.

687 On 21 June 2013, Le Binh concluded his work with Christianson concerning synergies and leveraging the grain and oilseeds supply chain in Australia for barley origination. The estimated synergies in this regard were for the period from 2014 to 2023.

688 Further, on or around 21 June 2013, employees of Cargill, Inc including Eden, Viers, Jeral D'Souza, Engle and Le Binh, participated in a call with Joe DiLeo and Ian Wilton (described in the minutes of the call as 2 "senior members of Cargill's Allied Mills

496 It was unclear on the evidence whether this was a reference to SAB Miller or South African Breweries Ltd, but see also par 874 below.

Flour Milling Joint Venture"). Essentially, the views of these 2 experienced individuals were sought.[497] The minutes included:

> Management case
>
> - *The forecast combination of high margins and high asset utilization are "pie in the sky"*. There are opportunities to do better than an implied $15/tonne trading margin, but it *will be volatile*.
>
> - Quite likely that a new government (opposition today, election in September) would repeal today's 10-15% carbon tax.
>
> Opportunities
>
> - *Increased penetration of the domestic market should be possible* – there is no reason why [Joe White] could not *go after and win a greater share of SAB*, particularly if Cargill has global relations. Margins with SAB historically higher than with Lion Nathan.
>
> - There should be an *opportunity with "grain innovation"*. Australia tends to have a "straight view" of grain, and doubtful that [Joe White] has ever looked at least cost supply chain practices. Cargill would have an opportunity to broaden varieties and maintain quality.
>
> - [Joe White] has historically relied on 3rd parties for storage, port and fobbing. They don't own or control any ports, and Cargill will need to find better ways to operate at the ports.
>
> - Plant closure candidates are at Tamworth (domestic only) and in Victoria (specialised malts). Tasmania serves James Bogue (sic) (Kirin).
>
> (Emphasis added.)

689 The minutes listed a number of risks identified, including the possible impact of major droughts or floods, exchange rate concerns and pressure from European producers in the Asian market. Under the heading "Synergy sources", the minutes stated:

> - The key to value addition will be grain procurement. [Joe White] does not have the capacity to acquire grain. They simply do not have the people to do it.
>
> - The top 4 opportunities for Cargill, based on the Allied Mills experience, are: (a) inbound and outbound supply chain, (b) barley procurement, (c) raw material procurement, and (d) people.
>
> - Size and feasibility of revenue synergies likely to be driven by Cargill's global relationships. This is one reason why Glencore probably seeking to exit.

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497 One of them had "competed with Joe White over the years", and both of them had worked in the GrainCorp business.

690 Eden rejected the suggestion that it was his view that the forecast margins and utilisation were "pie in the sky"; he said it reflected the view of 1 of these senior members. Eden said he accepted each of the responses as their opinions and took them into consideration. Engle did not recall the discussion or the use of the term "pie in the sky", but accepted that he understood the representations in the Information Memorandum presented an optimistic scenario and more of a "seller's case", as was customary in his experience. Viers gave evidence that he recalled receiving the minutes in June 2013. He said he accepted the advice that the opportunities were volatile concerning doing better than $15 per tonne as a margin, on the basis that earnings were always volatile in grain trading.

691 Upon receipt of the minutes, Eden circulated an email saying he had obtained further insights after speaking with a very senior ex-Viterra employee who was deeply involved in the "Australia business". That person was Malecha, who had had dealings with Eden as part of Cargill's involvement with Prairie Malt Ltd.[498] Eden recorded the substance of the "insights", which included that the 3 main assets of Joe White in Perth, Adelaide and Minto were good, competitive assets. Underlying details were given. Eden was informed that domestic margins had been much higher than those for export customers, but it would not be in Cargill's best interest to aggressively pursue more domestic business. Eden was further told that export customers were very demanding and he thought that Cargill could do better in this area. He said that, contrary to what the malt team itself believed, he did not feel that the name Joe White carried much value and maybe even held the business back. He suggested that a change of name to "Cargill Malt" would be a good thing.

692 Eden was also told that Malecha thought current management were "stuck in the past". Eden was told that Hughes was smart with a great background in the malting business. Malecha said that Hughes presented himself well, but he was a technical person who did not have overall leadership "stretch" to be the chief executive officer and should not be running the Joe White Business. Eden was told that Wicks was a

498 See par 345 above.

smart guy who was really nice, though not a commercial person. He said that Wicks was not too good at selling or challenging the status quo.

693 Eden was told that if Cargill wanted to drive change in a fast way, the current management were "not the team".

694 Eden's note of the conversation concluded with the following:

> Overall, he felt the acquisition underperformed [on the] basis [of Viterra's] expectations. [Viterra] totally underestimated the complexities of running the malt business and feels that others not in the malt business would do the same. [Co-Operative Bulk] would be in this camp and he feels they will be the most aggressive. He believes the natural parent for [the Joe White Business] is [a] global maltster.
>
> Quick and brief but does give another perspective.

695 Under cross-examination, Eden said he thought the summary provided by Malecha was interesting because it was not consistent with Cargill's summary of what Cargill was perceiving. Further, Eden said that Cargill's interest in Joe White was known by Malecha because there had been previous discussions with Viterra about a strategic partnership involving Joe White, but Viterra was not interested.

696 Before any management presentation to possible purchasers could take place, Glencore considered it necessary to prepare a document and have rehearsals.[499] Merrill Lynch was instructed to attend to the detailed drafting. King gave evidence that Merrill Lynch drafted slides, which were "talked through". He said it was done the same way as the Information Memorandum was done. When it was suggested to King during cross-examination that many hands were going over the draft management presentation slides, after seeking clarification of what was meant by the question,[500] King stated that a draft was prepared by Merrill Lynch with input predominantly from himself and probably Mattiske on the operational side, and many people were given a chance to review it "in a final sort of review, as it were".

697 A draft was forwarded by Merrill Lynch to Glencore, including Walt, Roelfs, King and

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499 As planned from the outset: see par 367 above.

500 The question was also directed towards the Information Memorandum.

Mattiske, copied to Hughes, Argent and others, with the comment that Merrill Lynch welcomed any feedback. King accepted this was done to see if the type of message being conveyed was what was wanted from a Glencore perspective. He also accepted he had a significant role in drafting the presentation, and fastidiously reviewed it until he was satisfied with the final product.

698 King described the information to be provided by the management presentation as an expansion of the Information Memorandum, with a greater level of granularity and explanation. King said management presented to him and Merrill Lynch to make sure they were "familiar with the key messages to deliver on the relevant pages". He said the key messages were determined by a combination of "management themselves and Merrill Lynch who drafted the presentation".

699 King had travelled to Australia from Switzerland to attend the preparatory meetings, and accepted he gave advice to Hughes about how Hughes might modify his presentation to improve the message. Although he could not recall the specifics, he acknowledged that he involved himself at a very close level of detail with the messages that were to be conveyed. He said he did this personally, principally with Hughes and also with Argent, in conjunction with Merrill Lynch. King said he wanted to make sure the messages delivered were positive and were messages Glencore wanted to convey to prospective purchasers. Mattiske also attended a rehearsal.

700 By way of example, King said Hughes and Argent were allowed to present the slides, which, as noted above, were drafted in the same way as the Information Memorandum was drafted. King's evidence was that if there was a key message "we felt they should perhaps make a bigger point of we'd perhaps say, … 'This is a good slide to talk about the following'". All that said, King gave evidence that, so far as he was concerned, he was there to make sure Hughes and Argent were on message to an extent, but management were left to present the Joe White Business in their own light and to answer any difficult questions. Nonetheless, King accepted that the extent to which management were "more forthcoming" was certainly subject to a level of

control by King.[501]

701 King was not the only person from Glencore taking a keen interest in the contents of the message to be delivered. In an email from King to Merrill Lynch sent on 21 June 2013, by which King provided some "final thoughts/comments",[502] he included a suggestion from Walt with respect to page 39 of the draft document. The level of attention being paid was reflected in Walt's comment that the page was perhaps better structured with 2 boxes rather than its then layout, with "Risk/Exposures" being moved to the right-hand side of the page and another box with the heading "Mitigating Actions" being placed on the left side, with the intention of highlighting the approach taken to mitigate the various risks identified. King stated that if these changes were made it would mean talking through the foreign exchange hedging in the same way it was intended to discuss the other mitigating actions.

702 Cargill was also doing its own preparation for the upcoming management presentation. On 24 June 2013, several Cargill executives met with Goldman Sachs in Sydney to formulate some questions to be put. These questions had been the subject of input from the various workstreams. The fact that a number of the formulated questions were asked and answered was not in issue. However, it needs to be noted that a question was prepared in the following terms:

> How does [Joe White] manage malt quality and grades of barley for its customers with such limited storage capacity?[503]

703 On 25 June 2013, Goldman Sachs emailed Merrill Lynch a single page of key questions Cargill had prepared for the upcoming presentation. Merrill Lynch forwarded them

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501 For example, in an email from King concerning Co-Operative Bulk, sent on 21 June 2013 to Merrill Lynch, copied to Mattiske (who did not recall reading it), Lindner, Pappas and others, King directed that a copy of the Management Presentation Memorandum (see par 711 below) was not to be provided before the scheduled meeting, as it would be likely to result in the preparation of "numerous questions which will turn the management presentation into a 3 hr Q&A session which management will be unable [to] control and will therefore not deliver the key messages". King stated the provision of additional customer information in "our view" was still too sensitive, but Glencore would "propose *to allow* management to be more forthcoming in the management presentation" (emphasis added).

502 The email was also sent to Fitzgerald, Mattiske, Lindner, Roelfs, Walt, Pappas, Hughes and Argent, amongst others at Glencore, Merrill Lynch and Mallesons.

503 The Viterra Parties correctly submitted there was no record that this question was actually asked at the Management Presentation. However, nothing really turns on this: see esp par 875 below.

to King, Hughes and Argent. King read them and expressed the view that Hughes and Argent were well prepared for the majority of the questions and topics that had been raised. In addition, a document was prepared for Eden to present on behalf of Cargill at the upcoming management presentation. It identified the Project Hawk team as Eden, Viers, Sagaert, De Samblanx and Jewison. The document also identified Cargill's vision and values. It included the statement that Cargill did the right thing "regardless of the consequences". Cargill's objectives up to 2015 were listed, and included increased scale and portfolio of malt products, as well as being recognised as the global leader in meeting customer needs and providing brewing solutions. It was also stated that an acquisition of the Joe White Business fitted squarely within Cargill's strategy and would create a footprint in the only major malting barley region not in Cargill's portfolio.

704 Le Binh and Engle travelled to Australia together to assist in the preparation for the management presentation. While they both assisted in the preparation and attended the presentation, Le Binh did not visit any plants. However, while he was in Australia, he met with Goldman Sachs to discuss the analysis and preliminary valuations Goldman Sachs had prepared to that time. Further, Engle stayed in Australia for about a week and attended workshops with Joe White employees with the intention of understanding how Joe White could fit within Cargill's business. Also during this period, Le Binh and Engle both reviewed documents in the Data Room of a financial or commercial nature, rather than technical or operational documents.

705 Further, both of them assisted Eden, Viers, Jewison and Sagaert in preparing slides and a pre-read summary for an upcoming Cargill, Inc board meeting due to be held on 9 July 2013. Without going into too much detail, the slides included figures concerning sales volumes, capacity, malt margin and Unadjusted Earnings that were taken directly from the Information Memorandum. It also spoke in terms of Joe White having well-maintained and strategically-positioned assets as well as a good financial track record.

706 While these events were happening in Australia, others within Cargill were also

considering the desirability of purchasing Joe White. The Cargill leadership team reviewed the "Cargill Corporate Game Board" from time to time in order to assess and grade potential acquisitions. By way of background, in November 2012 an independent board member of the Cargill board requested a list of "must have acquisitions that would be damaging if [Cargill] missed them or if competition bought them".

707 On 26 June 2013, an annual operating review was conducted by a meeting of the leadership team. During that meeting, the possible acquisition of Joe White was considered. The Cargill leadership team downgraded the status of this acquisition from "pivotal" to "desirable". This reclassification was reported to the board.[504]

P. The Management Presentation and related events

708 As anticipated, the Joe White management presentation took place on 26 June 2013 and lasted about 4½ hours ("the Management Presentation"). At the outset, Eden gave a presentation on behalf of Cargill broadly in the terms of the document that had been prepared.[505]

709 Merrill Lynch attended and, according to Eden, was heavily involved in the presentation of the Joe White Business. The Management Presentation itself was delivered by Hughes and Argent. Argent presented the financial section and Hughes presented the rest.[506] When asked the direct question during cross-examination about the role of Hughes and Argent, King gave evidence that they represented Joe White when giving this presentation. However, King then acknowledged that he had been concerned to ensure the messages conveyed by Hughes in particular at the Management Presentation were messages Glencore wanted to convey to prospective purchasers. He further acknowledged that, in addition to Hughes and Argent having the respective duties as executives of Joe White, Glencore needed them for a further

504 Conway explained during his cross-examination that the downgrade had something to do with the size of the Joe White Business, which was not big enough to have a strategic effect on Cargill or the relevant platform, although it would have been pivotal to the business unit.

505 See par 703 above.

506 "Financials" represented 1 of 7 topics listed in the table of contents.

purpose which was to assist Glencore in the conduct of the sale. King accepted that the tasks and responsibilities of Hughes and Argent in relation to the sale process were tasks uniquely related to Glencore's interests in obtaining the best possible price for the sale of Joe White.

710 A large number of people attended the presentation. These included, from Cargill, Eden, Viers, Engle, Sagaert, De Samblanx, Le Binh, Bram Klaeijsen ("Klaeijsen"),[507] regional director, corporate centre, Jewison and Purser. In addition, 2 executive directors of Goldman Sachs attended.

711 The written presentation was entitled "Joe White Maltings Management Presentation" ("the Management Presentation Memorandum").[508] The first slide was entitled "Legal Disclaimer". As before,[509] "Glencore" was defined as "Glencore and its subsidiaries" and it was expressly stated the document had been prepared by these entities. Again, for reasons already stated,[510] such a definition included the Sellers. The disclaimer set out in that slide was almost identical in terms to the disclaimer included in the Information Memorandum set out above,[511] aside from 2 key differences.

712 *First*, the legal disclaimer contained in the Management Presentation Memorandum set out additional language regarding the presentation itself, for example:

> A Recipient that is considering the Proposed Transaction must make, and will be taken to have made, its own independent investigation and analysis of the information in this document *and the information provided during the presentation of this document*.
>
> (Emphasis added.)

713 The obvious intention of this language was to incorporate the giving of the oral presentation into the legal disclaimer, in addition to the disclaimer's application to the

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507 Klaeijsen was based in Singapore.

508 Like the Information Memorandum, King regarded the Management Presentation Memorandum as marketing material. For further details on the cover page of the Management Presentation Memorandum, see par 2176 below.

509 See pars 457, 475-476 above.

510 See pars 476-482 above.

511 See par 475 above.

document itself.

714 *Secondly*, under the heading "Date of Document", the slide read "[t]he information in this document has been prepared as at *21 June 2013*" (emphasis added). This was in contrast with the legal disclaimer in the Information Memorandum, which gave 1 May 2013 as the date of preparation of the information in that document.[512]

715 The Management Presentation Memorandum consisted of 5 substantive sections, comprising an overview of industry highlights, an overview of the Joe White Business model, capital investment, financials, and growth opportunities. The substance of what was set out in writing was also presented orally.

716 Under "Industry Highlights", it was stated that "Asia is a Key Driver of Global Malt Demand", and "Joe White is uniquely positioned to service the Asian market". The presentation noted that Australian maltsters had been facing significant margin pressure during 2013, because of "a dislocation of Australian and EU malting barley prices" driven by "a large EU crop" but a poor Australian crop. As in the Information Memorandum,[513] with respect to the business model, it was stated:

> Joe White's business model is focused on ensuring customers receive the *highest quality malt* to meet their *exact specifications and requirements*.
>
> (Emphasis added.)

717 Eden gave evidence that these sort of assurances stood out in his mind at the time. He said they were consistent with the general impression he had about the industry reputation of Australian malt, and of Joe White in particular. Eden was very impressed throughout the presentation that Hughes and Argent were so well prepared and ready to answer Cargill's questions.

718 The business model was depicted in diagrammatic form, and prefaced with a statement about Joe White's business model ensuring customers received the highest quality malt to meet their exact specifications and requirements. At the top of the

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512 Consistent with his approach to the Information Memorandum (see par 485 above), Eden's evidence was that he did not read the disclaimer forming part of the Management Presentation Memorandum.

513 See par 504 above.

diagram was "Sales and Marketing", described as a "Top-down approach to understand each customer's unique requirement". Two arrows led diagonally downwards from "Sales and Marketing", making a pyramid shape. The first arrow led to "Procurement", under which was stated "[S]election of and access to high quality barley that best meets customer specifications". The second arrow led to "Production", described as "[B]est-in-class manufacturing facilities producing consistently high quality malt". In the centre of this pyramid was "Quality & Technical", which stated "[Q]uality and technical capabilities underpin each operating function".

719 During his cross-examination, Eden was taken to the business model diagram. When he was asked what he made of the statement under "Procurement", Eden said it impressed him. It was then put to Eden that he knew the statement was not correct. He rejected this whilst acknowledging he knew Viterra did the procurement for Joe White. Under "Production", Eden accepted the "best-in-class manufacturing facilities" needed to be looked at and checked. As to the statement under "Sales and Marketing" concerning the top-down approach, Eden's evidence was that it was also a very impressive statement but was harder to verify. Eden said Cargill's position was that it would attempt to verify it by asking questions, but rejected the suggestion that if it could not be verified the statement could not be relied upon. Eden said that during the Due Diligence Cargill attempted to understand the individual components of the business model and how they collectively came together. He explained that Cargill wanted to understand how Joe White was transferring the technical requirements from the customer back down through the barley supply chain and the genetic work Joe White was doing. His evidence was that procurement, sales and marketing, and quality and technical were connected. He said there was an interplay that Cargill wanted to better understand.

720 Subsequent slides gave an overview of customer segmentation, contract types (between long term agreements and "spot sales"), and pricing and contracting. A slide entitled "Sales and Marketing – Pricing and Contracting" set out 6 potential challenges

that could arise during Joe White's price and contract negotiations with customers, and the strategies Joe White had in place to mitigate them. Relevantly, the slide stated the following:

> **Barley Prices**
>
> **Barley prices impacted by Australian weather**
>
> - ✓ Diversified access to different growing regions across Australia
> - ✓ [Long term agreements] Cost Plus arrangements
>
> **…**
>
> **Volume**
>
> **Ability to service volume requirements with uncontracted capacity**
>
> - ✓ Broad manufacturing footprint
> - ✓ Flexibility in production planning
>
> **Customer Relationship**
>
> **Ability to retain customers**
>
> - ✓ Established, long-term relationships
> - ✓ Brand recognition, high quality product
> - ✓ Focused customer relationship management teams
>
> **Product Requirements**
>
> **Increasingly specialised malt demands from customers**
>
> - ✓ Access to all key Australian varieties
> - ✓ Unrivalled seed [Research and Development] program
> - ✓ Grain support and process control

721 Further slides set out select key accounts, possible barley sourcing and procurement models following acquisition, and an overview of Joe White's production facilities in Perth, Adelaide,[514] Minto, Tamworth, Devonport and Delacombe.

722 The twentieth slide of the Management Presentation Memorandum was entitled "Competitive Advantage Through Specialty Malts and R&D". This slide listed several specialty malt products. It identified some opportunities, suggesting increasing global brewer demand. In this context, it was stated that Joe White had the ability to offer

514 At the 2 sites, Port Adelaide and Cavan.

specialty malts and that Joe White had a competitive advantage over other maltsters.

723 Under the heading "Research and Development Capabilities" it was stated:

- Active program in place with University of Adelaide
- Close collaboration with customers, barley breeders and researchers to enhance R&D effort
- Product differentiation and advanced market competitiveness
  - Customers provided with exclusive rights to premium barley varieties

…

724 De Samblanx gave evidence that Hughes explained the good relationship with the University of Adelaide and they were in the process of developing new barley varieties that would modify more easily. De Samblanx said he was left with the impression that Joe White was more advanced than Cargill and the rest of the world.[515]

725 On this topic, Eden said he did not know which barley varieties were public and which were proprietary,[516] but he understood that Joe White made particular varieties available for particular customers, promising more efficient production processes. Eden said he was impressed with the long-time collaboration between Joe White and the University of Adelaide on malting barley genetic development, as it was much more than he had seen in other parts of the world.

726 The next several slides addressed capital investment. A slide entitled "Capital Expenditure" repeated the account of Joe White having invested approximately $200 million across its whole manufacturing footprint since 2006, coupled with the forecast of low future capital needs in the short to medium-term.

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515 The Viterra Parties submitted it was unreasonable and unlikely for any attendee, including De Samblanx, to believe that Joe White had proprietary barley varieties which assisted its processing performance. However, neither De Samblanx, nor any other witness who attended the Management Presentation, gave evidence to this effect. The position was subsequently clarified in the agreed summary of the questions and answers on 26 June 2013, where it was expressly recorded that Joe White did not have proprietary barley varieties. De Samblanx was not taken to this record when giving his evidence. Whatever be the position, it did not detract from De Samblanx's evidence about his impression.

516 See further fn 520 below

727 A slide entitled "Key Technologies" read:

> Reputation for production uniformity, consistency and *ability to meet exact specifications* built upon continuous commitment to improve the malting process and enhance plant quality through technological investment.
>
> (Emphasis added.)

728 The Management Presentation Memorandum moved next to cover Joe White's financial situation. This section, which Argent presented, contained a financial summary, on a "[pro forma] normalised basis", details of the normalisation adjustments for the 2011 and 2012 financial years, and pro forma normalised forecasts for the 2013 and 2014 to 2016 financial years. It also referred to Unadjusted Earnings performance "Through-The-Cycle" from 2005 to 2016, the Accumulation and Position Margin, gross margin, a costs analysis, issues concerning a carbon tax, details of head office costs, as well as net working capital and the ability of the Joe White Business to generate cash, and finally risk management issues. As part of the financial summary it was stated that Joe White had a track record of strong and stable earnings. The details for sales volumes, malt margin, gross margin and Unadjusted Earnings, actuals and forecasts were set out which largely reflected what had been stated in the Information Memorandum. Further, the pro forma normalisation adjustments for the 2011 and 2012 financial years were broadly explained.

729 Next in the financials section was a slide entitled "Budgeting Accuracy", which set out Joe White's malt margin, gross margin and Unadjusted Earnings before sale of assets. The malt margin was said to have been improved in the first half of the 2013 financial year by delay of bulk shipments. It was predicted that there would be a malt margin recovery in the 2014 financial year, driven by an increase in malt margins to $221 per tonne.[517]

730 Several slides were dedicated to setting out the Accumulation and Position Margin. The Management Presentation Memorandum stated that "additional margin can be achieved by Joe White through barley accumulation and sourcing flexibility and

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517 Noting that 59 percent of sales volume sold for the 2014 financial year was "sold at a normalised malt margin of $207/t".

optimisation", which Joe White "conservatively estimated" at $15 per tonne over the course of a year. This margin earned by "Viterra/Glencore" was said to be underpinned by a number of features (including blending and arbitrage), which would be available for Joe White in the future, including blending and barley origin.

731 It was stated that Joe White had a "[t]ransformation project in place to drive efficiency gains", said to be part of a disciplined approach to cost reduction. Specific details of the Malt Cost Reduction Transformation Project were not provided. King gave evidence that it was available for anyone who said they wanted to read it. King's evidence on this point was addressed in cross-examination by Hughes' senior counsel, but no document was shown to King as this occurred. It is clear King's answer was made on the assumption that what was stated in the Management Presentation Memorandum was correct, rather than from his actual knowledge. Earlier in his evidence he said he had no recollection of being told anything about a transformation project.[518]

732 After surveying the potential impact of either the abolition or retention of the carbon tax, head office costs and net working capital and cash conversion, the Management Presentation Memorandum moved to risk management:

> Joe White maintains a disciplined approach to minimising operational, business and financial risks *whilst securing quality malting barley* to allow full plant operation over the medium term. Joe White's approach to risk management is encapsulated within its Risk Management Policy.
>
> (Emphasis added.)

733 The slide identified as an operational risk the ability to source barley of the correct quality, variety and specification. Joe White's "Risk Management Discipline" was said to involve barley sampling on delivery and in storage, "[s]elf insurance", and "[c]ontract terms".

734 Finally, the last substantive section of the Management Presentation Memorandum identified organic and inorganic growth opportunities. Joe White was described as

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518 Cf Mattiske's evidence to the effect that all transformation projects were completed or dormant, as well as Stewart's evidence: see par 147 above.

already pursuing inorganic growth opportunities by enhancing its customer service offering, penetrating new markets, and delivering "margin benefits".

735 Questions were asked, some in line with those forwarded on 25 June 2013.[519] Very little oral evidence was led on the actual questions asked, perhaps explicable by the formal summary that became the agreed record of the questions and answers (which ultimately became annexure D to the Acquisition Agreement). Further, the following day, Engle gave a brief summary of the meeting, attaching the Management Presentation Memorandum and a summary by Goldman Sachs which summarised "information provided by [Hughes] and [Argent]".[520] In his covering email, Engle observed that "everyone" had noted that the contents of the Data Room had been sparse up to that time. He suggested the primary method of further understanding things would be through the Q&A Process. Engle also reminded the large number of recipients of his email[521] that the primary goals of the Due Diligence were to assess potential risks to Cargill, to make sure the "core team" was aware of any gaps in compliance for any given area, and to raise important issues or opportunities that would have directly impacted Cargill's views on the valuation of the Joe White Business.

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519 See pars 702-703 above.

520 Goldman Sachs' summary, about which there was no dispute as to accuracy, included that: there had been 6 owners in 10 years, where malt had been the periphery business, with this transaction being the first time malt had been the focus for the potential purchaser; until 2000 or so quality was the main issue but after that the market changed and cost reduction became more important; Joe White's sales plan and review identified best value customers and to ensure quality service, whereas value buyers received less service; in relation to proprietary varieties, the University of Adelaide and Joe White conducted public breeding, but this was dissolved and Joe White developed varieties - when Viterra purchased Joe White the research and development was centralised and sold, and accordingly a question arose over the commercialisation rights for the "Admiral" variety which was a niche variety - the expectation was that "Admiral" would be a public variety and not proprietary and the reference in the Information Memorandum was incorrect; Joe White's ability to service select key accounts was limited "again by Viterra transaction" and Joe White could not at that time obtain the desired varieties out of New South Wales; Joe White's long-term contracts with Lion Nathan were usually for 5 to 10 years, with the latest renewal coming up in 2014/2015, and there was an expectation that the margin would be maintained but with some difficulty; Joe White's relationship with SAB Miller and "BBM" was strained with the pricing and margin currently over the odds and up for renewal; Joe White operated on a turnover basis - especially on the "barley side" because of historical statutory government bodies providing storage and, therefore, there was limited storage at the plants with most "facilities 1 x (cf Canada 5 or 6 x)"; and on malt Joe White must manage distribution to customers - Joe White met quality and there were few complaints so the system worked.

521 These included Van Lierde, Koenig, De Samblanx, Eden, Hawthorne, Le Binh, Purser, Viers, Jewison, Bowe and many more.

736 That said, Eden gave evidence of questions being directed towards Joe White's key customers and contracts during the Management Presentation. Under cross-examination, he said that he believed a question was asked as to how Joe White managed malt quality and grades of barley for its customers with such limited storage capacity. He answered affirmatively when asked whether he was satisfied with the answer given to this question. Whilst Eden accepted the malt storage capacity looked very, very tight, he said at that time Cargill still did not know enough and still had questions. He also pointed out it was not his area of expertise, and it was De Samblanx who would "have an idea".

737 Viers said he asked most of the questions, however he was unable to recall much about the detail. His overall impression from the Management Presentation was very positive. De Samblanx recalled asking a question about low silo capacity. He said the response from Hughes was that Joe White was managing its customers well and that there were no real quality issues. De Samblanx said he captured this issue as a point of attention for the upcoming site visits.

738 Many of the questions and answers recorded in the Acquisition Agreement were relatively perfunctory and not material to the issues at hand. The objective of the list in annexure D was to summarise the key themes and concepts that were articulated "by Joe White Management" in response to questions raised by Cargill and its advisers during the Management Presentation.[522]

739 A number of questions were asked about how sales were achieved. Cargill was told that all Joe White's sales people were based in Adelaide, with the consolidated team consisting of Hughes, Wicks, a marketing manager, 2 contract administrators and a market analyst. It was stated that this team was responsible for the co-ordination of the sales plan, delivery into the market and volume quality. In relation to competing with Chinese maltsters, Cargill was told Joe White did not match them on price. After identifying quality and supply issues that were said to be problems Chinese maltsters

522 The list identified the page number of the Management Presentation Memorandum to which each question and answer was referable.

experienced, Cargill was told that Joe White's customers recognised Joe White's quality and security of supply and were willing to pay a premium for it.

740 As to other material questions, Cargill enquired as to why Joe White's exports were at the level they were when Japan was the largest importer of malt in Asia. Various reasons were given, but there was no reference to the use of gibberellic acid. A number of questions were asked about the Accumulation and Position Margin, the detail of which is not necessary to record beyond the general observation that the questions were directed to Cargill better understanding that margin. On Cargill enquiring where barley could be stored, the answers were directed towards the position in Western Australia.[523] On the issue of malt storage, queries were raised concerning the facilities at Port Adelaide and Cavan in South Australia. In addition to informing Cargill that the facilities were owned by Joe White, it was stated that further storage was available at a Viterra facility in Port Adelaide. There was no suggestion that the storage was inadequate.

741 Upon Cargill enquiring about Joe White customer data and contracts coming up for renewal, it was said this would be provided in the Data Room. Finally, as to the question of whether or not Joe White had experienced any audit rejections, it was stated that Joe White had a very high audit compliance and that there had been no rejections to date.

742 Although not recorded in annexure D, Eden gave evidence that Hughes raised the topic of barley varieties. Eden recalled Hughes stating in essence that certain barley varieties had been developed to process and modify faster as part of the "in-malt processing". This statement was made in the context of Cargill having been informed that Joe White had access to all key Australian varieties and an unrivalled seed research and development program.[524]

743 Engle gave evidence that he appreciated that Cargill was required to conduct its own independent analysis, especially as it related to his area around the financial valuation

523 The reason for this was not explored in evidence.
524 See par 720 above.

model, to independently come up with the Joe White Business forecasts that would eventually lead to a valuation, and to factor in any key risks.[525]

744 The site visits proceeded between 26 and 28 June 2013. Each visit lasted about 2 hours.[526] Cargill, Inc attendees at the Sydney (Minto) site were Eden, Viers, Klaeijsen, Sagaert, Jewison, and De Samblanx. For the site visits at Cavan, Port Adelaide, and Perth, only Eden, De Samblanx and Kim Woodburn ("Woodburn"),[527] general plant operations manager of grain and oilseeds supply chain Australia, attended on Cargill, Inc's behalf.

745 De Samblanx gave evidence that the purpose of the visits from his perspective was to see the plants and assess their quality. He wanted to be able to determine whether the plants were in line with what he had learnt from the Data Room. Although he had been told they were not permitted to ask questions about Joe White's customers, consumables performance or processing conditions, he understood that he would be permitted to ask questions about the design of the equipment and about the people who worked at the plants, including how many. De Samblanx anticipated that by seeing each plant, he would get an idea of the production process, the length of the process and how the kilning was working.

746 Minto was the first plant visited. De Samblanx decided to ask a question early on to see whether he would get a response. He asked the plant manager about power consumption. The plant manager asked Merrill Lynch if he was able to answer. Permission was not forthcoming. Rather, De Samblanx was informed by Merrill Lynch that the question could be asked through the Data Room. De Samblanx formed

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525 Engle gave evidence of the manner in which Cargill conducted its own independent analysis, including by: (1) building Cargill's own projection around what barley earnings would be; (2) validating what Cargill thought would happen in relation to margins; (3) assessing what Cargill expected from the Australian beer market, including looking at the production capabilities of the entire ecosystem of malting assets to determine whether new capacity would be required in the future; (4) analysing Cargill's financial model, including forecasts for the Joe White Business; (5) factoring in any key risks; (6) forecasting Unadjusted Earnings for financial years from 2014 onwards, which were not taken directly from the Information Memorandum, but were based on certain assumptions provided by the Sellers; and (7) creating Cargill's own valuation of the Joe White Business.

526 The schedule for the site visits allocated only 2 hours per visit, De Samblanx said in this timeframe they had to keep moving fairly quickly to see everything.

527 De Samblanx gave evidence that Woodburn possessed technical expertise in plant operations, but did not have a background in malt.

the view that Merrill Lynch was serious about the conditions of the site visits and that his questions were unlikely to be answered.

747 While De Samblanx walked through each of the plants, he made notes. Later, on the same day of each visit, he entered those notes into the spreadsheet he had created in draft before arriving in Australia.

748 A Viterra document distributed to plant employees in advance of the site visits set out a "Site Tour Protocol", specifying that questions "should be focused *only* on the technical aspects of the plant" (emphasis in original) and listing the following "Prohibited Conduct":

> - No communication permitted with anyone outside of the designated guide/plant manager/[Merrill Lynch] chaperone
> - No photography or recording devices
> - No questions that are not related to technical aspects of the specific plant and including, but not limited to the following:
>   - Other potential buyers that have visited the site
>   - Number of times site visits have been conducted
>   - Finance/Costs related questions (eg [Unadjusted Earnings] per tonne, manufacturing cost per tonne)
>   - Specific customers of the plant
>   - Transaction process-related questions
>
> **If you are unsure of any question or conduct of a particular bidder please revert to the [Merrill Lynch] chaperone. To the extent you require clarification on any of the items above please contact Saurabh Thaper …**
>
> (Emphasis in original.)

749 Eden participated in all of the site visits. On each occasion, representatives of Merrill Lynch were present. As arranged, they directed the protocol for each of the visits.

750 Eden gave evidence that while visiting a plant in Adelaide, he and others were looking at control screens in the processing room.[528] A question was asked about for whom the lot was being made. Merrill Lynch directed that the question not be answered.

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528 Some information was captured from what was observed in control rooms: see pars 788-789 below.

Further, there were numerous occasions when questions were asked about customers and recipes for malt. Again, Merrill Lynch instructed those in attendance that the questions were not to be answered. In short, the site visits did not give Cargill the opportunity to speak about customer details or customer specifications and how they were met.

751 Eden gave evidence that after the Management Presentation and the site visits, he remained impressed with Joe White's professionalism. He believed that Joe White was achieving well beyond what Cargill was capable of at the time. He thought Joe White had a very strong technical leadership team who really understood the science of barley and malting. He gave evidence that he was in awe of what Joe White was doing and was excited about what it might mean in terms of reverse synergies that could be introduced to Cargill.[529] He concluded that Joe White was doing something that made its varieties "hot", which he said was a term used in the industry to describe barley that modifies quickly and has a high degree of enzymatic activity. He concluded that this had been achieved as a result of the research and development that had been undertaken.

752 Viers attended the first site visit at Minto. He gave evidence that he did not have the technical knowledge or expertise to assess whether the plant was efficient. The impression he gained was that it was sanitary and well-kept. He was impressed by the computer system being operated at the plant. Viers left Australia on the evening of 26 June 2013. He was provided with regular updates by others as to the remaining site visits.

753 Viers considered the primary method of Cargill furthering its understanding was through the Q&A Process. Viers gave evidence that Cargill submitted a significant number of questions, but Glencore was very slow to answer and in some cases he had the impression that the responses were defective.

754 While the site visits were occurring, on 27 June 2013 Le Binh sent an email to

529 This matter was reflected in contemporaneous communications: see pars 754, #3; 755(3) below.

De Samblanx, copied to Eden and others, which was concerned with the Due Diligence with respect to operational matters and synergies. That email referred to a discussion earlier that day concerning synergies and invited De Samblanx to express his opinion on a number of points, as follows:

> #1 Additional volumes by expanding capacity without capital.
>
> #2 Decrease in gas, power and water costs (using) operational benchmarks.
>
> #3 Decrease in production costs by applying [Joe White]'s expertise to Cargill's operations.
>
> #4 Decrease in production costs by applying Cargill's expertise to [Joe White]'s operations.
>
> #5 Reduction in # of plant employees.

Le Binh also asked at which plant it would be possible to decrease production costs and to what extent.

755 Later on 27 June 2013, Eden provided a response to Le Binh's email, which was also sent to De Samblanx and copied to others. Eden said it was probably too early to comment but the general feeling was that the assets of Joe White were in good shape. As to the questions raised by Le Binh, Eden set out his "[q]uick thoughts" as follows:

> 1. We think there is *limited/if any to expand (sic) capacity without capital*.
>
> 2. Yes on gas we think there is opportunity – with some minor investments. Without investments [De Samblanx] thinks $3.00/mt. On power we are a bit confused. There is opportunity to better use frequency drives but *we would spend more money on cooling to be compliant with customer requirements*.
>
> 3. It might be related to barley varieties, but [Joe White is] only on 5 days steeping/germination where we are at 6/7. They definitely have solid processing expertise and utilise just in time better than us. We *have to be honest we are questioning how they can do this given ageing/process requirements*.
>
> 4. Re: reducing employees ––– There (sic) structure is very much similar to our European approach. They share plant manager in Adelaide and collaborate well and use one shift. They are using Viterra origin weights which we would have to staff up if we wanted to use our own weights. We don't see a major opportunity on processing/plant people. We still do not know the overall structure. For our purposes of money, I think we *should be thinking of $1.0 million in people synergies*. This does not address moving the headquarters.

(Emphasis added.)

The email was signed off "Doug & Steven", being Eden and De Samblanx. Both had input into the contents.

756 The enquiries of Le Binh with respect to capacity were directly related to the question of synergies. In short, if synergies were able to potentially achieve additional volumes, it was necessary to have extra storage capacity within Joe White in order for the additional volumes to be realised.

757 When Engle read this email exchange, he considered the views expressed by Eden and De Samblanx to be preliminary. In summary, Engle said that these concerns were raised at that point in time, but after then they were no longer raised. Engle understood this to mean that Eden and De Samblanx had received satisfactory answers to their queries. Engle said he did not have any expertise in malting. He gave evidence that both Eden and De Samblanx were experienced and that he trusted their judgment. Sagaert gave evidence that Eden and De Samblanx were alerting others there was a risk that Joe White was achieving a shorter germination and steeping period because it was using chemical additives such as gibberellic acid. She said it was an important matter that should have been investigated, but she did not investigate it herself.

758 Also on 27 June 2013, the final version of the pre-read summary for the board was circulated. The covering email stated the summary would be provided to the board the same day.

759 The summary stated that the base case standalone valuation of Joe White was $254 million (using a discount rate of 10 percent[530] and assuming no growth in the perpetuity terminal value calculation), and the valuation with "very limited preliminary net synergies" was $296 million. The summary stated that Cargill had bid above this because it believed there was a possibility to enhance the valuation by

530 The general policy at Cargill for business units with certain characteristics was that a recommended discount rate be applied. In 2013 for investments in Australia, the recommended discount rate was 10 percent.

learning more in Phase 2, especially with respect to available synergies.

760 The summary gave some background with respect to Joe White, which largely reflected what was contained in the Information Memorandum. The poor performance for the 2013 financial year was referred to. It was said it had been explained, and that the drop in performance and the potential for a rebound would be a key focus of the Due Diligence. As to the perceived strategic fit, the following was stated:

> The acquisition of Joe White represents an *opportunity for Cargill to extend its global platform*, by: (i) creating a regional footprint in the only major malting barley region not in Cargill's portfolio, (ii) gaining the ability to serve the highest growth regions, including Southeast Asia, for both barley and malt from a stable and mature country (57% of Cargill's asset portfolio would serve emerging markets), and (iii) *capturing high margins* from Australia which trails only Argentina globally from an attractive margin perspective.
>
> In addition, the acquisition is aligned with Cargill's vision of being a global commercial maltster. Malt customers are mainly large multinational brewers operating globally. By having a *high quality production* capability in Australia, Cargill would strengthen its relevance to global brewers as they are looking to deal with maltsters able to supply globally and guarantee supply assurance.
>
> (Emphasis added.)

761 The summary referred to some "Critical Assumptions", which had not been verified. It was stated these would be verified in Phase 2. It was noted that the assumptions relied on Joe White's management projections for the 2014 to 2016 financial years and corresponding trends from 2017 onwards. These assumptions included growth in sales volume to reach 96.5 percent utilisation by the 2015 financial year, and then remain flat.

762 The summary expressed various preliminary views with respect to synergies and dis-synergies. It was noted that, at that stage, there was an inability to accurately comment on the value of synergies.

763 There were 4 matters identified as the top risks. These were: increased susceptibility in Australia to crop failure because of "weather risk"; significant downturn in the Asia-Pacific economy; potential changes in government policy, including tax

legislation; and appreciation of the Australian dollar.

764 The summary stated it was expected a level of due diligence customary for a transaction of the nature and scale of Joe White would be undertaken. Such a due diligence was foreshadowed to include the operations and business of Joe White, as well as Joe White's financial, tax, legal, human resources, information technology, guiding principles, environment, health and safety matters. Further, it was expressly stated that there was an expectation Cargill would have access to all material information related to Joe White and to be able to submit questions and receive answers from Glencore.

765 At around the same time that this summary was provided, a more formal board paper was also provided to the directors. It stated that the paper had been prepared by Eden, Viers, Sagaert, Jewison, Engle and Le Binh. The contents of this paper were very similar to what had been presented to the Cargill leadership team. The paper suggested that strategic buyers of Joe White were likely to bid between $300 million and $450 million.

766 While Cargill was conducting its investigations and analyses, Glencore was also considering its position. On 28 June 2013, Mahoney emailed the chief executive officer, Ivan Glasenberg ("Glasenberg") and Walt to inform them that Cargill and Co-Operative Bulk were the 2 highest bidders for Phase 1. In response to a query from Glasenberg about whether "we" could push the bidders higher in Phase 2, Mahoney stated he expected to be able to do so, to $380 million plus. Walt then emailed Glasenberg and Mahoney, telling Glasenberg that "[w]e are obviously pushing as much as we can". After referring to the industry currently going through tough times, he noted that the Unadjusted Earnings had been normalised to get from $25 million to $35 million and that Glencore was "steering investors to buy in" at a $40 million-plus level. Walt stated that a sale price at $380 million would be a very good outcome. Glasenberg responded, stating that companies did not buy assets based on 1 or 2 years' earnings, and that many did an analysis of net present value to take into account future years. Glasenberg directed that "we" should be creating massive tension and

pushing sellers to the US$400 million mark. In relation to Cargill, Glasenberg said he did not understand Walt's statement that Cargill could not stretch its bid. He suggested the fact that they were private with a large balance sheet did not result in an inability to do so. Glasenberg stated a massive tension should be created between Cargill and Co-Operative Bulk. Emphatically, Glasenberg rejected Walt's suggestion that $380 million would be a good outcome. He asked why a price higher than US$380 million[531] could not be achieved, suggesting Walt had already miscalculated what would be a good outcome in relation to another sale occurring around that time. In the final email on this issue, sent by Walt to Glasenberg and copied to Mahoney and King, Walt stated that they had "lined up a ton of arguments and [were] pushing as hard as [they could]". He also stated they had maximised value through competitive tension. He said they were actively engaged, and managed and drove the process "way beyond a typical sale process given the contracting margins and flat to negative industry outlook". Walt informed Glasenberg that "we" were not purely relying on "the banks at all …".

767 During his cross-examination, King was taken to this email chain. In response to a question as to whether he was aware Glasenberg was taking a direct interest in the sale of Joe White, King stated that Glasenberg took a cursory interest in everything that went on at "the company". King referred to the publicly listed company and said that Glasenberg owned 8 percent of it. He then stated that not only was Glasenberg the chief executive officer, but he was also an incredibly important shareholder.

768 On 1 July 2013, Engle emailed a large number of Cargill employees setting out how it was envisioned the various due diligence teams would process through the additional documents provided in the Data Room. With respect to accounts, (within the accounting, financial valuation and synergies workstream), Jewison was specified as the primary reader and Le Binh as the secondary reader. In relation to production facilities (within the commercial, operations, human resources, information technology, and environment health and safety workstream), De Samblanx was listed

531 Although Walt appeared to be referring to Australian dollars in his earlier email, it appeared that Glasenberg took the amount to be referring to United States dollars.

as the primary reader, with the secondary reader yet to be determined.

769 Engle's email also attached an overview of the workstreams. This attachment identified the core deal team. Relevantly, Van Lierde was the platform leader; Hawthorne was the strategy and business development group leader; Eden was the malt business unit president; Viers was the malt business unit commercial lead; Jewison was the malt business unit controller; Sagaert was a malt business unit European representative; De Samblanx was also a malt business unit European representative; and Engle was the strategy and business development group lead, with 3 other persons listed as being part of the strategy and business development group including Le Binh and Bowe. Neither Hermus nor Christianson were listed as being part of the core deal team.

770 The attachment also identified members of each key Cargill workstream. With respect to commercial operations, in addition to Viers, Sagaert, De Samblanx and others, Christianson was to be responsible for "supply chain" and Hermus was to be responsible for "quality".

771 After attending the Joe White plants, De Samblanx prepared a summary of site visits in early July 2013. On 2 July 2013, De Samblanx emailed an excel spreadsheet ("the Operations Spreadsheet") to Eden, Le Binh, Sagaert, Viers, Jewison, Engle and others. In that email, De Samblanx said that the Operations Spreadsheet probably did not capture all that was seen at the Joe White plants. Otherwise, the email gave a very general overview of the contents of the spreadsheet. The Operations Spreadsheet contained "tabs" dedicated to the Joe White plants at Minto, Cavan, Port Adelaide, Perth and Tamworth, as well as tabs entitled "RECAP-&-opportunities", "consumables", "JWplantcosts", "CARGILLplantcosts", "PlantsOverview", "KIMWOODBURN" and "addresses".

772 In the first sheet entitled "RECAP-&-opportunities" (which De Samblanx's email said reflected the main conclusions and areas of opportunities), and under the heading "Executive Summary", De Samblanx recorded that Joe White's plants were generally

"very well maintained, clean and properly managed". He also compared the newer, state-of-the-art plants of Minto and Perth (which he said had capabilities to be very efficient), with the older plants of Cavan, Port Adelaide and Tamworth (which he considered could not be very efficient on heating). De Samblanx continued by observing that, with its 7 plants and 11 production lines, Joe White did very well on full-time employees at the plants. However, highlighted in red,[532] De Samblanx noted:

> The limited storage capacity for malt in combination with the local "non independant" (sic) laboratories is the biggest concern related to integrity (COA).[533]
>
> If [Joe White] would not follow the COA rules as Cargill does, additional storage costs are to be expected.

773 De Samblanx gave evidence that, at the time he prepared the Operations Spreadsheet,[534] he had doubts about the integrity of Joe White's Certificates of Analysis and about how they were issued. Before this time, he had been made aware of a Cargill malthouse in Belgium producing malt in 2001 where an employee had wrongfully adjusted results to record them as being within specification. He was also aware of Eden's previous experience in the United States.[535] But at this stage De Samblanx did not know what approach Joe White took to analysis and reporting and did not know what to expect.

774 As to the first paragraph quoted, Eden gave evidence that he remembered it as a broader topic rather than a specific topic. In relation to the second paragraph, Eden understood it to be a reference to the broader topic of segregation and how many there were going to be on the malt. His evidence was that more segregation required more storage and that Cargill's theoretical blend approach could require many segregations to be made.

775 Also in relation to the second paragraph, at the time of giving his evidence Engle

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532 Eden understood the matters in red were highlighted to catch the attention of those higher up, including him, because they were important.

533 COA being a reference to Certificate of Analysis.

534 There were a number of iterations over a number of days.

535 See par 1091 below.

understood it to mean that if Joe White did not follow the same Certificate of Analysis rules as Cargill, then additional storage costs were to be expected. However, Engle was unsure whether he read this document and further stated that he only subsequently learned what "COA" meant.[536] Accordingly, it is unlikely that he formed such an understanding in July 2013.

776 Under the heading "Objective" and next to a column entitled "Central laboratory", De Samblanx wrote in red and bold text:

> ensure there is no conflict of interest between plant and QC[537]
>
> ensure [Certificate of Analysis] is reflecting reality
>
> ensure high level of quality of analysis
>
> reduce outside analysis like PYF[538] and gushing.[539]

777 De Samblanx gave evidence that these notes also related to concerns he had at the time about Joe White's operations. At Cargill, there was a clear segregation between operations and analysis, with the effect that results produced by the central laboratory could not be the subject of any influence from personnel in operations. The reference to "conflict of interest between plant and [quality control]" related to a concern that the same persons were involved at Joe White in laboratory operations and plant operations. De Samblanx had observed on the site visits that Joe White had laboratories at Perth, Tamworth, Minto and Port Adelaide, as well as a laboratory at the head office in Adelaide. De Samblanx was unclear as to the proportion of samples that were analysed at local laboratories. He held the view that, to the extent that analyses were conducted where plant management were physically present and there was not a clear segregation, there was a risk that plant staff could be exerting influence on laboratory staff to produce results within specification.

778 Eden said he understood the issue referred to in the preceding paragraph had been

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536 In the worksheet "Certificate of Analysis" did not appear at all, and only the acronym "COA" was used.
537 QC stands for Quality Control.
538 PYF stands for premature yeast flocculation.
539 Gushing is an uncontrolled and sudden escape of foam and beer when opening a beer bottle.

printed in red because De Samblanx was identifying it as a problem.

779 As still part of the executive summary, and under the heading "Process", the following was stated:

> All the plants are steeping < 24 [hours] which is thanks to the Australian barley and gives an energy saving vs Cargill Malt.
>
> Germination time is 4 days equal to some of Cargill Malt plans (sic) (Cargill applies 5 days in 6 out of the 11 plants).
>
> Applying the requested 5 days for [Heineken] would mean loss of capacity of 20%. This would happen in Perth.
>
> In general we have seen high temperatures in steeping and germination. This can compensate the short process time but is not in line with processing parameters of global customers like Heineken.
>
> In no plant we have seen kilning programs that guarantee 2 á 3 hours on top of the kilning bed, which again is a requirement of several global customers.
>
> Applying strictly processing conditions for global customers as we know them would imply higher energy usage.

The last of these points was in red and bold text.

780 With respect to a 4 day germination period, De Samblanx's evidence was that he was not really surprised by it. He believed the shorter period could have been related to the growing and harvesting conditions of the barley. He understood Australia generally had healthier weather conditions during the harvesting period when compared to the northern hemisphere. That said, De Samblanx was aware of Heineken's requirement for 5 day germination for its "A Malt". Accordingly, at that time he expected a loss of capacity of 20 percent at the Perth plant if the 5 day requirement was applied.

781 Viers' evidence was that he was concerned about the possible practices engaged in by Joe White after reading De Samblanx's executive summary.

782 Sagaert read the executive summary and understood it to be saying that existing volumes might not be able to be produced if Joe White did not follow the same Certificate of Analysis rules as Cargill, which might have given rise to additional

capital expenditure. She also understood that De Samblanx was concerned as to whether Certificates of Analysis were reflecting the truth. She said she did not conduct any investigations herself with respect to these matters as she was not part of that deal team and her involvement was very low.

783 The second sheet was entitled "consumables". De Samblanx made a comparison between the operations of Joe White and those of Cargill in Europe.[540] Some of the entries were in green and others were in red. De Samblanx gave evidence that green indicated Cargill could improve the performance, and red indicated the factor was "against performance". By way of illustration, De Samblanx said that if the weather was warmer in Australia, then it was anticipated Cargill would be able to save on energy costs. Tellingly, De Samblanx indicated that Joe White had a shorter production process "thanks to barley" when compared with Cargill's "longer process due to barley". This indicated an acceptance of shorter steeping and germination times because of Australian barley varieties. It is unnecessary to set out further detail.[541]

784 The next 3 sheets were concerned with plant costs of Joe White, plant costs of Cargill and an overview of each of the Joe White plants. With respect to the last of these tabs, De Samblanx had prepared this before travelling to Australia. The information he compiled was from the Data Room, together with searches of Google Earth.

785 The next sheet was entitled "Minto". It recorded that the visit to that site only lasted between 1 and 1¼ hours, and was attended by various persons, including Hughes, Argent and the plant manager. De Samblanx's notes recorded it had been in operation from 31 May 2012 and had a capacity of 100,000 tonnes per year.

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540 De Samblanx gave evidence that he formed the view that Joe White and Europe were very similar and that was why he made the comparison.

541 The Viterra Parties submitted it should be inferred from evidence given in chief by De Samblanx concerning his observations of temperatures used by Joe White in the malting process that were not consistent with processing conditions required by customers of Cargill Malt that De Samblanx formed the view that there was a risk that Joe White was not complying with its customers' processing specifications. In light of the evidence in chief given by De Samblanx that this matter did no more than raise a query for him, coupled with the fact that this proposition was not put to De Samblanx during his cross-examination, no such inference will be drawn and no conclusion will be made beyond what was stated in De Samblanx's evidence in chief.

786 The "Cavan" sheet recorded Youil being in attendance for that site inspection. Again, a considerable amount of detail was set out. De Samblanx noted some questions with respect to specifications, including those required by local customers in contrast to export customers. De Samblanx's evidence was that he wanted to keep this in mind when considering the setup of this plant because it mainly serviced local customers about which he had no knowledge. He also made notes with respect to local breweries and export breweries, recording that there were no ageing specifications for local customers and export customers included transit as part of ageing time. This reflected what he had been told, and was relevant to the question of storage.

787 De Samblanx was cross-examined on the contents of the Cavan sheet. When asked why he had made some of the notes, he stated that he recorded all that he could capture. Without descending to the detail, scrutiny of De Samblanx's notes on Cavan demonstrated that he was largely positive about the operations at that plant.

788 The "Port Adelaide" worksheet commenced with a heading "Talk in the office", under which De Samblanx noted he had seen Heineken ring samples[542] and a list of customers' names "with several Asian destinations like [Burma], did see also APB".[543] The worksheet also recorded Youil in attendance during the Port Adelaide inspection. Included in the many rows of information concerning plant and production processes were details arising out of observations from the control room. De Samblanx included the observation that gibberellic acid could be added, noting that the "dosing equipment on screen (were not used when not allowed)". In explaining this note, De Samblanx gave unchallenged evidence that he was told very firmly by Youil that Joe White did not use gibberellic acid when it was not allowed.[544] Further, Eden's

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542 See par 819 below for details of Heineken's ring test.

543 APB was a reference to Asia Pacific Breweries.

544 In the Viterra Parties' closing submissions, it was stated that De Samblanx knew he was in breach of the conditions of the Due Diligence by asking this question of Youil. Leaving aside whether that is correct or not (the issue was not explored in evidence, so it was not raised as to whether or not the question and answer were authorised by Merrill Lynch as part of the process), it did not detract from the fact that Youil made the unequivocal statement that he did. Further, contrary to the Viterra Parties' submissions, the fact that De Samblanx included information on this topic in his later report (see par 819 below) did not indicate that De Samblanx did not rely upon what Youil told him. On the contrary, the fact that De Samblanx did not raise the topic again, despite having every opportunity to do so (see

evidence was that the note about being able to add gibberellic acid was brought to his attention, and that, based on this, he accepted Joe White would only use gibberellic acid when it was allowed.[545]

789 The sheet of the Operations Spreadsheet arising out of the visit to Perth recorded that Trevor Turnbull ("Turnbull"), the general manager for engineering,[546] was in attendance on behalf of Joe White. It was recorded that Perth's sales were mainly to 5 customers, which included Nestlé, San Miguel, Boon Rawd Brewery Co Ltd ("Boon Rawd") and Heineken (row 13). Under the heading "control room", De Samblanx noted there were 4 "impressive screens" and that data was stored for 4 years. It was further noted that Joe White could do Heineken malt "with 2 [hours] 80^0C at the top" to deliver Heineken A Malt. The note continued:

> [F]or [Heineken], they do 5 days germination per 4 batches
>
> Would do [Heineken] only in the winter

De Samblanx gave evidence that Heineken A Malt was a type of malt with particular customer specifications, including in relation to processing. The details recorded were what was told to him when he asked whether Joe White supplied malt to Heineken and under what processing conditions. In De Samblanx's experience, 1 of Heineken's conditions for this malt was a germination time of 5 days. There was no suggestion of any non-compliance with specifications in this regard. On the contrary, a comment from Turnbull recorded by De Samblanx actually referred to a parameter being out of specification, and the issue of compliance was addressed in that context. De Samblanx

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par 865 below) strongly supported the conclusion that he relied on what Youil told him up until around the time things started to unravel in October 2013: see, for example, pars 1102, 1129, 1140, 1145-1146 below.

545 It was submitted by Youil that Cargill should not be able to rely on this evidence because the representation was not pleaded in the Statement of Claim. The evidence (being both the contemporaneous document and the details of the oral statement) was contained in De Samblanx's witness statement, which was filed approximately 7 months before the trial commenced. That evidence was plainly material to the allegations made in the Statement of Claim, and no objection was made to the evidence being led. If Youil's counsel decided not to challenge De Samblanx's oral evidence (which was corroborated by contemporaneous documentary evidence) because the matter was not pleaded (as suggested in Youil's closing submissions, that is a matter for them. However, it provided no basis for this evidence not to be taken into account.

546 Turnbull formed part of the Joe White executive.

gave evidence that he understood from what he was told that if 1 parameter was out of specification, the malt could be taken back to the plant where it may or may not be reused, but De Samblanx understood that the malt would typically be re-blended with other malt to get it into specification.

790 This worksheet concerning Perth also referred to the Minto plant. The note arose out of a conversation between De Samblanx and Turnbull where De Samblanx asked Turnbull how Joe White managed at Minto in light of the limited storage capacity.[547] Turnbull replied that Joe White had 20,000 container units of storage available at port side, which meant that malt would come off the production line at the Minto facility, then be blended, packed and transported to off-site storage pending export. De Samblanx considered that 1 of the issues with this form of storage was that if the laboratory analysis revealed that malt tested out of specification, then the malt would have to be unloaded and transported back to the plant. Further, if malt were to be stored in this way, De Samblanx considered it preferable to analyse the specifications of the malt as soon as possible so as to minimise the risk of recall. When he raised these matters with Turnbull, Turnbull stated that it was possible to re-empty the containers and that the Minto samples received priority at the Joe White central laboratory.

791 Also during this discussion, Turnbull told De Samblanx that he believed that Joe White could bring benefits to Cargill. In this context, he referred to a number of matters including Joe White's research on barley varieties and its work with the local university.

792 Based on these notes concerning Heineken, the Viterra Parties submitted that effectively De Samblanx was told that Joe White's facilities in Perth were limited in the extent to which they could comply with Heineken's specifications. There was no basis to draw such a conclusion. On the contrary, there was nothing to suggest that

547 This conversation took place at the Perth airport following the site visit.

De Samblanx was told of any inability to comply.[548]

793 With respect to the "Tamworth" sheet, De Samblanx recorded that the Joe White representative there had previously worked in Adelaide, but still had a lot to learn, as there were many times where he did not know the answer to questions.

794 The sheet entitled "KIMWOODBURN" reflected some work done by Woodburn. He had been asked to participate in order to look at the plants from a legal perspective, concerning electrical equipment and the like. With respect to synergies with Cargill's grain and oilseeds supply chain in Australia, Woodburn observed that the "main ones" would be procurement of gas and power and the sharing of functional type roles. In other words, the synergies Woodburn was suggesting were those that could be derived from sharing with other parts of Cargill's existing organisation in Australia. De Samblanx agreed with this observation.

795 A final note before continuing, the Operations Spreadsheet demonstrated that, in early July 2013, De Samblanx had a number of significant concerns about the operations of Joe White.

Q. The sale process continues and final bids are made

796 On 1 July 2013, King received an email from Merrill Lynch, copied to Hughes, Argent and others, attaching an analysis of Joe White's sales volumes. The email stated only some of the information would be disclosed to bidders. It was recorded that the weighted malt margin for the top 10 customers was about $200 per tonne, which was lower than the $207 per tonne stated in the Management Presentation Memorandum. However, it was noted that the lower margin did not take into account certain things, including by-product and blending margin.

797 The following day, King responded to Merrill Lynch, copied to Hughes, Argent and others, including by referring to his memory that there was a $6 per tonne and a $3.60 per tonne uplift to "the contracted malt margins based on blending, etc". He

548 Moreover, the suggestion that the notes recorded the position as submitted was not put to De Samblanx.

continued:

> Need to think of a way to explain these so as to bridge the difference between the $200/t and the $207/t otherwise bidders could well further discount their projections.

798 Argent then joined in, by email to Merrill Lynch and King, copied to Hughes and another. He said he had added "the $9.60", which related to $6 for by-products and $3.60 for barley off-grades.

799 King responded to Argent's email saying he wanted to reflect the $9.60 per tonne "somewhere", but was conscious that if bidders cross-checked the customer contracts, "[would] they not notice a disparity between the margin in the contracts and what we have in this file?". King gave evidence that, at the time he wrote this, he did not know the customer contracts included in the black box of the Data Room did not contain any specifications in relation to malt. He believed that if prospective purchasers were not confident about what was being said about the margin, they would discount it.

800 In a further response to the email chain, Argent said it was "easy to strip out" and attached a version in which the $9.60 margin was not included.

801 King was still concerned. He emailed Argent, copied to Hughes and others, stating that if the $9.60 margin was not included, the bidders were likely to discount future malt margins by the differential. In response, Argent said he was happy to support either approach, stating the $6 was "real" as it happened every year, and that the $3.60 was seasonally based.

802 King sent a short email suggesting a footnote could be included, outlining the position and providing the necessary context.

803 Hughes then sent an email on the topic with his own suggestions,[549] and Argent shortly followed with his email suggesting a footnote be included stating that margins

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549 King interpreted Hughes' comments to express a concern that the $3.60 would be seen to be part of the Accumulation and Position Margin of $15 per tonne, which was the margin derived by Viterra, and then Glencore upon acquiring Viterra, for selling the barley. This margin could possibly be available to Joe White if it were to source its own barley directly from farmers (see par 526 above), and was a fact that King had been keen to explore and verify.

did not include revenue associated from the sale of by-products.

804 Merrill Lynch then entered the discussion, agreeing that using a footnote was probably the best way to go. With respect to the $3.60 component of the margin and the fact that it was seasonal, an enquiry was made as to whether this could be referred to as a "potential upside".

805 Argent's response, sent to others including Hughes, was direct. His email also sent on 2 July 2013, stated:

> Difficult to describe the $3.60 given that it refers to the use of off-grades which *isn't a topic generally disclosed to customers*.
>
> I suggest concentrating on the $6.
>
> (Emphasis added.)

806 King gave evidence that when he read this he did not think anything was untoward. He said he had already discussed this issue with Argent, though he could not recall Argent having said previously that the use of off-grades was not disclosed to customers. In short, King's understanding was that the "output" was compliant with customers' malt specifications and, accordingly, this non-disclosure of off-grades did not give rise to any concern. When pressed on this issue, King responded:

> If something was being done as an illegal practice, why on earth would you put it in an email?

That said, King accepted he faced a dilemma, because, in order to reveal the margin, it would involve revealing a practice not known to customers.

807 King then enquired as to whether that would still mean there was a shortfall relative to what had been shown in the Management Presentation Memorandum and the Information Memorandum. Argent responded that it would not.

808 The discourse continued. In a further email, King stated to Argent, copied to Hughes and others, that if $207 per tonne could be achieved "without having to go into details" about the $3.60 margin from off-grades, then King thought it was a workable solution. However, King continued that, given that there was a bidder who had no experience

of the malt business, it might be advisable to include an explanation of the $3.60 margin as well as the $6 margin.

809 Argent responded yet again, noting that the weighted average of the "contracts/margins" that had been disclosed was $200, excluding the impact of either the $6 margin or the $3.60 margin. He suggested that in those circumstances "we get there without having to disclose $3.60".

810 King agreed with Argent's most recent suggestion "with the addition of a suitable footnote". He continued:

> I would have thought it is preferable to leave the note slightly open in terms of the actual amount we have assigned [to] the sale of by-products so that they can follow up for a more specific answer via the Q&A and we could then share details with them of the $3.6/t as well. This would also mean that we could share the same file in due course with Cargill as I know this is something they are keen to get visibility of.

811 Argent accepted King's suggestion. Argent further suggested that a footnote be included with respect to values being for a contract year. Wording was then provided by Merrill Lynch with respect to that footnote. The footnote referred to both the Accumulation and Position Margin and "other revenue available to Joe White from the production and sale of malt (eg sale of by-products, off-take (sic))".

812 Argent put forward the next iteration of the footnote, which referred to the same subject matter but did not identify what the other revenue available to Joe White might be. He suggested it be left to the bidder to ask further questions on this issue.

813 The email discussion continued, focussing on the Accumulation and Position Margin, without any reference to the separate margin for the sale of off-grade barley. However, in a subsequent email King expressly suggested that he would include a footnote detailing what information was not included in relation to the Accumulation and Position Margin as detailed in the Management Presentation.

814 King could not recall what was ultimately included by way of detail of the separate margin for off-grade barley, but rejected any suggestion that the email chain referred

to above reflected any intention not to disclose any part of the components that made up the margin available to Joe White. Further, he accepted that it was not Argent's decision as to what comprised the wording as finalised.

815 Document 20.1 in the Data Room was entitled "Customer Sales Volume Analysis".[550] No customer was identified, with the "key customer contracts" being identified as "Customer A" through to "Customer J". The contracts' start and end dates respectively were listed as well as whether the type of contract was long-term or "spot". This document set out the tonnage and margin per tonne for each of the 10 key customer contracts (ranging from $226 to $145) and contained 3 footnotes. None of the footnotes explained or referred to the margin of $3.60 per tonne arising from the use of off-grade barley. Further, nowhere was there any mention of the fact that the use of off-grades was not disclosed to Joe White's customers. King acknowledged these matters. Further, the document contained no detail about customer specifications or required barley varieties.

816 Finally, on the estimation of the Accumulation and Position Margin, while King accepted there was an element of challenge in forecasting the correct number, he said the estimate of $15 per tonne was incredibly conservative in light of the actual numbers that had been achieved.[551] Further, King accepted the decision was his, Mattiske's and that of "the powers that be at Glencore" to settle on the amount of $15 per tonne. Mattiske's evidence was that he also wanted to take a conservative approach. Despite being told a substantially higher number by the "Viterra Group Operations" chief financial officer, Mattiske decided to adopt the figure of $15 per tonne.

817 On 2 July 2013, De Samblanx circulated the most recent version of the Operations Spreadsheet.[552] The covering email stated the attachment provided a "resume coming from the plant visits". De Samblanx highlighted various matters, including his

550 Recorded as part of annexure B to the Acquisition Agreement.

551 King referred to the Accumulation and Position Margin section of the Information Memorandum: see par 530 above.

552 It was sent to Eden, Le Binh, Sagaert, Viers, Jewison, Engle and Bowe, copied to Woodburn and Hermus.

conclusion that Joe White's plants were comparable with Cargill's European plants in relation to efficiency.

818 On 8 July 2013, De Samblanx recirculated the Operations Spreadsheet to the same persons. He noted that he had updated the "FSQA" sheet.[553]

819 The food safety quality assurance sheet included the following:

> Large spectrum of in-house (Technical Centre) analyses fitting most of global customers [specifications] …
>
> Labs are participating in several Ring Tests ([Malt Proficiency Scheme], Heineken and San Miguel ring tests). *With current information it cannot be concluded how well [Joe White] is positioned in the haram test*.[554]
>
> All plants to have ISO 22000 certification which implies high degree of control program implementation in the area of [hazard analysis critical control points] and regulatory compliance. The sanitary condition of the plants is one of the evidences that [hazard analysis critical control points] is taken seriously in [Joe White] operations. The *[D]ata [R]oom did not provide any information on the details per location of Major and Minor NonConformities* or [hazard analysis critical control points] plans.
>
> According chemical (sic) register gibberellic acid and beta-glucanase are stored and used in production. These processing aids/additives are normally not allowed by most of international brewers. Here is *some potential risk that Cargill Guiding Principles are compromised*.[555] The chemical register also includes 'Multifect Neutral' which is an enzyme normally used in protein processing. Not clear what exactly this product is used for. Same question related to Laminex Super G and Laminex BG2.
>
> …
>
> Some clients like [Heineken] do require 5 days of germination. Site visits proved that most plants do have 4 days of germination. This *might mean a process non-conformance that can be addressed either by waiver or by reducing plant capacity*.

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553 FSQA stands for food safety quality assurance.

554 HARAM stands for Heineken analytical ring analysis malt, and is the test used by Heineken which Stewart understood was very similar to the Malt Proficiency Scheme, but gave no evidence of having any direct knowledge of the details. De Samblanx was taken to a document recording details of a test using HARAM. This document contained a legend for a graph depicting a summary of results. The legend had a traffic light system, with green signifying results less than 2 standard deviations from the specification, amber for results greater than 2 but less than 3 standard deviations, and red for results greater than 3 standard deviations. De Samblanx's evidence was that under HARAM, results within 2 standard deviations were regarded as satisfactory. He further confirmed that both the Malt Proficiency Scheme and HARAM were 2 external ring schemes that tested controlled samples, which were used to test the accuracy of the results of certain *equipment* in comparison to the same type of equipment in different laboratories throughout the world.

555 But see par 788 above.

> Delta T over the malt bed in at least the location of Minto was largely exceeding state of art the (sic) plant design. *Customers like Heineken do not allow* such [Delta] T's.[556]
>
> (Emphasis added.)

820 In the same sheet, De Samblanx posed a number of questions. These included:

> What are the result (sic) of the last HARAM proficiency test from [Joe White] technical [centre]?
>
> What are the ISO 22000 findings of last round of Bureau Veritas audits for each of the locations (E.g. Executive summary)?
>
> …
>
> What is the scale of use of gibberellic acid, betaglucanase and Multifect during production expressed in % of total volume [produced] per type of processing aid/additive?
>
> How does [Joe White] compensate if minimum germination time is required by customers of more than 4 days?
>
> How does [Joe White] assure that if delta T requirements are not met for certain customers, that malt is not used in blends for these customers?
>
> …
>
> For what is Laminex Super G and Laminex BG2 used …
>
> Do employees in [Joe White] have to annually sign a Company Ethics Charter similar to Cargill Guiding Principles?

821 De Samblanx gave evidence that the updated food safety quality assurance worksheet included input from Hermus. His evidence was that this was the only piece of information that Hermus provided to him in writing. De Samblanx discussed the detail with Hermus before it was sent. De Samblanx was cross-examined extensively on the details contained in this worksheet. In essence, his evidence was that he had a number of queries and matters about which he was uncertain at this point in time. However, he had not formed any final view about whether the matters raised were material. De Samblanx's intention was to make further enquiries to ascertain the significance of the questions then in his mind.

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556 Delta T is a measure of temperature. Put simply, it is the difference between the ingoing temperature at which a batch is germinating and the temperature coming out of the batch. Some customers specify a maximum Delta T, which will result in higher energy costs if the batch needs to be subjected to airflow to keep the temperature down. Accordingly, some plants may not be capable of producing malt that meets the Delta T specification if those plants do not have the capacity to provide the required airflow.

822 Eden gave evidence that he did not recall receiving this document. He said he might have read it on or around 8 July 2013. Whether he read it or not, Eden gave evidence that he did not do anything about the issues raised because questions were still being asked at that time.

823 On 3 July 2013, responding to an email from Viers, Eden stated that there was something missing from the proposed board presentation about the strategic rationale for purchasing Joe White. To explain, Eden stated that if it did not get the Joe White Business, Cargill would be locked out of Southeast Asia for a very long time. Eden acknowledged Cargill could "greenfield our way into the market", but suggested this would be more expensive, slower and would not result in Cargill being the market leader. He asked Engle and Hawthorne to deliver that message more powerfully than had been done to date.

824 Engle responded, saying he had discussed the matter with Viers and that both of them thought Eden had raised good points. Engle then suggested some wording to be presented orally at the upcoming board meeting, namely:

> 1. To be relevant in the malt business you need a global footprint. This plays to how the global brewers want to align, as well the regional players place value on same (ability to serve from multiple origins for supply assurance and quality).
>
> 2. It's about growth, given per capita consumption rates and perceived economic growth potential is clear that SE Asia is the most critical geography in our industry and this is the opportunity to step in as the market leader.
>
> 3. Scarcity value to the Joe White asset - opportunities such as this come up every 5-7 years.

825 Later that day, Eden sent an email to De Samblanx and others referring to the then current version of the Operations Spreadsheet as outstanding work in a very short period of time. Eden queried whether, for valuation purposes, Cargill could use a "pickup" on the Joe White malt volumes. Further, he asked De Samblanx for his opinion on whether he had seen any best practices that Cargill could apply to its existing malt business that would have synergy value.

826 De Samblanx responded to Eden's queries stating he believed Joe White managed things well, sometimes better than Cargill, but that there was no real difference that had been observed that could bring a synergy. De Samblanx further observed that, with respect to plant design, Joe White did things differently. He informed Eden that Joe White opted for a horizontal design and for grouping malt and barley cleaning equipment in a building separated from the silos.

827 Also on 3 July 2013, Goldman Sachs sent an email to Merrill Lynch concerning the Due Diligence. That email stated that Cargill was very focused on putting its best efforts into making a strong bid, but some aspects of the Due Diligence were preventing this from being achievable. A number of issues were raised in respect of some of the responses Cargill received during the Q&A Process. Complaint was made that the response given to some of Cargill's queries was that the information had been "black boxed". An explanation was sought as to what Glencore and Merrill Lynch intended with respect to the black box information given the Phase 2 Process Letter was silent on the issue. Another response, the subject of complaint, was that the question had previously been answered in the Management Presentation. Goldman Sachs expressed a strong preference for answers to be given to questions as part of the Q&A Process. The last point raised was as follows:

> The contractual details of many of the inputs to the business and sales commitments have not been provided or are said to be "black boxed". Amongst other things, this prevents an accurate assessment of the synergies available for combining the business …, the timing of when the synergies can begin to be [realised] …, the benefit of the potential repeal of carbon tax … and the risks of acquiring the business …

The email concluded by expressing understanding about confidentiality obligations that could prevent some information from being disclosed. However it was stated that, as the matters raised related directly to the value of the Joe White Business, absent such details being provided, a more conservative estimate would be undertaken. Further, a draft of the proposed acquisition agreement was sought.

828 The email from Goldman Sachs gave rise to a series of emails over the next week or so, including a follow-up email from Goldman Sachs a week later. King was informed

of Cargill's various requests for information, and agreed that some information should not be offered "in the first instance". King arranged with Merrill Lynch for a telephone call to discuss the issues raised. Soon after this, he sent a further email to Merrill Lynch directing it to ensure that Mattiske was on the call.

829 On 4 July 2013, Engle emailed a draft addendum for the board presentation. Engle referred to a discussion Conway had had with Hawthorne and confirmed that permission was being sought from the board to pursue the purchase of Joe White up to a certain price "subject to Cargill management's review and discretion".

830 Also on 4 July 2013, customer data on volume and margin was added to the Data Room.[557] Viers sent an email to Eden, Engle and others giving a summary of some of that data on 7 July 2013. Viers said he suspected that whatever was provided was as much detail as Cargill would see.

831 One of the matters noted in Viers' email was that Joe White did not have many customer commitments beyond March 2014. Eden viewed this as positive. He believed with growing malt demand, Cargill could renegotiate to obtain higher margins in the next round of contracts.

832 On 5 July 2013, a meeting was held concerning finance and accounting matters. On behalf of Cargill, Jewison attended with another employee, a representative of Goldman Sachs, and representatives of KPMG. Those in attendance otherwise were Argent, representatives of Merrill Lynch and representatives of Deloitte. Questions had been prepared by Cargill in consultation with Goldman Sachs and KPMG. The details of that discussion were ultimately recorded in the Acquisition Agreement.[558]

833 On 7 and 8 July 2013, internal discussions were held with respect to updating Cargill's draft valuation model. As a result, a new model was circulated. This model contained a "waterfall chart slide" sheet which commenced with the midpoint of the indicative bid valuation, being $298 million. Adjustments were then made to take account of the

557 See par 815 above.
558 See par 1037 below.

net present value of additional items, including Cargill Malt synergies of $2 million, grain and oilseeds supply chain synergies in Australia of $5 million, and "incremental volume, other benefits" of $40 million. After some negative factors were taken into account, totalling $33.5 million, the midpoint of the then current valuation of $360.5 million was given.

834 Another sheet was dedicated to synergies. Consistent with the earlier model, new or additional volumes were anticipated. These increases in volumes were premised on the existing capacity of Joe White's plants without the addition of further storage facilities. The major changes from the earlier model were as a result of changes made with respect to the possible synergies.

835 Also on 8 July 2013, Goldman Sachs circulated a progress valuation. It was expressly noted that the financial forecasts it contained were based on the Information Memorandum, the Management Presentation Memorandum, the Data Room documents, and the questions and answers provided to that time. The Goldman Sachs draft valuation presented a midpoint value of $397 million (with a range from $327 million to $501 million), based on a discounted cash flow analysis with the discount rate of 10 percent.

836 Cargill and Goldman Sachs continued to work on their respective valuations separately, but exchanged information and asked questions of each other from time to time. As Engle explained, having Goldman Sachs work independently of Cargill allowed Cargill to test its own assumptions. Further, Goldman Sachs was able to provide input with respect to potential competitive bids by utilising its industry knowledge and specialist financial experience.

837 Again on 8 July 2013, De Samblanx sent an email to Engle, Bowe and Le Binh, copied to Viers and Hermus, attaching a series of questions concerning operational performance, quality, and food safety highlighted in red in a spreadsheet containing other questions. The added questions had been authored by either De Samblanx or Hermus. Some of these questions were never put forward during the Due Diligence.

At the end of the email, De Samblanx asked for an update of the list with all questions.

838 Early on 9 July 2013, Engle provided a further draft of the addendum for completion ahead of the board meeting later that day. A few hours later, the addendum was finalised. The purpose of the addendum was to provide an update since the board papers had been finalised.

839 The addendum provided feedback from the Management Presentation and identified some key learnings. It was stated that the Joe White management team was as expected, with the general manager (presumably a reference to Hughes) regarded as important at least for a transition period. The conditions of Joe White's plant were said to be better than expected. The same evaluation was given with respect to commercial and operating synergies, and the ability of Cargill to leverage the Australian footprint. As to the sustainability of the malt margin, it was noted that there was a structural advantage in Australia, with a protective marketplace and a niche brewer customer book that helped to sustain margins. The only negative observations were with respect to costs associated with integration and upfront costs. Further, it was stated a key focus area, amongst others, was further analysis of Joe White's malt margin outlook including evidence provided by management in support of sustaining margins.

840 The addendum also provided a revised financial summary. Using a discount rate of 10 percent, the base case valued Joe White at US$353 million. On the best case, using the same discount rate, the valuation given was US$469 million. Further details contained in the financial summary are discussed below.[559]

841 The last page of the addendum was a request for board approval of the Joe White acquisition. Using 3 bullet points, it was stated that Cargill was refining its valuation views and completing confirmatory due diligence in preparation for a final bid on 29 July 2013. It was further stated that the Cargill leadership team and the food ingredients and systems platform would be kept informed of the progress made.

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559 See par 850 below.

Finally, board approval was sought "subject to Cargill management's review and discretion" to submit a final bid for Joe White.

842 The addendum was finalised by Le Binh and Bowe. Eden was not involved in the preparation of the addendum, but gave evidence that the figure of US$400 million had been arrived at because Cargill knew that it was probable it would have to pay more than $400 million for the Joe White Business to beat Cargill's competitors. Eden's evidence was that the addendum had been approved by either Conway or 1 of the other executives for whom the secretary who circulated the addendum worked.

843 Later on 9 July 2013, Eden gave his presentation to the Cargill, Inc board,[560] including by reference to a document entitled "Joe White Maltings, Australian Maltster Acquisition – … ADDENDUM".[561] The purpose of the presentation was to secure board approval to submit a cash free and debt free final bid of up to US$400 million to acquire Joe White (equating to $440 million).[562]

844 Eden had made extensive handwritten notes on the addendum, which he intended to be his speaking notes. However, Eden's evidence was that most of the document was not able to be presented. Although Eden could not remember specifically, he said he probably would have just summarised the position without going into the detail he listed in the document.

845 Eden's notes at the start of the addendum recorded that he intended to give a brief recap of the bidding process, including the dates for Phase 1 and Phase 2, including when bidding was anticipated to close. Next, Eden wrote:

> 2. Been waiting to make this presentation for 13 years. Aussie dream. *Australia our dream for 13 years*
>
> Today Cargill Malt is #3 in global production ~ 1.6 million MT. #1 & #2 (Malteurop & Souflet (sic)) both have ~ 2.1MM MT

560 This had been prepared by Eden, Viers, Sagaert, Jewison, Engle and Le Binh.

561 See par 838 above.

562 Eden initially said he could not recall whether this was the first or last of the 2 occasions he presented to the board. Later he said there was only 1 presentation in person.

4. [Joe White] acquisition would make Cargill Malt the largest malt company in the world.

   Strategically [Joe White's] business is much more than growth opportunity or to be #1 globally! Biggest and most profitably malt biz in world. – Advantaged

5. Globally, malt has 2 regional "sweet spots" – barley and advantaged access to fastest growing/highest profit markets

   1. Argentina – Cargill Malt leader with our 3 Greenfield investments 2000

   2. *Australia – 2nd sweet spot* – cheap & broad range of barley & advantaged access to SE Asia. Cargill has no presence in this "sweet spot"

   More importantly, [Joe White] is Crown Jewel of Australian Malting

   - *Best/most efficient assets*
   - 60% Australian market share – largest in Asia
   - Best locations

** Once in career opportunity stoked is understatement Aussie/Malt [long term].

(Original emphasis underlined; emphasis added in italics).

846 In the body of the addendum, Eden stated that they liked and were encouraged by what they were learning. In relation to the plant conditions, Eden noted that they were outstanding assets.

847 Eden's handwritten notes on the final page of the addendum stated:

> We have been waiting for this opportunity for a long time and it is finally in front of us. We need to act boldly to not miss opportunity. Once in a lifetime opportunity.
>
> The addition of [Joe White] to Cargill would make us the unprecedented leader in global malt.

848 Under the heading "Update since Board package [finalised]", the presentation slide recorded the Cargill, Inc malt team's expectations. With respect to each of them (Joe White's management team, plant conditions, commercial and operating synergies, the ability to leverage Cargill's Australia footprint, sustainability of the malt margin, and likely integration and upfront costs), Eden made extensive handwritten notes. Eden said he recalled reporting the information in this slide to the board.

849 The next slide contained a handwritten note that there was still a lot of work to do over the next 2 to 3 weeks. Eden said that was certainly how he felt, but could not recall whether he said it to the board. The page was entitled "Key focus areas of further diligence" and included an intended analysis of the "malt margin outlook", as well as consideration of integration timing, foreign exchange considerations, and information technology integration. "Confirmatory financial, tax and legal diligence" was described as "[o]ngoing". Another note of Eden's on this page recorded that various workstreams had to be completed in the next 3 weeks, and that over 50 people were involved. Eden wrote that the goal was to win this auction.

850 The next slide provided a revised financial summary. Eden gave evidence that he thought he would have had a chance to present this summary. Eden gave evidence that notwithstanding a base case valuation of US$353 million, approval was given at US$400 million. After setting out a range of possible present values for the Joe White Business, total enterprise values of US$350 million, US$375 million and US$400 million were listed, together with the forecast internal rate of return based on the best case, the base case and the downside case for each of these amounts. With regard to the amount of US$400 million (equating to $440 million), an internal rate of return ranging between 11.5 percent (as the best case), 9 percent (as the base case) and 5.5 percent (as the downside case) was provided.

851 Eden said he could recall being directed to the final slide of the addendum, which contained a request for board approval up to US$400 million.[563] Eden explained that it was intended the final bid recommendation was to be made to the food ingredients and systems platform (rather than the board) on the basis that the board would have already approved the purchase for an amount up to US$400 million.

852 Based on the updated information, the US$400 million represented a 9 percent internal rate of return (which was reflected in Eden's adjacent handwritten note), rather than the previously required 10 percent.

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563 See par 842 above.

853 The last page of the document that Eden had when he presented to the board had a fourth bullet point, which recorded that Cargill management would require a minimum internal rate of return of 10 percent in the base case. This point was not included in the addendum that had been provided to the board earlier that day. On Eden's copy, the point was struck through. However, despite this, Eden said his understanding at the time was that there were 2 pre-conditions of approval: an amount up to US$400 million and an internal rate of return of 10 percent. This understanding was reflected in an email from Hawthorne to Van Lierde and others, copied to Eden, sent 10 July 2013 stating that the board had agreed to support the request up to US$400 million, with a minimum internal rate of return of 10 percent. Eden was unsure as to how the internal rate of return had been agreed upon. Although he did not attend the board meeting in question, Van Lierde gave evidence that both pre-conditions applied to the approval.

854 After Eden had completed his presentation (which was short), he was excused so that the board could consider the matter; although Eden's evidence was that the board stated in his presence that it agreed to support the request. The Cargill, Inc board minutes for 9 July 2013 show the resolution passed was confined to the making of a bid not to exceed US$400 million, and were silent with respect to any internal rate of return.

855 The board approval authorised Cargill's management to negotiate with Glencore on the basis that, if the final price was within board approval, there would be no need to revert to the board again.

856 Koenig attended the board meeting. He gave evidence that the Cargill board met 5 to 6 times a year. His recollection of this particular board meeting was of Eden presenting and being very enthusiastic, though noting it would be an exception if Eden were otherwise. Koenig said he read the board papers before the meeting and there was nothing that troubled him about the investment.

857 Conway also attended. Equally, his memory was confined to Eden giving a very

enthusiastic presentation about the acquisition of Joe White, and was not able to recall specific details of the presentation. Conway gave evidence that approval was given and that it was duly minuted.

858 Meanwhile, De Samblanx was raising concerns within Cargill, Inc and with Joe White management regarding the storage capability he had observed at Joe White's plants. On 9 July 2013, De Samblanx nominated silo capacity as an "item for investment" in an email to Viers, Eden and Engle. De Samblanx stated that "in view of the minimal storage at sites", it was possible that Cargill, Inc would have to invest in further storage capacity to ensure that operation of the plant was aligned with the Cargill Blending and Certificate of Analysis Procedure.[564] This comment demonstrated that De Samblanx contemplated that Cargill's procedures and processes might have been more onerous or at least might have required some additional storage capacity.

859 On 12 July 2013, Le Binh sent an email to De Samblanx, Eden, Viers, Jewison and Christianson referring to a planned meeting expected to last 3 to 4 hours to review all assumptions as a team. The email referred to De Samblanx travelling to the United States to attend the meeting.

860 On 13 July 2013, Engle requested De Samblanx incorporate his observations into a pro forma due diligence memorandum. De Samblanx did not do so. In addition to the Operations Spreadsheet he prepared to stand as his due diligence report,[565] he said he conveyed his views in which he validated synergies on around 16 July 2013, in Minneapolis in a meeting with Bowe and Engle. He also told Eden that he did not think Joe White's management could tell Cargill anything about efficiencies in operation, or anything that would be a "game changer".

861 Also on 13 July 2013, each due diligence memorandum was consolidated into a single document by Goldman Sachs. Engle went through the consolidated document and said it provided a helpful guide to valuation and document discussions. However, he

564 See par 302 above.

565 In De Samblanx's opinion, all the information that was needed to be known by others was contained in the spreadsheet.

noted the consolidated document did not include a report from De Samblanx, as De Samblanx had not prepared such a document. Engle said he would follow this up, and did so by email shortly after. No response was forthcoming by way of the preferred format for reporting, but rather the Operations Spreadsheet was relied upon as circulated on 8 July 2013.[566]

862 Shortly before 16 July 2013, De Samblanx travelled to Minneapolis to attend a meeting of Cargill representatives to discuss the possible acquisition of Joe White. De Samblanx described the Project Hawk meeting held on 17 or 18 July 2013 as the most important meeting that he attended in the whole Due Diligence. According to De Samblanx, the meeting lasted approximately half an hour to an hour.

863 De Samblanx said there were approximately 10 or more people around the table. He could not recall who they were, beyond stating that he thought Engle chaired the meeting and that he was certain that Hermus was not there. De Samblanx said he was the only person representing his workstream and the only person from Europe.[567]

864 De Samblanx recalled each person being asked whether there was agreement "to go further, looking at your responsibility". In substance, he said the question was directed to each person responsible for a certain area, which person would respond on behalf of that workstream. De Samblanx said that his response to the question was that he was okay to go forward. He said he was not required to give an explanation for his position.

865 On 18 July 2013, De Samblanx (in Minneapolis), Youil and Hughes had a phone call to further discuss the operation of Joe White's plants ("the Operations Call"). Representatives of Goldman Sachs and Merrill Lynch dialled in. Although De Samblanx had expressed that from his point of view Cargill should proceed, he said he wanted to speak with Youil to "double-check to be 100 percent sure". As he

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566 Engle was unsure whether the Operations Spreadsheet was updated after 8 July 2013.

567 As a general observation, De Samblanx's memory of this meeting was not strong. He made no reference to it in his witness statement and only recalled the meeting over a weekend after he had commenced giving evidence. Others also gave evidence of De Samblanx attending meetings in Minneapolis in mid July 2013, but the evidence of what was or was not said was very limited: see also par 2080 below.

explained to Engle at the time, during the Due Diligence De Samblanx had considered the ability of Joe White to deliver quality malt in accordance with customer specifications given that there was such limited storage space. On this matter, he had expressed surprise to Engle that Joe White was able to do so.

866 Engle gave evidence that, prior to the Operations Call, there had been internal discussion between Eden, De Samblanx and him concerning operational features of the Joe White Business that had been ascertained during the Due Diligence up to that time. Engle said there were a couple of remaining questions relating to malt quality and storage, and how Joe White was able to deliver malt in accordance with specifications given the limited storage. It was decided that an agenda would be formulated (which Engle prepared), which deliberately did not include questions relating to malt quality as these would be raised on the Operations Call.

867 De Samblanx created a worksheet (as part of the Operations Spreadsheet) in which he prepared some draft questions after being asked to prepare an official agenda for the call with Youil. De Samblanx gave evidence that the questions he prepared in this worksheet were only draft questions and the exercise was a type of brainstorming. He said the questions which were in fact asked were only those questions set out in a later document.[568]

868 The draft contained some introductory words, which noted that the Minto and Perth plants were well designed and efficient. As for the older plants, it was noted that they were well-maintained, clean and well-managed. The worksheet contained questions with respect to "inventory capacity - quality management", being "processing requirements, blending requirements - limits, analytical requirements - high number of parameters, internal tolerance on [specifications] – vs [analytical] standard deviation". As to the last of these points, De Samblanx gave evidence that it concerned whether a laboratory was systematically deviating for any of the parameters. Such a question was in line with participation in the Malt Proficiency Scheme. He explained that the question was linked to the HARAM ring test, but he could not recall whether

568 See par 870 below.

in fact a question was asked in that regard.

869 There were also questions under the heading "limited inventory at site". Under that heading appeared "most of the site[s] do have only something like a week malt storage capacity, in case of out of specification, how do you manage? Reprocessed at site or outside? what is a quality issue?".

870 Also in preparation for the Operations Call, Goldman Sachs contacted Merrill Lynch. The email stipulated approval was sought for the call between De Samblanx and Youil, but also invited Merrill Lynch to determine whether anyone else needed to be on the call.[569] An agenda was requested and provided. It was confirmed De Samblanx would be the only Cargill employee on the call. A short list of questions, drafted with the assistance of De Samblanx, was forwarded to Merrill Lynch before the meeting entitled "Questions/Topics for Conversation with Peter Youil".

871 Included in the questions De Samblanx wanted to ask were questions concerning the reporting policy for Certificates of Analysis. At the time, he thought Joe White would have a policy, but he did not know whether any such policy would be written or unwritten. He also intended to ask questions about germination times for Heineken and any implications they may have had for plant capacity. De Samblanx had arranged the call while in Minneapolis, and for this to be with his counterpart, Youil, (and their separate advisers) for the purposes of addressing malt quality questions that were not included in the agenda prepared for the meeting. It was thought that the individuals involved in malt quality might be more forthright if there was a smaller audience because of the more limited issues. De Samblanx gave evidence that he was taken aback by Hughes' presence and active participation in the call, regarding it as strange.

872 The Viterra Parties were also preparing for the Operations Call. As early as 12 July

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569 Presumably, this was done based on an acknowledgement of the terms that had been agreed concerning the sale process and Phase 2. De Samblanx's evidence was that he wanted to speak to Youil by having a call with him, but said that obviously was not possible through the Due Diligence and the Q&A Process.

2013, Merrill Lynch emailed Hughes stating that Cargill had requested a call to discuss some commercial issues.[570] In response, Hughes asked for an agenda, stating it would be helpful preparation. After Merrill Lynch informed Hughes that an agenda had been promised and that they would pass it on, Hughes responded that he would like the agenda so he could "align" anyone else needed. In the next email in this chain, on 17 July 2013 Merrill Lynch emailed Hughes referring to a couple of requests that had come from Cargill overnight. One of those requests related to arranging a telephone call between Youil and De Samblanx to discuss operational issues. Merrill Lynch told Hughes that it had asked for more specifics and enquired of Hughes whether he could also attend the call. Merrill Lynch stated that Hughes might have also wanted to be on the call to ensure consistent messaging with whatever was said in the Management Presentation. On the same day, in response to this suggestion, Hughes stated that he would also participate for continuity purposes and to ensure that "we don't stray". Merrill Lynch agreed with this, stating it was important that Hughes was on the call.

873 Returning to the Operations Call, De Samblanx said that Hughes answered most of the questions and estimated that Youil spoke only 5 to 10 percent of the time. De Samblanx made notes of the Operations Call and recorded that he asked questions, amongst others, relating to quality problems, storage limitations on site, and the viability of Joe White's Tamworth plant. In relation to the quality of malt produced, De Samblanx's notes recorded that he asked the following question as "question 1":[571]

> How often does [Joe White] experience quality problems? How does [Joe White] reprocess product that is not within specifications? What are the internal tolerances around specifications?

874 The answers given, as recorded by De Samblanx, related more to the specific requirements of Heineken, rather than Joe White's general policies and conduct regarding quality control and production of in-specification product. In his oral evidence, De Samblanx said he was told in response to "question 1" that Joe White

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570 This related to another call that also took place: see par 910 below.

571 It is unclear whether these precise questions were asked as De Samblanx's memory of the questions actually put during the call was limited. In his evidence in chief, a question was put to De Samblanx without objection which was premised on the basis that "question 1" was asked.

was not having any real quality issues, and then the discussion came very fast to a discussion about Heineken. De Samblanx said it was important to him to receive information about "Japanese Heineken", Japanese customers and SAB Miller Plc ("SAB Miller"). He said, from that moment on, he "got really the comfort that [his] doubts about silo capacity and in relation with Certificates of Analysis were satisfactorily answered".

875 De Samblanx's notes record the second set of questions he asked as:

> In looking at the system and current storage limitations, what sorts of challenges does this present? Do you have outside storage or outside blending capabilities? How does [Joe White] manage malt quality and grades of barley for its customers?

In response, De Samblanx's notes recorded he was told of various measures Joe White was taking in its Perth and Sydney plants. These included building 2 more silos with a capacity of 3000 tonnes in Sydney, packing on the weekend and limiting the number of customers per plant in Perth. It was stated that Joe White's Korean and Japanese customers were similar and could be grouped, which was said to ameliorate storage issues. In giving his evidence, De Samblanx made the general observation that, in responding to this question, Hughes did not answer in terms of having challenges, but rather what the solutions were with respect to limited storage.

876 Although there was no evidence of precisely what solutions Hughes outlined, there could be little doubt that satisfactory solutions were given. Mattiske's evidence was that there was an enormous amount of storage capacity in Australia. In his experience in managing "these types of businesses", Mattiske gave evidence that storage capacity was the last idea to consider after looking at appropriate logistical plans to deliver the malt barley to the silo because there was ample barley storage in Australia, and more than was needed.[572]

877 De Samblanx said that, for him, the information provided was a very important point

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572 It was unclear from this evidence whether Mattiske was confining his answer with respect to storage capacity to barley storage, or whether it also applied to malt storage. The evidence was given in response to questions about the suggestion in the Customer Review Spreadsheet (see pars 1211, 1228-1229 below) increased silo capacity was a potential solution to meeting supply issues.

of reference. The reason it was important was because, up until that time, De Samblanx was not clear as to which customers were being supplied by Joe White. He said that when he got this reference, including with respect to Heineken, to whom Cargill delivered throughout other regions in the world, he knew that to supply Heineken an audit needed to be passed. That audit process involved a very long list of questions, together with Heineken visiting the relevant plant and carrying out tests as to the design and capability of the plant. He said the audit also involved checks on traceability. De Samblanx gave further evidence that Heineken, being maltsters, knew how a malting plant was operated. From the discussion, including referring to the relevant person from Heineken involved, De Samblanx understood Heineken was doing audits in the same way as Europe and drew comfort from knowing that Joe White had been approved by Heineken.

878 In further response to his questions, De Samblanx said he was told that Joe White had very good "upcountry" storage and could rely on this in terms of segregating varieties of barley. Also with respect to malt storage in Perth, De Samblanx was told that Joe White was able to work with Co-Operative Bulk, which provided access to extra storage, and could be extended by contract if needed in the future.

879 In relation to Joe White's Sydney plant, De Samblanx recorded that either Youil or Hughes stated that there was no outside storage, which was "challenging". They said that there was a lot of emphasis on barley, but also on analysing barley on the weekend in Sydney and Perth. De Samblanx was told that the customer group was aligned to the Sydney (Minto) plant's capabilities, and that there were a number of varieties that had to be managed at the same time. The response also included details about the Cavan plant in Adelaide. However, De Samblanx could not recall anything being said about malt quality and grades of barley.

880 Finally, in relation to barley, De Samblanx's notes record that it was said that there was "[v]ery comprehensive … storage in the country" and "[u]pcountry storage is very reliable". De Samblanx was told that Joe White had an ability to "change from 1 silo to another".

881 De Samblanx asked, and Youil or Hughes answered, additional questions in relation to malt yield, quality issues Joe White had been having with "dom boxes"[573] and a consequent legal dispute, and the rationale for keeping Joe White's Tamworth plant operational.

882 De Samblanx's evidence was that he accepted what he was told during the Operations Call. However, he subsequently expressed his disappointment to Eden that he did not get to speak to Youil alone. He also told Eden he thought Joe White had been tactical in its responses.

883 Shortly after the call with Hughes and Youil, Goldman Sachs emailed its notes of the discussion "this morning" to De Samblanx.[574] De Samblanx did not forward the notes to anyone else, nor did he provide any feedback to Goldman Sachs. Engle gave evidence that he read these notes, but there was no email demonstrating they had been forwarded to him.[575]

884 An agreed account of the Operations Call formed part of the Acquisition Agreement. It included:

> **1. How often does [Joe White] experience quality problems? How does [Joe White] reprocess product that is not within specifications? What are the internal tolerances around specifications?**
>
> - Joe White's malt plants supply to a customer base with a wide range of specifications. This *enables malt to be reassigned to another customer in the*

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573 Dom boxes are containers for freighting malt, that are higher than the standard rail-based containers: see also par 1022 below.

574 The meeting was scheduled for 10.30am Australian eastern standard time, which was 7.30pm on Wednesday 17 July 2013 in Minneapolis. The notes were received around midday on 18 July 2013 Australian time: see fn 311 above. De Samblanx's evidence was that he arrived back in Belgium on the morning of 19 July 2013. Accordingly, he was still in Minneapolis when the summary was emailed to him.

575 In his witness statement, Engle originally gave evidence that he reviewed notes of the discussion prepared by Merrill Lynch (which were amended by Youil and ultimately became part of annexure E to the Acquisition Agreement as a document included in the Data Room) and gained the impression that De Samblanx had received detailed answers to his questions. When it was pointed out to him during cross-examination that Merrill Lynch's notes were not prepared until 24 July 2013, were not placed in the Data Room until 2 August 2013, and were not reviewed by him until 3 August 2013 (Engle was the only Cargill employee to access this document in the Data Room), he then gave evidence that his reference to the Merrill Lynch notes was incorrect and he should have referred to the notes prepared by Goldman Sachs. Whether Engle's evidence as he ultimately gave it was correct or not (there was little doubt that Engle was doing the best he could to recall the relevant circumstances), it was clear on the evidence that nothing was said to Engle to suggest anything other than De Samblanx had been satisfied with the answers he had received.

event the malt did not meet the specification it was originally targeted towards. Blending is further able to produce malt to a wide variety of specifications.

  - Each individual plant varies in terms of what malt specifications it is able to produce. This is directly related to the barley varieties available rather than a fundamental deficiency of the plant. This will change from season to season depending on barley quality. Some customers only want malt from an approved plant, which will also determine the malt specification being made at the plant.

  - Perth and Minto are the most flexible in terms of meeting differing malt requirements. The Adelaide plants would have similar flexibility as the aforementioned.

- Heineken A Spec Malt is typically has (sic) one of the most onerous malt quality requirements

  - Joe [W]hite does not currently supply this type of malt to Heineken

  - Joe White is in the process of obtaining certification (first trials have been sent)

  - A Spec market not seen as key to business going forward

- *Range of other malts supplied to Heineken which have specific requirements* (e.g. D-Malt)

  - Joe White is *able to produce these malts* at several of its plants

  - Historically, Heineken have been happy with Joe White's processes following *plant audits*

2. In looking at the system and current storage limitations, what sorts of challenges does this present? Do you have outside storage or outside blending capabilities? How does [Joe White] manage malt quality and grades of barley for its customers?

<u>Malt Storage</u>

- *Other than Sydney*, all malt plants have *malt storage that is more than sufficient for its requirements*

- High turnover sales program sees packing most days, so the finished malt product tends to move out quickly, meaning *no issues with insufficient malt storage space*

- Perth – The majority of blending will occur on [Joe White]'s side. The malt will then be transfer (sic) to [Co-Operative Bulk] ready to pack. There may be the occasion whereby further blending may be requested by [Joe White] for [Co-Operative Bulk] to perform

- Sydney – currently in the process of building two additional storage silos. Current storage at Minto is 3600 metric tonnes of malt. This includes 4 analysis bins. The two additional silos will add a further 1200

tonnes to the total malt storage on site. Therefore the total malt storage capacity in Minto will be 4,800 tonnes

- Sydney designed to operate with fast turnaround times
- Additional storage available through dom boxes
- Lower levels of storage capacity (relative to other sites) has meant greater focus on incoming barley processes

Barley Storage

- *Barley storage at Australian malt facilities differs significantly from malt facilities around the world*
  - Significant proportion of storage is done upcountry
  - Sampling opportunities available throughout year
  - Barley is well segregated upon receival
- Sydney – relatively lower level of barley storage compared to other sites
  - Offset by greater controls around customer base and upcountry barley storage facilities
- Adelaide
  - Port Adelaide – more than sufficient barley storage, ability to store 4 different barley varieties
  - Cavan – less storage than Port Adelaide, but only utilises 2 barley varieties
- Perth – storage predominantly with [Co-Operative Bulk] (with facility located adjacent to plant)

…

(Emphasis in italics.)

885 Pausing here, in light of the above, it was not surprising De Samblanx took comfort from what he was told with respect to Heineken (and, by extension, SAB Miller).

886 A document distributed by Heineken and dated 28 May 2013 was in evidence at trial, (although it was unclear exactly when this document was received by Joe White).[576] This document, entitled "Supplier Performance Management (SPM) – Supplier Communication Pack", provided details of Heineken's program and was designed to

576 The document was part of the Cargill Parties' discovery. Questions put to Stewart during cross-examination were premised on the basis that he had seen this document.

improve the business that Heineken had with its key suppliers. The document set out several "key performance indicators" for suppliers, the second of which was entitled "Quality" and was described as "[d]eliveries according [to] the agreed specifications including follow up on non-conformities". The specific "performance indicator" was described as "Specification compliance".

887 Stewart said he may have seen this document at some point, but he had no recollection of it. However, regardless of whether Stewart had previously seen the document, on being taken to the details referred to above, he gave evidence that it did not surprise him that a customer like Heineken, or any customer, would insist on strict compliance with its specifications. This evidence was markedly different to some of the other evidence Stewart gave about customer expectations and industry practice,[577] but was entirely consistent with the expert evidence that brewers impose specifications to ensure they receive the malt quality they require.

888 Stewart also gave evidence that, generally speaking, brewers were "jealous" to protect their recipes and that they were not easily persuaded to adjust them. Further, his evidence was that brewers like Heineken, Sapporo, SAB Miller and Asahi were clear and detailed in the specifications they required to be satisfied.

889 Also not surprisingly, De Samblanx gained comfort from having learned that Viterra had an ethical code of conduct, being the Viterra Code, that was required to be signed by all Joe White employees. He said this was another factor that, in combination with the other matters he was told, gave the satisfactory answer to his doubts.

890 Further, on the question of storage capacity, De Samblanx was asked directly under cross-examination whether he made any assessment as to whether the storage was sufficient to enable Joe White to produce malt in accordance with Cargill's practices. De Samblanx said he did so as "part of the puzzle", before giving the "green light" for his component of the Due Diligence. Furthermore, his evidence was that the level of storage capacity was sufficient to allow Joe White to produce malt at the time he was

577 See pars 168-173 above. Stewart agreed during cross-examination that Heineken took its malt specifications very seriously: see par 1709 below.

giving his evidence. Moreover, De Samblanx did some work with Youil on this issue in March 2014 to bear this out. His evidence was that the capital expenditure for increased storage was contemplated in March 2014 on the basis that Joe White would extend the customer book for different plants.

891 After the Operations Call, De Samblanx told Eden that it had been satisfactory, but that he found it a little strange that Hughes was part of the call and that he felt the discussion was a little anecdotal by reason that he had asked to call the operations manager and also found someone else there. He said it would be the same as if someone asked to call him to discuss operational matters and he asked Eden to be part of the discussion.

892 In their closing submissions, the Viterra Parties focused upon the difference between the questions asked (as set out in the agreed account),[578] and the draft questions De Samblanx originally prepared.[579] It was submitted that there were significant differences between the concerns originally raised by De Samblanx and the matters that were actually discussed. After submitting that the reason for the failure to directly address the subject matter of his original questions was unclear, it was further contended that the substance of what was discussed could not have addressed De Samblanx's concerns. Moreover, it was submitted that the court should reject De Samblanx's evidence that he got comfort with respect to his doubts as a result of the call on the basis that it was inherently implausible.

893 To elaborate, the Viterra Parties referred to the fact that Heineken required malt to be germinated for 5 days, whereas "Joe White's facilities were built for four-day germination periods".[580] Further, attention was given to his evidence that it was not clear to him until this call to which customers Joe White delivered. It was submitted this evidence was incorrect because of the details contained in the Information Memorandum and what was seen on the site visits. When asked during oral closing submissions why such information made De Samblanx's evidence incorrect, the court

578 See par 884 above.
579 See pars 867-869 above.
580 On this issue, see also pars 779, 789 above and par 1035(2) below.

was informed that it may not make it incorrect. Further, the information that was available before this call was far more general than the specifics provided by Hughes during the course of the discussion, particularly with respect to Heineken.

894 Furthermore, the Viterra Parties submitted De Samblanx acknowledged during his evidence that he knew that if Joe White was supplying malt to Heineken then Heineken would have certified Joe White, and that also he knew from the site visits that Heineken was a customer of Joe White. In fact, De Samblanx's evidence was that normally a supplier to Heineken would be certified. In addition, when it was put to him that "if" Joe White was dealing with Heineken he would have been confident that Heineken would have certified Joe White, his answer was, "If that was true that they were dealing with Heineken, yes". When he was then asked whether he had any doubt Joe White was dealing with Heineken, he responded, "No, but the information was not very, how would you say, there was not too much information. The only information I got was in the plant of Perth where they were quite specific on, if I remember well, the, how do you say, the kilning temperatures."[581]

895 In short, the evidence was equivocal as to the state of De Samblanx's knowledge at the time of the site visits. In closing oral submissions, the Viterra Parties' senior counsel acknowledged that De Samblanx's evidence was not accurately recorded in this submission.

896 Next, the Viterra Parties submitted that De Samblanx giving evidence of taking comfort from Hughes mentioning Heineken audits because he already knew of audits Heineken had performed on Cargill plants in other regions of the world ought not be accepted because there was no evidence Heineken performed the same kind of audit in respect of all of its malt suppliers. Reference was also made to SAB Miller because of his belief that SAB Miller also conducted audits similar to Heineken. In particular, the Viterra Parties focused upon the express reference to SAB Miller in the Information Memorandum (in contrast to Heineken which had not been expressly referred to).

581 For the avoidance of any doubt, English was not De Samblanx's first language. In making this observation, no disrespect is intended, but rather it is made in order to explain the choice of words made by De Samblanx at times.

This submission seems to run logically counter to the submission made with respect to Heineken certification. In any event, whether or not Heineken, or for that matter SAB Miller, conducted audits differently with respect to different regions in the world was not raised with De Samblanx.

897 In summary, none of the points raised by the Viterra Parties provide a compelling basis to reject De Samblanx's evidence on this issue. Further, De Samblanx was a credible witness. Furthermore, immediately after the Operations Call he reported to Eden that the conversation had been satisfactory. In the circumstances, it was simply not plausible that De Samblanx would have misled Eden as to the outcome of the call if De Samblanx's concerns, such as they were, had not been allayed. Moreover, no concerns were raised by De Samblanx with Engle, who had arranged the meeting, or, for that matter, anyone else. Prior to this time, De Samblanx had not been reticent to express the concerns that he had previously held. There was no sensible basis to conclude that his approach changed at this point such that he would have decided to keep any material ongoing concerns to himself. On the contrary, his decision after the meeting in Minneapolis to speak to Youil to double-check and make 100 percent sure, and in the process to openly discuss the position with Engle, demonstrated that his approach had not changed.

898 The last piece of material evidence on the outcome of the Operations Call concerned Viers. He gave evidence that he recalled being told of this call specifically because an item that was discussed gave him comfort; namely, how Joe White dealt with out-of-specification malt. Viers recalled being told Joe White had a broad range of customers and that any out-of-specification malt produced could be redirected. He said it was a very poignant comment at the time.

899 When asked under cross-examination if he had a good memory of being told this, he said that he did. When he was then asked whether he had refreshed his memory shortly before giving evidence on this issue, Viers stated he remembered very vividly the time that it happened. Viers gave further evidence that following the Operations Call he read the answers to the questions asked during the Operations Call, though he

could not recall the details of how he was provided with the document or whether it was "recapped" with him. Further, he rejected the suggestion put to him that he had read the document when preparing to give his evidence, repeating that he vividly remembered the comment because it was something that shifted him and gave him comfort relative to what was going on.

900 After a weekend adjournment, Viers' cross-examination continued and this topic was revisited. Viers confirmed that he could not recall how he was informed of this particular answer. Further, he stated that the only document he could recall seeing was a "recap of that call" when preparing his witness statement in November 2017 (which was approximately 8 months before he gave evidence). He said he could not recall seeing that particular document either before or after this time.

901 When the evidence Viers had given the previous week was recounted to him, he was then asked in relation to what he was shifted. Viers' answer was that the reason he remembered the statements clearly was that it was the straw that broke the camel's back, and was the point from which he was no longer concerned, including in light of everything else he was told. As already noted, Viers acknowledged that up until this time he had concerns primarily because of what De Samblanx had put in his executive summary.[582] Furthermore, when pressed during cross-examination, Viers stated that he could specifically remember a comment about Joe White having a broad range of customers and having the ability, if Joe White produced off-grade malt, to be able to shuffle the malt to different customers. When pressed further, Viers gave evidence that he was shifted by the answer because he considered it a very reasonable response and would expect it to be the case. No doubt Viers' last comment referring to his expectation was to be understood in the context of all of the information that had been provided to him to that date. At another point in his evidence, Viers stated that there were 2 reasons that gave him comfort that the Certificates of Analysis were not being manipulated, this matter being 1 of them and the other being that he was told that Joe White's processes were "ISO 9000 certified".

582 See pars 772-781 above.

902 The Viterra Parties submitted that this evidence of Viers ought to be rejected. They did so by pointing out that there was no supporting evidence of any such statement being made to Viers. They referred to Viers' lack of operational expertise in malting and contended that his lack of knowledge would make it unlikely he would take any comfort in such a statement. They further submitted that De Samblanx placed no importance at all on Viers' "'poignant' and 'vividly' remembered statement".

903 There are several reasons why Viers' evidence ought to be accepted. *First,* there were a number of sources that could have informed Viers of the substance of the Operations Call, regardless of whether or not a document was shown to him. *Secondly,* there was no dispute that, in substance, in response to a question as to how Joe White reprocessed product that was not within specification, De Samblanx was told that Joe White was able to reassign it to other customers.[583] *Thirdly*, it is not out of ordinary human experience, when seeking to recount events from a number of years before, for a person to recall specifically being told something, but also to be unable to recall by whom or under what particular circumstances. *Fourthly,* Viers was a credible witness who, on numerous occasions, was willing to concede he could not recall matters if that was the fact. He was adamant about his recollection in this regard, and there was no proper basis to reject that evidence.

904 Sometime after his discussions with Hughes and Youil, De Samblanx met with the strategic business and development department to discuss synergies that had to be confirmed or not in the deal model.[584] Although he could not be certain, De Samblanx's best recollection was that he met with Engle and Bowe. During this meeting, issues concerning energy, the possibility of a carbon tax, capital expenditure and additional capabilities were discussed. During the meeting, he was asked for a forecast about capital expenditure for the future. He gave such a forecast, but did not express any view to the effect that there was a need for capital expenditure.

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583 See the first answer to question 1 in par 884 above.

584 De Samblanx had a specific recollection of this meeting because he was annoyed at how long he had to wait before he was able to meet with the strategic business development department, as it delayed his return to Belgium.

905 De Samblanx gave evidence that during this meeting about synergies he was not asked anything about the concerns he had previously identified. When he was asked why he thought that was so during his cross-examination, he gave evidence that there was no reason to because the Project Hawk team trusted his opinion, De Samblanx having already given his approval for the transaction to go forward.[585] De Samblanx's evidence as to his state of satisfaction with his assessment of the Joe White Business was clear and unequivocal, namely, if he had any ongoing doubts about such matters he would have expressed them.

906 Specifically, he gave evidence that if he had been told about the Varieties Practice during the Due Diligence, he would have contacted Eden and Viers within minutes of discovering it and would have told them to restart the Due Diligence for the points that would not have been confirmed or were not in line with what had been discovered. His evidence was that it would have also raised doubt on all other aspects of the Due Diligence because the Varieties Practice was "not right" and would have had a financial impact as well. De Samblanx gave evidence as to what his response would have been if he had been informed of the Reporting Practice or the Gibberellic Acid Practice. With respect to each of the Operational Practices, in substance De Samblanx's evidence was that he considered their implementation showed no respect for contractual rules and were "of the same order" in terms of reprehensibility.

907 There was evidence from other Cargill witnesses about the meetings that occurred in Minneapolis on 17 and 18 July 2013. It is unnecessary to recite the individual accounts of what occurred at this time.

908 The Viterra Parties' closing submissions addressed this evidence. They invited the court to conclude that Cargill chose to ignore the "clear risks of which it had become aware" concerning Certificate of Analysis practices and procedures, including, it was asserted, that Certificates of Analysis did not reflect the actual results of the malt testing and that Joe White was obtaining its low steeping and germination times by

585 See par 864 above.

the use of chemicals such as gibberellic acid.

909 The evidence referred to above demonstrated that Cargill did quite the opposite and De Samblanx obtained the reassurances he required to be satisfied that operationally Joe White was being conducted satisfactorily. Further, although Cargill had not ascertained the manner in which Joe White adopted practices and procedures with respect to its Certificates of Analysis, there was no basis on the evidence to conclude that Cargill knew or ought to have known in mid July 2013 that Joe White's Certificates of Analysis did not reflect actual results (as that term was understood in the context of either the theoretical blend approach or otherwise) or that barley varieties and chemicals were being used by Joe White directly contrary to its customers' specifications.

910 In the following days, the exchanges continued. On 19 July 2013, a phone call took place between Hughes, Eden, Viers and representatives from both Merrill Lynch and Goldman Sachs ("the Commercial Call").[586] An agreed record of the Commercial Call was also annexed to the Acquisition Agreement and entitled "Joe White Maltings – Commercial Discussion Questions & Answers – Cargill 19-July-2013".[587] At the top of the document was stated:

> **Objective:**
>
> This document intends to summarise Questions & Answers ("Q&A") from the Commercial Discussion held with Joe White Management on 19 July 2013. The summary contains the key themes / concepts that were articulated by Joe White Management in response to questions raised by Cargill and its advisors.

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586 The agreed record of the Commercial Call recorded that Hawthorne was also in attendance. Hawthorne's evidence was that he had no recollection of ever attending on the Commercial Call or any call attended by Joe White management. Further, Engle gave evidence that he believed it was likely he attended, but he had no specific recollection. He also said he had no recollection of Hawthorne attending.

587 As an aside, in the lead-up to the Commercial Call, Viers prepared a list of issues he considered should be raised with "Joe White". A meeting with Hughes was sought in relation to some of these matters (some of them related to issues raised in the Operations Call), and questions were forwarded for Hughes' consideration. In these circumstances, the Viterra Parties submitted, Cargill sought information from Joe White and not the Viterra Parties. Whatever might have been Viers' intention, Hughes was not contacted directly to address the issues in question. The approach was made through Merrill Lynch in order to get access to Hughes and the meeting was managed as part of the Due Diligence.

> We request that you review this document and confirm that the messages conveyed are consistent with your understanding of the meeting.

911 The parties discussed the attainability of Joe White's forecast for the 2015 financial year and beyond, given the shortfall Joe White had experienced in profits in the 2014 financial year[588] to that time and the maintainability of margins. Broadly, positive statements were made in this regard. The notes included:

> - A number of factors occurred in FY13 which have impacted the results when compared to historical figures:
>
> - Significant dislocation/inversion of Australian and European malting barley prices
>
> - New malt house construction by GrainCorp which resulted in temporary pricing pressure in some markets
>
> - Joe White now seeing a correction in malting prices
>
> - Joe White is currently seeing conditions return to normal and has recently completed malt sales in excess of $200/t (excluding the Barley Accumulation and Position Margin). This is attributable to the following factors:
>
> - Good Australian crop
>
> - Reduction in Australian barley prices
>
> - Lower AUD/USD exchange rate.

912 The notes recorded a series of other questions and answers, including:

> Are there other key factors that distinguish Australian malt that allow it to command such a premium? If customer mix is the key driver, what makes you believe it is sustainable?
>
> - *Efficiencies in Australian Malt production* allow for margin premiums
>
> - Joe White can sustain their premium as its export customers are located in growth markets
>
> - Asian breweries are currently unable to produce enough beer to meet demand
>
> - New breweries are under construction in Thailand and Korea

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588 The summary referred to "the FY2014 shortfall on profits" and "the shortfall in FY2014". In fact, given Joe White's financial year was from 1 November to 31 October each year, the "2014 financial year" had not commenced in July 2013. The answers make it plain the information provided concerning shortfalls related to the 2013 financial year ending 31 October 2013.

- Aggressive growth in demand is taking place in Myanmar, Cambodia and Laos

- Other factors supporting Joe White's premium include:

  - Service model
  - Short turnaround time
  - Supply risk profile
  - Free trade agreement with Thailand (Australian government currently working on an agreement with Korea)
  - *High quality malt*

(Emphasis added.)

Further, in response to a question as to when customers pushed back and which competitors they turned to, it was stated that they pushed back when Australian barley prices inflated malt prices so that they were significantly above prices offered by European maltsters. To a further question as to at what price customers pushed back, it was stated that Joe White normally received margins between $180 to $230 per tonne. It was further stated that during the bidding process it had been indicated that Joe White's margins were generally $25 per tonne higher than its competitors would normally receive.

913 Viers gave evidence that he recalled the issue of key factors distinguishing Australian malt being raised and the general response. He said the response gave him a strong impression of a premium product and an excellent brand reputation. Further, he said it reassured him that there were factors that distinguished Joe White's Australian malt and that Joe White could sustain its premiums thanks to factors such as a short turnaround time and its high-quality malt.

914 In relation to a question as to Joe White's prospects in Japan when its share of the Japanese market was not large, the response given was that historically Joe White's ability to compete in Japan was significantly limited "due to sourcing of quality barley (vs Canadian competitors)". After recording that the barley variety "Baudin" was approved by 2 of the 4 major breweries, the notes of the Commercial Call continued:

Other

Describe how Australian extreme weather patterns impact the business and how do you manage through periods of floods and droughts? How do you think about best/worst/most likely cases?

- *Joe White has always managed to secure the required amount of barley* and has never operated at a loss in a drought
- Drought events tend to not hit the whole country at the same time
- Should a drought occur, Joe White will look at how best to relocate barley
  - Drought affecting the East coast often affects NSW to a greater degree than SA and Victoria
  - West Coast of Australia does not experience much drought as the barley growing areas tend to be wet
- *During times of drought, Joe White may buy off-grades and work with grain handlers to capture higher volumes*
- *Joe White also has had a good record with communicating with customers.*

(Emphasis added in italics.)

915 The issue of weather patterns had been built into Cargill's model.

916 After the Commercial Call, Cargill did not ask that further due diligence be undertaken in relation to the use of off-grade barley. Viers' position was that he thought the answers given during this discussion were clear and that Cargill could be comfortable moving forward.

917 In closing submissions, the Viterra Parties referred to draft questions for the purposes of the Commercial Call which were not in fact asked. In particular, reference was made to questions concerning how Joe White met customer-stated specifications on ageing without sufficient storage; how Joe White handled product that might be slightly out of specification with very limited storage; whether there was any capability or asset limitations that prevented Joe White from meeting customer specifications; whether Joe White had written derogations; and how Joe White managed malt quality and grades of barley for its customers with such limited storage

capacity.[589]

918 Although the Viterra Parties suggested there was some significance in these questions not being raised as part of the Commercial Call, in fact very little, if anything, turned on this. Questions concerning storage capacity and the ability to meet customer specifications had been expressly asked and answered the previous day during the Operations Call. Given Hughes also participated in that call, it is not surprising that Cargill chose not to ask the same or similar questions again (even if the Cargill representatives were different in each call).

919 The Viterra Parties' submissions also focused on Cargill being told about the situation in Japan arising out of issues concerning barley quality and the fact that Joe White might have purchased off-grade barley at times. Contrary to these submissions suggesting Cargill was put on notice or at least on alert about barley quality issues, what Hughes told Cargill about the use of off-grade barley implicitly represented that its use was more acute during times of drought. Moreover, by referring to Joe White having a good record communicating with its customers, immediately after indicating that Joe White might have to use off-grade barley in certain circumstances, it implicitly represented that customers were being kept informed about the quality of barley that was being used in the malt being supplied to them. In any event, neither of these matters being conveyed in any way indicated to Cargill that Joe White was then having issues with barley quality or that Joe White might be failing to meet customer specifications.

920 The Viterra Parties made the further observation that despite Eden being told that Joe White purchased off-grade barley, neither he nor anyone else made any further enquiries in relation to issues concerning barley quality during the Due Diligence. Given the manner in which Hughes discussed the use of off-grade barley and the fact that he did not suggest there were any issues in this regard, it is hardly surprising that

589 The last of these questions was to be found in an "internal list" circulated on 18 July 2013 by Engle to Eden, Viers, Jewison, De Samblanx and Le Binh.

this issue did not ring any warning bells so far as Cargill was concerned.[590]

921 A like observation can be made with respect to the absence of any further enquiries in relation to barley varieties. In short, there was simply no suggestion that Joe White was supplying grades or varieties of barley contrary to customer specifications.

922 On 19 and 20 July 2013 a call dedicated to barley inventory was arranged for the near future.[591]

923 In the meantime, Viterra continued uploading documents to the Data Room and received questions about them. An email from Merrill Lynch on 17 July 2013 to Fitzgerald and Max Allan ("Allan"), a senior associate at Mallesons, copied to Lindner and another, relayed a question from the Q&A Process submitted by a potential bidder:[592]

> Can you please provide an explanation for the large (87 [kilotonnes]) purchase in [South Australia] in FY12/13 season, commenting on the large volume (relative to other contracts) and low price[?]

The email further stated that 2 attachments had already been sent in response and requested these be uploaded to the Data Room. When shown this document during her evidence, Lindner said she could not recall this topic being discussed, or any discussion about disclosing barley margins or prices.

924 On 18 July 2013, Merrill Lynch asked Mattiske about redacting the prices contained in contracts. Merrill Lynch noted that it had previously provided prices to Co-Operative Bulk in an attachment which summarised the barley purchasing contracts. Merrill Lynch asked Mattiske whether the information was particularly sensitive for Cargill and, if so, whether he would like Merrill Lynch to delete the column of the summary

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590 The topic of use of off-grade barley was addressed again some 4 days later: see par 926 below.

591 See par 925 below. On 19 July 2013, Le Binh sent an email to Goldman Sachs, copied to Engle, Jewison, Christianson and Bowe entitled "Hawk/Barley inventory: Critical Questions". In that email, he noted that Cargill's calculations showed a significantly bigger amount of days of inventory than what had been reported by Joe White. He observed that Cargill suspected Glencore or another third party was carrying the inventory for Joe White at a cost and stated it was critical that Cargill understood this point for the purposes of Cargill's valuation. The email then set out a short list of questions on the topic. The following day, Engle asked Goldman Sachs to arrange a 30-minute call with Argent to discuss the issues which had been raised.

592 Part of this email and the response to its request was the subject of a claim for legal privilege.

which contained the price as Cargill had requested this information in addition to seeing the physical contracts. In an email the following day, Merrill Lynch reported that Mattiske had confirmed Merrill Lynch could send Cargill the barley-purchasing data that had been prepared for Co-Operative Bulk, including the pricing data. Merrill Lynch stated it also intended to upload a representative sample of approximately 15 physical contracts, which would support the barley-purchasing data. It was noted that Argent was collating the contracts and that once he had completed that task the contracts would be forwarded to Fitzgerald and Mallesons for their review and final confirmation. Upon this occurring, Merrill Lynch said it would then upload the information to the Cargill Data Room only. Next in the email chain, Argent produced 15 contracts for review. In response to Argent's email, Lindner emailed Argent and Fitzgerald, copying Merrill Lynch, stating that she would wait for Fitzgerald to confirm that he was comfortable with the contracts being provided to bidders. She said once this confirmation had been received Mallesons would review "for confidentiality issues, etc" and then redact supplier names and pricing information. Lindner asked Fitzgerald whether any further information should be redacted. Merrill Lynch then expressed the view that there would not be any need to redact pricing information as it was already contained in the document that Merrill Lynch was providing as approved by Mattiske. In response to Merrill Lynch's email, Argent noted that there was presently no connection from price to vendor as no vendor names were disclosed in the purchasing sheet. Finally in this email chain, Fitzgerald stated that he was comfortable with the contracts being provided in the redacted form. Hughes was included in only 1 of the emails in this chain, being the first email sent on 19 July 2013. Further, nothing in the email chain suggested that Argent's participation went beyond an administrative role.

925 A further phone call between the parties was held on 23 July 2013 ("the Barley Inventory Call"). Again, notes were annexed to the Acquisition Agreement.[593] These notes were entitled "Joe White Maltings – Barley Inventory Discussion Questions & Answers – Cargill 23-July-2013". The document recorded the same objective as the

593 These formed part of annexure E to the Acquisition Agreement.

notes to the Commercial Call and recorded the participants as including Argent, Viers, Engle, Le Binh, Jewison, Purser and Christianson. According to Engle's evidence, the primary purpose of the Barley Inventory Call was to provide Christianson with the opportunity to leverage his expertise and to better understand Joe White's barley procurement process. Evidence was given that the Cargill representatives in attendance were satisfied with the answers they received.

926 The notes of the Barley Inventory Call record a discussion concerning barley sourcing. In response to a question whether Viterra positioned barley in anticipation of Joe White's need, it was stated that Joe White was required to provide suppliers sufficient notice of its barley requirements. There was no suggestion that Viterra ever declined to supply barley ordered, in times of drought or otherwise.[594] These questions and answers also included:

> Is there potential to achieve additional margin on the barley?
>
> - Malt blending with lower and higher grade barley – up to 30% of non-malt 1 varieties can be utilised
> - Potential margin which Joe White can earn is dependent on the spread
>   - Spread can be range (sic) from $5/t to $30/t
>   - On average, an additional $10/t could be earned.

927 A number of the Cargill Parties' witnesses were cross-examined about this note. It was suggested that "lower" grade barley indicated to them that Joe White was supplying barley that did not comply with specifications. This was either directly rejected or met with a response that the witness had no recollection of any discussion about barley not complying with customer specifications.

928 Although "off-grade" and "off-spec" were sometimes used interchangeably during the trial, and are often used in the industry in such manner,[595] the attempt by the Viterra Parties to suggest that referring to "lower grade barley" or "non-malt 1 varieties" was giving notice of providing malt out of specification was without

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594 But see pars 93, 131-132, 914 above.

595 See par 20 above.

substance. Such a suggestion ran directly contrary to the evidence of a key witness called by the Viterra Parties, Mattiske.[596] In any event, neither "lower grade barley" nor "non-malt 1 varieties", either expressly or implicitly suggested malt was being supplied contrary to customer specifications. Further, no witness the subject of this puttage recalled any discussion about "off-spec" barley. Furthermore, the use of such language must be understood in the context where Cargill had been told more than once, in writing, that Joe White provided malt that met its customers' exact specifications and requirements.[597]

929 Notes of the Barley Inventory Call were also taken by Goldman Sachs. No witness was taken to these notes, but they indicated that Argent referred to the barley margin being available because of the price difference between malt 1 grade barley and non-malt 1 grade barley, and blending. It was submitted by the Viterra Parties that what was contained in the 2 sets of notes of the Barley Inventory Call demonstrated that Argent clearly informed Cargill that Joe White considered it was acceptable to use up to 30 percent of non-malt 1 grade barley. Further, the Viterra Parties submitted that Christianson (who was not called) appeared to have been the person most likely to have understood "the implications of this information".

930 During oral closing submissions, the Viterra Parties' senior counsel was asked what those implications were. None were proffered in response, beyond referring to the general proposition that it was easier for the court to draw inferences in the manner explained in *Jones v Dunkel*.[598] The mere fact that Cargill was told Joe White could use up to 30 percent of non-malt 1 grade barley did not in any way indicate that Joe White was engaged in any of the Operational Practices, or for that matter any conduct which meant Joe White was not complying with its contractual obligations with its customers.[599]

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596 See par 149 above.

597 See pars 504-505, 515-519, 521-522, 716, 718, 727 above.

598 (1959) 101 CLR 298: see further pars 1988-1989 below.

599 For completeness, such information did not sit entirely comfortably with a representation that Joe White's customers received the "highest quality malt" (see pars 504, 716, 718 above), but that did not detract from the position repeatedly put that Joe White met its customers' specifications.

931 Cargill, Inc's queries regarding Joe White's operations were also logged in a spreadsheet entitled "Project Hawk … Due Diligence Tracking Sheet: Questions and Issues (cannot be solved by additional questions)", which was updated on 26 July 2013 ("the Tracking Sheet"). An email from Goldman Sachs noted the colour coding in the Tracking Sheet, indicating whether or not a question had been asked.

932 The Tracking Sheet contained several columns. One of these columns, "Category", sorted the queries into categories (including "malt", "barley", or "operations"). Adjacent to this column, the queries were designated a "sub-category". For example, the category "malt" had sub-categories including "[o]ff-spec malt/barley", "yield", "[s]pecialty [m]alt" and "craft". Another column designated numeric values for priority, with the value "1" described as "[c]ritical", "2" described as "[i]mportant", and "3" described as "[n]ice to [h]ave". Other columns included "Dataroom Location", "Question or Issue", "Request/Question/Issue", "Author", "Date raised", "Answer/Comment/Next Steps", "Date Answered", "Status" and "Date Submitted".

933 Many of the rows in the Tracking Sheet were shaded yellow to indicate the questions were submitted as part of the Due Diligence, with the relevant answer recorded in the same row. The remaining unshaded rows were not submitted and accordingly did not have an answer recorded.

934 The first query in the Tracking Sheet, under the category "malt", sub-category "[o]ff-spec malt/barley" and designated priority "2 ([i]mportant)", stated "[w]hat is the history of off-spec malt and the cost of selling to alternative markets?". There was no "Author" or "Date raised" designated for the question. Consistent with it being unshaded, in the column "Answer/Comment/Next Steps" there was no entry.

935 The eighth query, unshaded, recorded under the category "plant" and sub-category "[m]alting requirements" stated "[w]hy 5 day malting – at least at Perth?". It was designated the priority "1 ([c]ritical)". The spreadsheet did not record an answer, author, date raised, date answered, status, or date submitted.

936 The thirtieth query, unshaded, recorded under the category "Operations" and the sub-

category "Inventory", asked "[a]s malt/barley storage capacity is low, is there frequent use of third party silo/terminals[?]". It was designated at level "2 (Important)". The question's author was recorded as De Samblanx. However, all other values in the spreadsheet were blank.

937 Question 112, unshaded, was as follows: "[w]hat is the scale of use of gibberellic acid, betaglucanase and Multifect during production expressed in % of total volume produced per type of processing aid/additive?". It was recorded that Hermus raised this question on 8 July 2013. It was given the priority "3 ([n]ice to [h]ave)". This, and numerous other questions of which Hermus was the author were unshaded and therefore not submitted or answered.

938 No witness called on behalf of the Cargill Parties was able to explain precisely how it was that the questions referred to above were not put during the Due Diligence, though Engle surmised that some of the questions may have been covered during discussions with Joe White's management. Eden said that he was not part of this process and that he trusted that all questions in all workstreams were being asked and addressed before each workstream gave its final report.

939 Questions were fielded not only from Cargill but also from other potential bidders. Bickmore gave evidence that a process was put in place by which answers were provided. She said that the Viterra legal team explained the importance of the process to those involved. Employees from various departments were engaged, including malt, tax, workplace health and safety, and human resources.

940 A daily timeline was created for the purpose of providing responses. At 8.30am, "filtered" questions were provided by Merrill Lynch and Mallesons to Viterra's legal department. Around 9.00am, a daily meeting was held between Fitzgerald, Rees, Argent, Bickmore and Julie Faehrmann, a project manager who worked for Viterra and assisted in the sale of Joe White, who were responsible for reviewing and allocating questions to the appropriate "Viterra personnel". Such questions were to be distributed to the relevant personnel by 10.30am, on the basis they were to provide

answers by 3.00pm. The answers were forwarded to Mallesons around 3.30 and 4.00pm. A second meeting was held around 8.00pm, attended by Bickmore, Fitzgerald, Mallesons and Merrill Lynch, was held for the purposes of running through new answers, and checking for issues such as confidentiality and relevance before the information was uploaded to the Data Room.

941 Bickmore gave evidence that this second daily meeting did not seek to check the substance of the answers provided. She said the attendees "did not have the knowledge to check responses". Rather, responsibility for the accuracy of the answers was said to lie with the relevant person who was allocated the relevant question or questions and also ordinarily had responsibility for the matters the subject of the question.

942 Each area of responsibility was given a lead. Norman was responsible for human relations; Matthew Mann ("Mann"), the general manager of safety, health and the environment for Viterra and Glencore Grain, was allocated safety, health and the environment; Rees was allocated finance; Argent was recorded as the malt controller; Hughes was recorded as the malt executive; Youil was recorded as being responsible for malt operations; and Wicks was allocated "MALT Commercial Barley/Sales". There was no contemporaneous evidence to suggest that Stewart was part of this process.[600]

943 The instructions to each person responsible for answering the questions included requiring them to consider carefully each question and to ensure that responses were clear, concise and did not involve ambiguity. In addition to being advised not to use abbreviations or acronyms, each person was told expressly not to provide information that had not been requested. King gave evidence that this approach was standard practice in this type of transaction.

944 Throughout the second half of July 2013, Le Binh continued to work on the valuation

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600 Bickmore gave evidence that she believed Stewart attended a meeting as part of this process, though under cross-examination she acknowledged she did not actually have any recollection of Stewart being there.

model. He refined it on a daily basis. To this end he had discussions with Engle, Eden, Viers and others to test assumptions and refine estimates.

945 On 23 July 2013, Le Binh circulated a valuation pack from Goldman Sachs, which included a valuation model and a competitive analysis, together with an updated version of Cargill's valuation model. Again, the Goldman Sachs valuation stated it was based upon the Information Memorandum, the Management Presentation Memorandum, the Data Room documents, and the questions and answers provided to date. The Goldman Sachs valuation was revised to provide a midpoint value with synergies of $439 million, using a discount rate of 10 percent. The Cargill valuation remained below Goldman Sachs, at an amount of $421 million with synergies on the base case at the same discount rate.[601] In the draft, Goldman Sachs referred to its understanding that the field of bidders remained fully intact, without stating the basis of that understanding.

946 The Cargill valuation model was ultimately the basis for Cargill's final bid for the Joe White Business.

947 The Cargill valuation model contained an income statement, which covered the years from 2010 to 2033. In relation to the actuals for 2010 to 2012, and the estimates for 2013, these figures were taken directly from information provided in the Data Room. For subsequent years, the forecasts were produced by Cargill and Goldman Sachs, using as a starting point the data that had been provided by the Viterra Parties. The forecasts of Cargill were not the same as those provided in the Management Presentation Memorandum. For example, Cargill factored in an assumption that drought or flood conditions would negatively impact the Joe White Business every 7 years, starting from 2016. This assumption was based on Cargill's experience in Australia.

948 In his witness statement, Engle provided further explanations with respect to various aspects of the income statement and the discounted cash flow. It is unnecessary to go

601 The best case was $567 million and the downside case was $258 million.

through this in detail. Suffice to say, there were many assumptions made by Cargill in producing the valuation which were not derived from the Information Memorandum or the Management Presentation Memorandum.

949 In preparation for an upcoming Cargill leadership team meeting, Engle prepared some talking points. Engle had discussed the key points with Eden and Viers, and forwarded the talking points to them, as well as Hawthorne. Hawthorne responded, stating it was a good outline.[602]

950 Amongst other things, the talking points expressed uncertainty about how the bidding process might be concluded. It was stated there was a chance a bidder might be selected as the "winner" or, more likely, 2 or 3 parties would be given the opportunity to "sharpen [their] pencils" and refine valuation views or agreement terms or both. With respect to the bidding strategy, it was stated that Cargill understood there were 5 other parties who remained focused on Joe White. Further, on the bidding price, 3 observations were made: *first*, to truly differentiate and reach the potential for exclusive discussions, it was likely there was a need for a $20 million gap from other bidders; *secondly,* a bid of $400 million plus offered the chance to differentiate the other bidders if they remained in the "$380's" (which presumed Co-Operative Bulk did not bid as aggressively as possible); and *thirdly*, a bid of $400 million plus made it unlikely Cargill would not get a call back, noting that if there was another bidder at $420 million plus then Cargill would have reached the extent of its capabilities given the target internal rate of return of 10 percent.

951 Eden gave evidence that the part of the presentation dealing with the bid strategy was important because it emphasised who might be Cargill's competitors, together with the competitors' capacity to pay which was an important consideration.

952 Also on 23 July 2013, Viers accessed the Data Room. A spreadsheet he reviewed set out details of Joe White's barley purchasing contracts for the years 2010 to 2011, 2011

602 For completeness, during Hawthorne's cross-examination he said that Eden told him that Eden was concerned about the limited time available for the Due Diligence. Hawthorne did not consider that the Due Diligence was being hurried. See also par 959 below.

to 2012 and 2012 to 2013. During the Due Diligence, this spreadsheet was accessed by Christianson, Engle, Hermus, Jewison and Viers. It was also accessed by Cargill's external Australian lawyer, Matthew Marcus Clark ("Clark"),[603] then a partner at Allens.

953 Under cross-examination, Viers could not recall why he viewed the spreadsheet. Viers did recall learning that Joe White had the ability to blend less than malt 1 grade barley, though his recollection was also that this was put forward as an opportunity rather than a practice.

954 The spreadsheet recorded purchases of significant tonnage of Hindmarsh barley, including in the 2012 to 2013 year. Viers gave evidence that if he read the spreadsheet (which he did), he would have seen this, but in 2013 he did not know that Hindmarsh was not a malting grade barley. Further, he could not recall asking any questions about Hindmarsh at the time.

955 Purser also gave evidence concerning the spreadsheet. She could not recall ever seeing the spreadsheet before it was shown to her in preparation for giving evidence.[604] Purser's evidence was that if she had seen the spreadsheet in 2013 and observed the entries concerning Joe White purchasing Hindmarsh, it would not have raised any issue or reason for concern. Although Purser was aware in 2013 that accreditation for Hindmarsh had been declined,[605] she gave evidence that Hindmarsh purchases might be explained by foreign customers having approved the use of Hindmarsh, or, given that Hindmarsh was, at that time, anticipated to pass tests for malt accreditation, Joe White may have been conducting its own internal trials using Hindmarsh. Purser explained that, as she was not in the malting business, she would not have known the size of any possible trials. In short, Purser's evidence was that, with the knowledge she had from grain trading, the spreadsheet would not have

603 Clark (who goes by the name Marcus) was admitted to practice in Queensland in 1998 (and in other jurisdictions subsequently) and became a partner at Allens in 2007. He has worked in mergers and acquisitions since 2009. He moved to another law firm in 2015.

604 The records indicated she did not access it in July or August 2013. She gave evidence she did not need to look at this information because it was not part of her workstream.

605 Her evidence was that she was unaware as to why the accreditation had been declined, and she recalled discussions about the possibility of changes with Hindmarsh, and that it might be reassigned.

"raised a flag".

956 Purser was cross-examined about her ability or otherwise to assess synergies with respect to barley purchases when she did not ascertain what barley varieties were held by Joe White. Her evidence was that this information was not necessary in order to identify the synergies. She said there were many varieties of barley and that volumes were important, but at that point varieties were not considered important. Further, she accepted that because of the existing relationships the grain and oilseeds supply chain had with barley suppliers in Australia, it was assumed Cargill would be able to manage whatever varieties Joe White required. In circumstances where there was no suggestion at all that there would be any difficulty in Joe White obtaining the required barley varieties (indeed, the exact opposite had been represented in the Information Memorandum and subsequently up to 4 August 2013), this appeared to be a reasonable assumption to make.

957 De Samblanx gave evidence that he did not look at any information in the Data Room to determine what varieties were held by Joe White. He disagreed that such a step was elementary. He accepted that if he had reviewed the information available and found an inventory of non-malting barleys, that would have constituted a risk to him. He explained that he did not attempt to ascertain details of the barley varieties because he did not know Australian varieties and would not have known which of them were non-malting varieties. Further, his evidence was that he did not know which varieties Joe White's customers had approved. Finally, on this point, De Samblanx gave evidence that it never crossed his mind that Joe White would not respect the correct barley varieties.[606]

958 Late on 23 July 2013, Wilson-Smith sent an email to a large number of Joe White

606 In their closing submissions, the Viterra Parties submitted that Cargill knew a significant number of Joe White's customers, which breweries provided its maltsters with specifications that applied internationally. On this basis, it was submitted that Cargill must have had knowledge of barley varieties specified by a number of Joe White's customers. Assuming this to be accurate (which seemed unlikely given Australian barley varieties are different to those in other parts of the world), it did not advance the position very far in circumstances where Cargill had not been provided with the breakdown of sales to each of these customers, and further it would not have explained the barley variety requirements of Joe White's other customers, including whether any of them had approved Hindmarsh.

executives, including the Third Party Individuals, copied to Fitzgerald and Bickmore. Wilson-Smith noted that questions had arisen as to whether Joe White had any ongoing liabilities in respect of past contracts. Specifically, Wilson-Smith asked whether any of them was aware of any contracts with liabilities that continued despite having come to an end, "or the site being sold (please disregard the Redbank site in this answer)". Further, Wilson-Smith said he wanted to know whether all material contracts relating to "your aspect of the Malt Business" had been included in the Data Room as far as each of them was aware. That night, Argent responded to Wilson-Smith, copied to all others. He stated "No" to the first question. In relation to the second question, he answered "Yes" and continued, "A sample of barley contracts rather than the entirety has been included for selected bidders. Otherwise all material contracts made available."[607]

959 On 24 July 2013, a meeting of the Cargill leadership team was held. For this meeting, a written presentation was prepared and circulated. The executive summary stated that the Due Diligence had not raised any major issues and had helped identify additional synergies. It noted that the board had provided support for a bid up to US$400 million or $435 million. The leadership team was informed that the base case valuation with synergies was US$387 million or $421 million. So, competitive bids were estimated to be between $350 million and $450 million. A bid of $405 million was recommended, which was said to deliver an internal rate of return of 10.3 percent.

960 The Due Diligence summary identified the commercial risks as low. It was stated that malt customer margins in barley merchandising earnings were in line with the levels Cargill had calculated based on comparative pricing from Europe. As for operations, it was stated that Joe White's plants were modern and reflected extensive investment. However, it was stated that there were environmental issues that had been discovered with potential remediation costs between $2 and $5 million, which was said to be

607 In closing submissions, Argent's counsel submitted that there was no evidence Wilson-Smith followed up his questions with any other Joe White executive. It was submitted this was a failure on the part of Wilson-Smith. As all the other recipients to the email from Wilson-Smith were copied into Argent's response, any criticism of Wilson-Smith in this regard was taking a very stringent approach to what might have been reasonably expected of someone in Wilson-Smith's position. As this correspondence was not raised with Wilson-Smith at trial, it is not appropriate that any finding be made in this regard.

factored into the valuation model. This area had a higher risk level, being graded as closer to high than low. Further, minor issues relating to newly constructed plant were referred to; the issue being confined to rail containers and penalties related to not reaching minimum levels of use. It was suggested these issues could be dealt with in the terms of any acquisition agreement.

961 The document also dealt with the underlying assumptions for the base case valuation, estimated synergies and dis-synergies, integration costs and the proposed integration team, shared services costs, a competitive analysis, key issues for any acquisition agreement, and a considerable amount of data underlying the Cargill valuation at that point in time.

962 With respect to the integration personnel, Viers was listed as integration manager. De Samblanx was to be the plant operations lead; Christianson was to be the trading and risk management lead; and Viers was to be the sales lead. There were also a number of other positions to which it is unnecessary to refer.

963 Eden was again the presenter at this meeting, which was held over the telephone. Eden gave evidence that Gregory Page ("Page"), the chief executive and chairperson of the board of Cargill, Inc at that time,[608] Conway and Koenig were on the call. Although he could not recall, he believed that David MacLennan ("MacLennan"), the chief operating officer of Cargill, Inc and a member of the Cargill leadership team,[609] also participated.

964 Eden made notes for the purposes of his presentation. Those notes included that a tremendous amount of work had gone into the valuation model and the evaluation of Cargill's competitors. Consistent with Engle's talking points, Eden recorded that he felt it was likely that 2 to 3 parties would be given the opportunity by Glencore to "sharpen pencils and work on cleaning up contract terms".

965 Eden noted the proposed purchase price of $405 million indicated a strong intent, and

608 Page no longer worked for Cargill, Inc at the time the trial commenced.
609 MacLennan later became the chief executive officer of Cargill, Inc.

expressed the belief that it was sufficient to "leave some room" and that Cargill would get a call back and be "in the game".

966 The Cargill leadership team approved a bid being made for $405 million. Conway did not have a specific recollection of this meeting, but recalled noting Viers had been given the role of integration leader, which he considered to be positive both in terms of his experience and because the position had been filled well in advance.

967 A further version of this presentation to the Cargill leadership team containing notes made by Engle was the subject of evidence. Engle noted that a bid of $400 million would be a strong bid and a bid of $410 million would be a really strong bid. Although Engle accepted during cross-examination that a bid of $410 million was on the radar, he rejected the suggestion that he considered the amount of $405 million, which he was seeking to have approved, was an opening amount. However, he also accepted that there was room left to potentially negotiate if necessary.

968 On 25 July 2013, KPMG provided a financial due diligence report to Cargill. Although it was marked draft, it was the final report before Cargill proceeded with the Acquisition.

969 The KPMG report set out the scope of work, which was to provide Cargill with financial due diligence assistance in connection with the proposed acquisition. The report stated it had been prepared on the basis of fieldwork commencing on 20 June 2013 and carried out up to 25 July 2013.

970 In relation to the reliability of Joe White's financial statements, KPMG reported that they were not prepared as standalone financial statements for Joe White. Rather, the statements were audited to a "Viterra Australian Group materiality threshold". It followed that the audits of the underlying trial balances had been performed at a materiality level appropriate for the Australian group, which KPMG reported would be significantly higher than the materiality level that would be applied to Joe White as a standalone business. As Joe White represented approximately 20 percent of the assets and revenues of the Australian group, KPMG reported less comfort could be

placed on the fact the financial information had been audited when compared to a business which had been audited to an appropriate materiality level.

971 In addition, KPMG stated that the "vendor" and Deloitte (whose retainer included an engagement to verify and reconcile the financial data books to ensure their accuracy confirmed that there were no audit management letters issued in relation to Joe White's financial statements for the 2011 and 2012 financial years, that there were no audit issues identified, that there were no material unadjusted audit differences and that there were no adjustments made to the trial balance of Joe White when preparing the Australian group financial statements. KPMG recommended that warranties be sought to the effect that the Joe White financial statements were a materially accurate representation of the Joe White Business.

972 A key finding of the report was that the financial information was largely prepared on a pro forma basis, with a limited audit trail back to source documents. Observations concerning this key finding included the following:

> Whilst the pro forma adjustments appear logical, there is limited information or detailed supporting calculations to provide comfort over the accuracy or completeness of the adjustments made, particularly in relation to the adjustments to restate malt margins on a commercial arms-length supply arrangement.
>
> In addition, the management accounts provided in the [D]ata [R]oom are brief and heavily redacted, and provided limited insights into significant business events, trading and financial results.

973 Certain implications were said to arise from these observations. It was noted that bidders would ordinarily be provided with greater detail of the source information for pro forma adjustments or have the comfort of being able to rely on the work undertaken through a vendor due diligence exercise. It was further noted that no such due diligence was undertaken by Glencore on Joe White. By reason of these matters, it was stated that Cargill was reliant upon vendor warranties that the information had been presented accurately and was a true reflection of the Joe White Business. Accordingly, it was again recommended that appropriate vendor warranties be obtained, including that the pro forma financial information accurately represented

the Joe White Business. Furthermore, it was recommended that Cargill should consider whether the standalone malt margin presented was in line with its expectation and experience in Cargill's global malt business.

974 If Cargill was unaware of the fact already,[610] it was now plainly on notice before agreeing to purchase the Joe White Business that no vendor due diligence had been conducted by Glencore.

975 On 29 July 2013, a meeting of the Cargill leadership team was held. At that meeting, a presentation was given of the deals Cargill was involved in. The likely "close date" for "Viterra Malt (Joe White Maltings)" was recorded as the second quarter of the 2014 financial year. Under a summary of the current deals "Viterra Malt" was recorded as active.

976 Further, on 29 July 2013, Cargill, Inc submitted what, under the agreed regime, was to be a final bid for Joe White of $405 million ("the First Final Bid"). The First Final Bid was emailed and addressed to Merrill Lynch and was in the form required by the Phase 2 Process Letter.[611] Cargill, Inc stated that it proposed to undertake the acquisition of Joe White "via its Australian indirect subsidiary, Cargill Australia" and confirmed it was making the First Final Bid on behalf of Cargill Australia. The First Final Bid commenced by referring to the fact that Cargill, Inc had committed substantial resources and effort in evaluating Joe White, and continued:

> *Based on the due diligence that we have undertaken and discussions with Joe White management*, we have confirmed our view that Joe White is an impressive business with a portfolio of top-tier assets and a strong strategic fit with Cargill, our global malt business, and Australian grain and food ingredients activities. We are also impressed with the quality and depth of the management team …
>
> (Emphasis added.)

977 Under the heading "Due diligence requirements", the First Final Bid stated:

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610 See pars 561, 623 (at par (d) of the Cargill Indicative Bid referring to the assumption that the information was supported by due diligence findings) above. Further, the Viterra Parties submitted that if a vendor due diligence had been done by Glencore it would be inferred that Glencore would have disclosed it. It was contended that this was "an important fact": see par 4435 below.

611 See par 639 above. The First Final Bid was signed by Hawthorne for and on behalf of Cargill, Inc.

> Cargill confirms that it *has conducted its due diligence based on the information provided to date in the process*. This includes a review of the information provided in the *Information Memorandum, management presentations, site visits, the [Data Room] (including responses provided through Q&A)* and some public registers.
>
> *Subject to the Acquisition Agreement*, Cargill confirms that this Offer is *not conditional upon completion of any further due diligence, except confirmatory due diligence in relation to information that has been withheld or redacted in the [Data Room]*.
>
> (Emphasis added.)

978 At the close of the First Final Bid was written:

> We would like to thank you for giving us the opportunity to participate in this process. We believe that our Offer represents a compelling proposition in terms of value, certainty of execution and timing. Cargill stands ready to move forward on an expedited basis towards completion of the Proposed Transaction.

979 The covering email referred to attached documents which included a draft acquisition agreement tracked with Cargill's proposed amendments. In the draft acquisition agreement,[612] various suggested amendments were proffered.[613] With respect to the "Knowledge and belief" clause (which ultimately became clause 31.15), in addition to each Seller's knowledge being deemed to be the actual knowledge of various specified persons (which were then yet to be inserted), such knowledge was provided to include facts, matters or circumstances on the date of the Warranty if the specified persons had made reasonable enquiries before that date of Joe White's executives or if disclosed within certain items of the Disclosure Material.[614] In addition, amongst the numerous suggestions made to amend the definitions of the Warranties set out in schedule 4, Cargill had deleted reference to material defaults in relation to Material Contracts,[615] so that the proposed Warranty with respect to default by Joe White was expanded to knowledge of any default of any Material Contract.

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612 The document recorded that it was the "Allens mark-up" dated 29 July 2013, replacing the draft provided by Mallesons dated 14 July 2013.

613 These included significant proposed amendments to cl 13 of the draft concerning "Warranties and representations": see par 1029 below for the final form of the clause in the Acquisition Agreement. However, the draft cl 13.4 expressly stated that Cargill Australia acknowledged and agreed that in entering into the Transaction Documents it did not rely on any statement, representation, warranty, condition, promise, forecast or other conduct which may have been made by a Seller, except the Warranties.

614 See the definition in par 1022 below.

615 Ibid.

980 In relation to acknowledgements intended to be made by Cargill Australia, it was suggested that there was a significant overlap between 2 proposed clauses, and that Cargill had consolidated those acknowledgements which were acceptable to Cargill. The consolidation was by way of tracked changes which deleted a clause and combined the acceptable acknowledgements in another clause (which ultimately became clause 13.4).

981 Eden continued to be very excited about the prospect of Cargill purchasing Joe White. In an email to various persons, including Sagaert, Viers, De Samblanx and Jewison, he stated he had an expectation that Glencore would keep at least 1 other bidder "on hold 'warm' as we work through the details" and that Merrill Lynch would involve "our competitor" if contractual terms could not be agreed. Eden suggested the prospect of purchasing Joe White was "really exciting" and a breakthrough event for Cargill Malt, although he acknowledged there were many potential risks and that the deal might not happen.

982 Following receipt of the First Final Bid, Viterra was working to finalise the terms of the anticipated contract. Further, Glencore wanted to have the executives of Joe White, including the Third Party Individuals, verify the warranties it was proposed that Viterra Malt, as the Share Seller,[616] would give as part of any sale agreement. Wilson-Smith was directed to attend to this.[617]

983 Also on 29 July 2013, Merrill Lynch summarised the Phase 2 bids, of which there were only 3. In addition to Cargill's bid, Co-Operative Bulk offered $335 million and Malteurop offered $320 million. The key conditions of each bid were also set out, none of which were conditional on financing. With respect to due diligence, Cargill had the least onerous conditions. In short, not only was Cargill's bid substantially more than the competing bids, it was also the most straightforward with respect to other matters.[618]

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616 See par 1020 below.

617 See further issue 125.6 below.

618 While, in contrast to Cargill's bid, the bid by Co-Operative Bulk did not require approval from the

984 On 31 July 2013, Cargill was informed that it would be able to continue to negotiate the terms of a sale.

985 Late on 31 July 2013, Merrill Lynch emailed Goldman Sachs stating that Glencore had agreed to provide Cargill with access to certain additional black box information on terms previously agreed with respect to access to supply and transportation agreements. The terms included that access was only to be given to Cargill's nominated external lawyers on the basis they were not to disclose the contents of any of the documents other than amongst themselves. The external lawyers were only able to access the information on a read-only basis, with saving, printing, copying or photographing of the information being prohibited. The external lawyers were permitted to provide Cargill with a written summary of certain stipulated matters. With respect to Joe White's customer contracts, a summary was permitted of any material differences between the terms of those contracts and the summary of terms previously provided as document 20.1, being the "Customer Sales Volume Analysis" that was contained in the visible section of the Data Room.[619] This email was then forwarded to Cargill.

986 During the Due Diligence, Cargill had sought access to Joe White's customer contracts. Cargill was told that it could not have access to these documents, including because of competition rules in Australia. It was agreed that access would be given at the appropriate time to Cargill's external lawyers.

987 Upon Viers viewing the 31 July 2013 email, he suggested the email was "a bit fuzzy" and wanted to know whether or not Cargill was "good to go in". Engle responded to Viers' enquiry, stating that what had been proposed was the same procedure as had been applied for access to the supply and utility contracts contained in the black box, where someone had been given access and then provided a summary for the group.

Foreign Investment Review Board, there was nothing to suggest that anyone anticipated there would be any difficulty with this approval. Further, Cargill also required approval from the South Korean competition regulator, but again there was no suggestion that this would give rise to any difficulties. As to the key conditions of the Co-Operative Bulk bid, they were exclusivity, review of the black-box documents, no material adverse changes and the transfer and continuity of key Joe White management.

619 This information did not disclose customer specifications: see par 815 above.

Engle suggested the process was fine as it had worked well the last time, and Cargill's external lawyers, Allens, would be able to summarise and circulate the relevant information quickly.

988 On learning of this development, Hawthorne sent an email to a large number of Cargill employees noting that the parties were in final contract negotiations and might well reach an agreement in the following 48 to 72 hours. He expressed the belief that the process remained competitive and the position still remained uncertain.

989 In the early hours of the morning on 1 August 2013, Lindner sent a response rejecting Cargill's suggested amendments to the draft acquisition agreement.[620] However, the covering email indicated that what had been sent was subject to any further comment from Glencore and a further review by Mallesons. Further, Mallesons suggested only the knowledge of Rees and Fitzgerald ought to be the subject of the "Knowledge and belief" clause and that there be no deemed knowledge based on what they would have known if they had conducted reasonable enquiries. In other words, not only was Cargill's suggestion that reasonable enquiries would include enquiries of the Joe White executives rejected, but there was a complete removal of the provision that any reasonable enquiries would be part of the consideration of what would be deemed to be Viterra's knowledge for the purpose of the relevant proposed warranties. Furthermore, the reference to knowledge of defaults of Material Contracts by Joe White was reinstated to refer to material defaults.

990 Throughout 1 and early 2 August 2013, representatives of Cargill, including Engle and Le Binh, worked with their external advisers in seeking to reach agreement with Glencore on the terms of the proposed acquisition agreement. Engle was involved throughout. He had many regular telephone calls with Walt, his counterpart, during these negotiations.[621] Engle gave evidence that he discussed various issues in detail with Walt.

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620 See par 979 above.

621 Engle had also had dealings with Walt in relation to the sale of Prairie Malt Ltd.

991 The parties negotiated throughout the day and most of the night. At approximately 9.00am on 2 August 2013 United States' time,[622] agreement had been reached on nearly all the terms, with about 5 or 6 issues outstanding.

992 After 4pm on the afternoon of 2 August 2013, Lindner circulated a further revised draft of the proposed acquisition agreement. Subject to receiving instructions from Glencore, Lindner proposed that Mann and Mattiske be added as specified persons for the purposes of the "Knowledge and belief" clause, on the basis that each Seller would be deemed to know matters the subject of the actual knowledge of each of Rees, Fitzgerald, Mann or Mattiske on the date the Warranty was to be given. Significantly, the previous attempt by Mallesons to confine Viterra's deemed knowledge, so that it did not include what the named individuals would have known had they made reasonable enquiries, was unsuccessful. Thus, after the addition of the names of Mann and Mattiske, together with the reference to the date that the Warranty was given,[623] the words "or would have been aware had they made reasonable enquiries" were reinstated. However, in contrast to what Cargill had suggested, there was no reference as to whether or not such enquiries would include enquiries of the Joe White executives as there was simply no specification to whom such possible reasonable enquiries were to be directed. Further, the reference in schedule 4 to material defaults of Material Contracts was maintained. At the end of the trial, the Viterra Parties made various submissions based upon their refusal to adopt all of the amendments put forward by Cargill ("the Refusal of Certain Terms").

993 Early in the afternoon of 3 August 2013, Cargill was provided with additional information by Allens from the black box of the Data Room, including with respect to customer contracts. The document provided included a section entitled "Material differences between summary of customer contracts and terms of those contracts". It is unnecessary to set out all the significant amount of detail provided. During King's cross-examination, he said that customer contracts were the most sensitive documents

622 The time zone was not identified.

623 As a result of Cargill's insistence upon the requirement that the Warranties were to be given at the date of Completion as well as at the time of the Acquisition Agreement.

in the entire transaction. He explained that margins achieved were the most sensitive piece of information because another malt company could undercut Joe White if it knew what Joe White was charging. He suggested access to such information could result in Joe White losing its business. He said this was the reason access was given so late.

994 Nothing disclosed in Allens' summary suggested that customers' specifications were not being met, incorrect barley varieties were being supplied, or gibberellic acid was being used when it was prohibited.[624]

995 What was or was not summarised by Allens was not something that the Viterra Parties sought to control.[625] However, there was no evidence to suggest that, even if the entirety of the contract terms had been the subject of the summary (leaving out the names of the customers), such an exhaustive summary would have revealed the existence or extent of the Operational Practices at that time. Although Clark gave evidence that what was prepared by Allens was on the instructions of Cargill, there was no basis to conclude that Cargill sought to curtail a fair and accurate summary of the customer contracts by way of this process or that it ought to have revealed the true nature and extent of the Operational Practices.

996 On the afternoon of Saturday, 3 August 2013, Wilson-Smith sent an email with the subject line "Ballarat – Warranty Verification Process" to Mattiske, Fitzgerald, Rees and Mann.[626] The email stated:

> As you are aware, as part of the [Joe White] divestment, we are required to give certain warranties to the successful bidder about the current state of the [Joe White] [B]usiness. Some of these warranties are qualified by knowledge which, under the final document, is the knowledge of each of you having made

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624 With respect to "Customer C" (none of the customers were identified by name), reference was made to the possibility of a rebate payable by Joe White in the event that the malt supplied failed to meet specifications. However, there was nothing to suggest that that rebate clause had been acted upon or that specifications in this regard were not being met.

625 Clark could recall a restriction being imposed with respect to the names of Joe White's customers, though he could not recall whether or not they were in fact disclosed to Allens. The summary prepared by Merrill Lynch was on a no-names basis.

626 Project Ballarat was the name Glencore gave to the sale of the Joe White Business.

reasonable enquiries. *We therefore need to ensure that you are comfortable that you have undertaken reasonable enquiries.*[627]

To assist you, over the last few days Legal has conducted a process to verify the warranties in the [Acquisition Agreement].

This process involved

1. Discussing each warranty (*to the extent relevant to their portion of the business*)[628] with: Legal, Gary Hughes (Exec), Scott Argent (Finance), Peter Youil (Operations), Rob Wicks (Commercial), Doug Stewart (Technical), Trevor Turnbull (Engineering), Shilo Wyatt (Environmental), Ben Norman (HR), Matt Forsythe (Safety) and Vern Chubb (Property).

2. Asking each person to confirm whether the warranty is true and correct and, if not, whether the incorrect nature of the warranty has been disclosed in the [Data Room]. *It was reiterated that this process was not a time to hide anything.*

(Emphasis added in italics.)

997 The email attached a copy of Wilson-Smith's typed notes of the warranty verification process. Wilson-Smith noted that "[y]ou will see" that as at that date there were a few issues raised in the verification process, and suggested they would be finalised before signing, including with disclosure made in the Data Room. At the end of the email, Wilson-Smith wrote in bold, red font:

> Please note that you will not be in any way personally responsible for the accuracy of the warranties or personally liable for any claim arising from an incorrect warranty.
>
> (Emphasis in original.)

998 As to the last paragraph of the email, Wilson-Smith said he included it because he recalled such a clause being in the draft acquisition agreement.[629] The position adopted was in stark contrast to the approach taken with the Joe White executives

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627 But also see par 1000 below.

628 Precisely how Wilson-Smith determined the extent to which a Warranty was relevant to a particular person's "portion of the [Joe White Business]" was not explained. There was no evidence to suggest Wilson-Smith discussed this issue with each Third Party Individual to see if Wilson-Smith's determination accorded with the executive's view. However, the fact that Wilson-Smith adopted this approach was recognition of the fact that all the Third Party Individuals were not in a position to verify all the Warranties that required verification. Even with his lack of knowledge of the Joe White Business, Wilson-Smith's evidence was that he understood that, for example, Argent was not someone he approached to verify Warranties concerned with operational, contractual or technical matters.

629 It was in clause 31.15.

referred to in paragraph 1 of the email. Those executives were given no such assurance about personal responsibility or liability.[630] Further, Wilson-Smith gave evidence consistent with his email that he did not go through all the Warranties with each relevant individual Joe White executive, but discussed them "to the extent they were relevant" to each of them. Furthermore, he accepted under cross-examination that he did not state to Wicks that the process was not a time to hide anything.[631]

999 On the morning of 3 August 2013, Mattiske was with his family at a swimming pool. He received a call from Pappas. Pappas told him Cargill was insisting on Mattiske being added to the contract as a "knowledge individual" for the purpose of the Warranties. Mattiske had not been involved in the negotiations concerning this aspect of the proposed agreement previously.

1000 Mattiske gave evidence that he was told by both Mallesons and Fitzgerald that he could rely on what had been done and would not have to make his own independent investigations with respect to the Warranties. This appears to be contrary to what was stated by Wilson-Smith in an email sent later that day, copied to Fitzgerald.[632] In any event, Mattiske gave evidence that he read the Warranties and was not aware of anything untoward or incorrect. However, there was nothing to suggest that he personally verified any of the matters relating to the Warranties.

1001 In the afternoon, Mann responded to Wilson-Smith's email. Mann stated he was comfortable with his oversight of the safety, health and environment related responses. He confirmed he had made reasonable enquiries concerning the Data Room documents relating to safety, health and environment. No such responses were provided by Mattiske, Rees or Fitzgerald with respect to other aspects of the Joe White Business.

1002 Also on 3 August 2013, after Mallesons received instructions from Walt on that Saturday morning to finalise the transaction document, Lindner was involved in

630 See par 4992 below.
631 See par 5025 below.
632 See par 996 above.

discussions about the finalisation of the Warranties and the Data Room to ensure that full disclosure had been made.[633]

1003 The contents of the Data Room were progressively supplemented as new material came to light. In the lead up to the Acquisition Agreement being entered into, the documents in the Data Room included: the Data Books; a spreadsheet of Joe White's barley purchases for the financial years from 2010 to 2013 (the last of which was naturally incomplete), which included information about Joe White purchase contracts which did not specify the particular malting varieties to be acquired (which was said to be about half),[634] and the quantities of barley purchased which was not malt 1 grade, including Hindmarsh purchases;[635] a breakdown of customer sales volumes in summary form for Joe White's top 10 customers (the specific customers' contracts were black-boxed); the Management Presentation Memorandum; the minutes of the Operations Call and the Commercial Call; dossiers of information relating to various Joe White facilities, including malt storage capacities; Joe White's chemical register, including details of gibberellic acid quantities; and the Malt Proficiency Scheme.

R. Cargill induced to increase its final bid

1004 Returning to 2 August 2013, a phone call took place between Mahoney and Koenig ("the First Further Bid Call"). According to King's understanding, Mahoney was the Glencore executive in charge of the sale of the Joe White Business. It was common ground between the Cargill Parties and the Viterra Parties that this phone call was

633 But see pars 662 above and 1324 below. Further, Lindner gave some very vague evidence that as the completion of the sale documentation was approaching there was a process of ensuring the Data Room was fully populated; in which process she suspected she participated. After saying she could not specifically recall, she referred to her understanding that Wilson-Smith was co-ordinating the process. She could not recall any specific communications on the subject.

634 The worksheets included a column headed "Variety". Some of the contracts listed simply stated, for example, "Malt 1", without indicating the variety required. Others were specific as to the variety or varieties to be purchased. However, some were unclear as to whether or not a variety was specified. This was not explored at trial. The Viterra Parties submitted "around half" of Joe White's contracts did not specify a barley variety without saying how they arrived at that approximation. Given the lack of clarity in the spreadsheet, it has not been possible to check the accuracy of the submission. However, in circumstances where the Cargill Parties did not quibble with this submission the approximation has been accepted as it appeared that at least 40 percent fell into this category.

635 See pars 952-955 above.

made by Mahoney to Koenig and that during the call Mahoney asked Koenig if Cargill, Inc would increase the value of its bid for Joe White from the First Final Bid of $405 million to a bid of $420 million.

1005 Within approximately 2 hours, Koenig had discussed the substance of the First Further Bid Call with others in Cargill, received a direction to increase Cargill's offer to $420 million (subject to certain conditions), and telephoned Mahoney to inform him of Cargill's position ("the Second Further Bid Call"). A far more detailed account of these events and their significance is set out below.[636] In short, the unsolicited First Further Bid Call caused Cargill to increase its First Final Bid by $15 million, subject to certain conditions, which was still within the amount of US$400 million approved by the Cargill, Inc board on 9 July 2013.

1006 Shortly after the Second Further Bid Call, Koenig informed his fellow Cargill executives, by email, that the deal was "done".[637] Van Lierde replied to the email chain at 2.39am on 3 August 2013, stating:

> [I]t doesnt (sic) come cheap, but it's an excellent fit for our biz and we will deliver on the promises made.

1007 As a result of the increased purchase price and additional conditions, Engle called Walt to progress the finalisation of the contract terms as soon as possible. Walt already knew about the discussions between Mahoney and Koenig. During this discussion, Engle explained all the conditions Cargill required. Walt asked Engle to email the conditions, which Engle did. The email stated that Engle would instruct Allens to reflect the further conditions in an updated version of the proposed acquisition agreement.

1008 In an email in response, Walt stated that documents were still being posted to the Data Room and a few hours were needed before the giving of Warranties. However he stated further that he could not see anything preventing the execution of the proposed acquisition agreement during the course of Saturday, Australia time. Further

636 See pars 3777-3859 below.
637 See par 3803 below.

telephone discussions occurred between Walt and Engle every couple of hours for the next 24 to 36 hours.

1009 Others within Cargill were also very positive about the finalisation of the offer. On 3 August 2013, Eden sent an email to Jewison and Viers thanking them for their work on Cargill's bid and continuing:

> We all know it is not perfect and I am sure we will many (sic) more challenges along the way. The good news is we bought this business at a fair price *given the intense competition*. I know of at least 2 other companies that will not be happy as of our announcement. Thank God it is not us on the other end.
>
> I will say again. It is hard to put a price on the value of being the leader in an industry.[638]
>
> (Emphasis added.)

1010 Also in response to the increased purchase price, Le Binh provided an updated valuation model. In so doing, he varied the exchange rate input and decreased the synergies by $1 million. With a base case value of $427 million with synergies, Le Binh reported an internal rate of return of 10.1 percent with a bid of $420 million. The base case still contained as its foundation financial and operational information as stated in the Information Memorandum.[639]

1011 As for those on the other side of the transaction, on 2 August 2013 Merrill Lynch emailed Goldman Sachs attaching a "package" that Glencore proposed as a compromise to address the outstanding issues in the proposed acquisition agreement.[640] This was followed by an email from Mallesons, attaching a revised draft acquisition agreement.

1012 Lindner gave evidence that there was a discussion on the afternoon of 2 August 2013 after which there were still a number of issues unresolved. During the course of this meeting, Pappas said that Glencore was not conceding any of the outstanding issues. However, very properly, Lindner clarified that the "outstanding issues" that existed

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638 As for the perceived competitiveness, see also pars 593, 950 above and par 1083 below.

639 The financial and operational figures for the base case for the financial years from 2010 to 2012 replicated those contained in the Information Memorandum. The 2013 figures were different as they were more up to date, but were still recorded as estimates.

640 See also pars 3800-3801 below.

at the time Pappas made this statement were different to the outstanding issues referred to in the "package" emailed from Merrill Lynch.

1013 Lindner said she took part in a conference call the following morning with King and Walt and some others. She was informed by Walt that he had spoken to Cargill and, in return for Glencore not pressing a handful of outstanding points, Cargill had agreed to increase its purchase price by $15 million.

1014 A response to this "package" was sent by email from Allens to Mallesons late in the afternoon on 3 August 2013, attaching a mark-up to a revised draft acquisition agreement circulated by Mallesons.

1015 At no time before Cargill agreed to purchase the Joe White Business did any representative of Cargill ask for a copy of any policy Joe White may have had with respect to the analysis and reporting of test results for malt delivered to its customers. During his cross-examination, De Samblanx acknowledged he did not ask for any policy, and gave evidence that in 2013 he had no idea what policies other maltsters may have had with respect to Certificates of Analysis. Eden also acknowledged he made no such request, but said he believed some documents were available to Cargill (presumably, a reference to the Malt Proficiency Scheme which was contained in the Data Room).[641]

1016 Equally, Viers accepted he did not ask for any policy, nor direct anyone else to do so. When it was then put to him that the reason he did not do so was because he did not care what Joe White's policy was, Viers said that proposition was absolutely false. In response to a question as to whether Viers was telling the court that he did care, his evidence was that given the assurances that Cargill had received he was not concerned

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641 The Viterra Parties referred to Eden's evidence on this issue and the fact that he could not explain why he did not ask for a policy. Eden's evidence was that it was not part of his workstream and he relied on De Samblanx to ask questions about policies concerning Certificates of Analysis. When giving his evidence, Eden did not know if a policy had ever been requested. Eden rejected the suggestion put to him that he did not ask for policies on malt production and reporting because he did not regard them as sufficiently important. Further, although later in time, discussion of this topic is not compete without referring to the misleading statement made by the Viterra Parties before Completion to the effect that the relevant policy was reflected in the Malt Proficiency Scheme included in the Data Room: see par 1378(2) below.

about a possibility that there was a broad-based issue around practices concerned with Certificates of Analysis. He said it had not crossed his mind. In light of the assurances given, including those contained in the Information Memorandum and Management Presentation Memorandum, it was understandable why Viers had this state of mind.

1017 Despite the fact that Cargill intended to adopt its own approach to analysis and reporting upon any purchase of Joe White, the Viterra Parties' contention that the reason no one from Cargill sought a copy of any policy relating to Certificates of Analysis was because Cargill did not care what approach had been taken by Joe White cannot be accepted.

1018 With the benefit of hindsight, undoubtedly requesting a copy of any written policy would have been a simple means by which Cargill could have discovered many things about which it subsequently complained.[642] However, I do not accept that there was a conscious decision not to ask for a policy, nor a wanton disregard for how Joe White operated with respect to analysis and reporting concerning malt delivered to its customers (which was reflected in the absence of a request), because of any future intentions of Cargill in relation to the operation of the Joe White Business or because of an overriding keenness to acquire the Joe White Business.

1019 Although as things have turned out it was perhaps unfortunate that no such request was made, the absence of a request for any policy was explicable in large part by the manner in which the Joe White Business was presented to Cargill. Further, as King in effect readily acknowledged, if Joe White had a policy that was material to its operations, Cargill could have reasonably expected for it to be disclosed in the Data Room.[643] Furthermore, what was disclosed was a copy of the Malt Proficiency

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642 Lindner's evidence, as a solicitor with significant experience in mergers and acquisitions, was that it would have been prudent for a prospective purchaser to ask about a process if it became aware of a "process germane to the business" which was causing it concern. She said in that situation she would advise a client to do so. She also accepted a proposition that if there was a policy in respect of the process, there would be nothing stopping a purchaser from asking for it. The evidence did not establish that Cargill had a material concern in this regard.

643 See par 619 above. This position concerning a reasonable expectation of disclosure pertaining to a transaction of this nature was given by King who was aware of the terms contained in the documents relevant to disclosure, including the Information Memorandum, the Management Presentation Memorandum and the Data Room Protocol.

Scheme. This would have provided some comfort to Cargill that the equipment being used by Joe White was properly checked and calibrated in accordance with a well renowned scheme. Moreover, disclosure of the Malt Proficiency Scheme in the Data Room in no way put Cargill on notice that Joe White was engaged in pencilling or reporting results of malt analysis other than as they appeared, or engaging in any practice that was consciously concealed from its customers and auditors.

S. The Acquisition Agreement

1020 The Acquisition Agreement was executed in the early hours of Sunday, 4 August 2013. It named the following parties, each of whom executed the document:[644]

Viterra Malt, defined as the "Share Seller".[645]

Viterra Operations, defined as the "Land Seller".[646]

Viterra Ltd, defined as the "Dom Box Seller"[647] (together, the "Sellers").[648]

Cargill Australia, defined as the "Buyer".

Cargill, Inc, defined as the "Buyer Guarantor"[649] (together, the "Buyers").

Glencore was not a party to the Acquisition Agreement. Joe White was referred to as the "Company".

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644 The Acquisition Agreement was executed by Mattiske and Fitzgerald on behalf of Viterra Malt, Viterra Operations and Viterra Ltd; Philippa Tinton, director and Jason Price, director on behalf of Cargill Australia; and Daryl Wikstrom, president and Lesley Ann Doehr, assistant regional treasurer, on behalf of Cargill, Inc.

645 As the sole registered holder and beneficial owner of all the shares of Joe White.

646 Viterra Operations was the sole legal owner and, with Joe White, the beneficial owner of land and buildings utilised at the Minto plant.

647 Viterra Ltd was the sole legal and beneficial owner of the Dom Boxes used in the conduct of the Joe White Business.

648 Any obligation or liability imposed on any of the Sellers was an obligation or a liability imposed upon them jointly and severally: cl 1.6.

649 Cargill, Inc agreed to guarantee the obligations of Cargill Australia as "Buyer" and acknowledged incurring obligations and giving rights under the Acquisition Agreement for valuable consideration received from the Seller.

1021 The document was lengthy. Including annexures, it ran to 301 pages.[650]

1022 The Acquisition Agreement contained a large number of definitions which were to have the meanings described in the Transaction Documents unless the contrary intention appeared, including the following:[651]

> **Action** means an action, dispute, claim, demand, investigation, enquiry, prosecution, litigation, proceeding, arbitration, mediation or dispute resolution.
>
> …
>
> **Assets** means the assets from time to time which are exclusively used in connection with the Business and includes the Business Premises but does not include the Malt Assets, the Former Business Premises or the Dom Boxes.
>
> …
>
> **Business** means the malt business trading as "Joe White Maltings" conducted by [Joe White] using the Assets, the Malt Assets and the Dom Boxes.
>
> **…**
>
> **Claim** means any allegation, debt, cause of action, Liability, claim, proceeding, suit or demand of any nature howsoever arising and whether present or future, fixed or unascertained, actual or contingent, whether at Law, in equity, under statute or otherwise.
>
> …
>
> **Completion** means completion of the sale and purchase of the Shares, the Minto Land and Buildings and the Dom Boxes pursuant to this agreement and **Complete** has a corresponding meaning.
>
> …
>
> **Completion Date** means:
>
> (a) the date that is 5 Business Days after all of the Conditions Precedent are satisfied or waived; or
>
> (b) where the date in paragraph (a) falls on a date less than 5 Business Days before the end of a month, the first business Day of the following month; or
>
> (c) any other date agreed by the Seller and the Buyer.
>
> …
>
> **Confidentiality Deed** means the confidentiality deed dated on or about 22 (sic) May 2013 between [Glencore] and [Cargill, Inc].[652]

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650 In the recitals, the governing law was defined as the law of New South Wales.

651 There are some further definitions that are relevant, but it is unnecessary to include them as the meaning of the defined term is apparent from its use elsewhere in these reasons.

652 Despite "Confidentiality Deed" being defined as a deed being dated on or about 22 May 2013, it was common ground that the operative Confidentiality Deed at the time the Acquisition Agreement was signed was dated 27 May 2013.

…

Control of a corporation includes the direct or indirect power to directly or indirectly:

(a) direct the management or policies of the corporation; or

(b) control the membership of the board of directors,

whether or not the power has statutory, legal or equitable force or is based on statutory, legal or equitable rights, and whether or not it arises by means of trusts, agreements, arrangements, understandings, practices, the ownership of any interest in shares or stock of that corporation or otherwise.

…

Data Room Documentation means:

(a) all documentation contained in the Data Room[653] or referred to in this agreement or listed in the data room index provided to the Buyer or its Representatives (including the information listed in the index in Annexure B) and any supplementary data room indexes provided to the Buyer or its Representatives up to and including the day before the date of this agreement; and

(b) all written responses and other information provided to the Buyer or its Representatives as part of the Q&A Process up to and including the day before the date of this agreement, including the responses set out in Annexure C.

…

Disclosure Material means the information set out or referred to in Schedule 8.[654]

…

Dom Boxes means the 350 containers supplied to the Dom Box Seller under the Container Purchase Agreement.[655]

…

Due Diligence means the enquiries and investigations into the Company and the Business carried out by the Buyer and its Representatives before the date of this agreement, including but not limited to enquiries and investigations of the Data Room Documentation and materials provided in the management presentations conducted in relation to the sale of the Shares by the Share Seller

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653 "Data Room" was defined as the virtual data room established for the purpose of the transaction.

654 This included the Data Room Documentation and all information disclosed from various identified sources, and "all other information and data provided or communicated in writing to the Buyer, its Related Bodies Corporate or any of their respective Representatives by the Seller, its Related Bodies Corporate or their respective Representatives before the date of this agreement in connection with the transactions contemplated by the Transaction Documents, including all written information and data provided or communicated as part of or during: (i) management presentations ...; (ii) visits by the Buyer … to the sites …; (iii) any formal or informal information request process conducted by or on behalf of the Seller in conjunction with the review by the Buyer of the Data Room Documentation including the information set out in Annexure E".

655 See also fn 573 above.

or the sale of the Malt Assets by the Land Seller or the sale of the Dom Boxes by the Dom Box Seller.

…

Last Balance Sheet Date means 31 October 2012.

Law includes:

(a) any law (including common law and principles of equity), regulation, authorisation, ruling, judgment, order or decree of any Government Agency; and

(b) any statute, regulation, proclamation, ordinance or by-law in:

(i) Australia; or

(ii) any other jurisdiction.

Liability means any liability or obligation (whether actual, contingent or prospective), including for any Loss irrespective of when the acts, events or things giving rise to the liability occurred and **Liabilities** has a corresponding meaning.

…

Loss means all damage, loss, cost and expense (including reasonable legal costs and expenses of whatever nature or description).

Malt Assets means:

(a) the Minto Land and Buildings; and

(b) the [Joe White] Intellectual Property.[656]

…

Material Contract means:

(a) the Qube Agreement;

(b) the Silo Agreement;

(c) the Storage and Supply Agreement;

(d) any lease to the Company of the Business Premises;

(e) any trade waste agreement relating to a Business Premises;

(f) any contract entered into by the Company pursuant to which at least 20,000 tonnes of malt is supplied by the Company over the term of that contract;

(g) any contract to which the Company is a party which, at the date of this agreement, is reasonably expected to require gross expenditure by the Company exceeding $3 million over the remaining term of that contract

656 The intellectual property in question was identified in schedule 3. Schedule 3 referred to "Trade mark number 957998 in relation to the word (sic) 'Joe White Maltings' in clauses 31, 35, 39, 42 and 44 held by the Land Seller".

or has a remaining term of more than 12 months (with "term" in each case to include any options if exercisable by the counterparty); and

(h) any contract to which [Joe White] is a party and is critical to the effective conduct of the Business and the absence of which would be likely to have a material adverse effect on the Business.

…

Q&A Process means both:

(a) the online process by which the Buyer and its Representatives submitted certain questions regarding the transactions contemplated by this agreement and the Business, the responses to which were posted to a secure internet site and accessible to the Buyer before the date of this agreement, and includes any documents which were separately provided to the Buyer or its Representatives before the date of this agreement in response to a question asked as part of that process; and

(b) (if applicable) any process by which the Buyer and its Representatives submitted questions regarding the transactions contemplated by this agreement and the Business directly to a Seller or its Representatives via email, the responses to which were received by the Buyer or a Representative before the date of this agreement, and includes any documents which were separately provided to the Buyer or its Representatives before the date of this agreement in response to a question asked as part of that process.

…

Records means originals and copies, in any Material Form, of all books, files, reports, contracts, records, correspondence, data, documents and other material of the Company or exclusively or predominantly relating to the Company or the Business and includes:

(a) minute books, statutory books and registers, certificates of registration, books of account and copies of taxation returns for the Company;

(b) certificates of title or registration or other documents evidencing title;

(c) reports, plans, surveys and drawings;

(d) Licences and Licence applications;

(e) manuals and policies;

(f) Employee records;

(g) sales literature, market research reports, brochures and other promotional material (including printing blocks, negatives, sound tracks and associated material);

(h) all sales and purchasing records, contracts, designs and working papers;

(i) all trading and financial records; and

(j) lists of all regular suppliers and customers.

…

Representative of a party includes an employee, agent, officer, director, auditor, adviser, consultant or sub-contractor of that party or of a Related Body Corporate of that party.

…

Seller means either the Share Seller or the Land Seller or the Dom Box Seller, and **Sellers** means all of them.

…

Shares means all of the issued shares in the capital of the Company …

…

Transaction Documents means:

(a) this agreement;

(b) the Employees Offer Deed;

(c) the Intellectual Property Assignment Deed; and

(d) the Transition Services Agreement.

…

Warranties means the warranties and representations set out in Schedule 4 and **Warranty** has a corresponding meaning.

1023 The Acquisition Agreement went on to set out substantive clauses. Clause 2 was entitled "Sale and Purchase".[657] Clause 2.1 specified that Viterra agreed to sell, and Cargill Australia agreed to buy, effectively the Shares, the Malt Assets and the Dom Boxes on Completion.

1024 Clause 3 was entitled "Payment of Purchase Price", and specified that the total price to be paid was $420 million excluding goods and services tax. Clause 3.3 was entitled "Adjustment Amount Interest" and stated:

(a) Interest is payable on the Adjustment Amount at the Interest Rate.

(b) Interest at the Interest Rate on the Adjustment Amount accrues daily from (and including) the Completion Date to (but excluding) the date of actual payment and is calculated on actual days elapsed and a year of 365 days.

1025 Clause 4 set out the conditions precedent to the sale, which included foreign

657 Headings were for convenience only and did not affect the interpretation of the Acquisition Agreement: cl 1.5.

investment clearance in Australia and competition clearance in South Korea, and imposed an obligation of reasonable endeavours by the parties to ensure that the conditions precedent were met.

1026 Clause 5 was entitled "Completion" and set out details of the parties' obligation to complete the transaction and related documents.

1027 Clauses 6 and 7 were entitled "Adjustments to Adjusted Share Purchase Price" and "Completion Accounts" respectively.[658]

1028 Clause 9 was entitled "Pre-Completion Matters". It included:

> **9.1 Conduct of business pending Completion**
>
> From the date of this agreement until the Completion Date, other than:
>
> (a) as expressly permitted by the Transaction Documents;
>
> …
>
> the Share Seller will ensure that:
>
> (d) (**ordinary course of Business**) the Business is carried on in the ordinary course (but subject to the restrictions in this clause 9.1) and at arm's length, on its usual commercial terms and in compliance with all applicable Laws;
>
> …
>
> **9.4 Access prior to Completion**
>
> Prior to Completion, the Share Seller and the Land Seller must procure that appropriate Representatives of the Buyer have reasonable access, at the risk of the Buyer, to:
>
> (a) the Business Premises and the Malt Land and Buildings during normal operating hours for the purposes of:
>
> (i) observing the manner in which the Business is conducted, inspecting the physical assets of the Business and integration planning; and
>
> (ii) briefing Employees about the Cargill Group and the offers of employment contemplated by the Employees

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658 Clause 7.2(d) provided that in certain circumstances, Cargill Australia and Viterra Malt were required to confer in good faith with a view to resolving any disputed item. If disputed items remained unresolved, they were required to be the subject of a review by the Independent Expert in accordance with cl 8 of the Acquisition Agreement: cl 7.2(f)(iii). Clause 8.1(d) required the Independent Expert to act in that capacity and not as an arbitrator with any decision being final and binding in the absence of manifest error.

Offer Deed and negotiating such offers with the Employees; and

(b) appropriate Employees and Representatives of the Sellers for the purposes of discussing the conduct of the Business and integration planning including in respect of information technology systems; and

(c) the Records,

…

1029 Clause 13 dealt with the Warranties, which were set out in schedule 4. Relevantly, clause 13 read:

13 Warranties and representations

13.1 Accuracy

The Sellers represent and warrant to the Buyer that each Warranty is correct and not misleading on the date of this agreement and will be correct and not misleading on the Completion Date as if made on and as at each of those dates except where otherwise provided in the Warranty.

13.2 Independent Warranties

Notwithstanding any other provision in the Transaction Documents, each Warranty is to be construed independently of the others and is not limited by reference to any other Warranty.

13.3 Matters disclosed

(a) Subject to paragraph (b), each Warranty is to be read down and qualified by any information:

(i) fairly disclosed in the Disclosure Material;

(ii) fairly disclosed in the Transaction Documents;

(iii) which is otherwise within the actual knowledge of the Buyer on the day before the date of this agreement; or

(iv) disclosed in writing to the Buyer during the course of the Due Diligence;

which is inconsistent with that Warranty and, to the extent that any Warranty is incorrect or misleading having regard to any such information, that Warranty is deemed to be modified to account for such information. No amount will be recoverable by the Buyer in respect of any breach of Warranty to the extent that the breach arises by reason of or in relation to any such information.

(b) Paragraph (a) does not apply in respect of Warranty 15.14(e) or (f).

(c) A reference to the actual knowledge of the Buyer in this agreement is to the actual knowledge of all individual Representatives of the Buyer who have participated in the Due Diligence except that, in the case of any individual Representative who is not an employee, officer or director of the Buyer or a Related Body Corporate of the Buyer, it excludes any information which that individual is not permitted to disclose (and has not disclosed) to the Buyer because of a duty of confidence it or its employer owes to another person or any information barrier it or its employer has an obligation to maintain.

13.4 Buyer's acknowledgements

The Buyer acknowledges and agrees that:

(a) in entering into the Transaction Documents and in proceeding to Completion, the Buyer does not rely on any statement, representation, warranty, condition, promise, forecast or other conduct which may have been made by or on behalf of a Seller, except the Warranties;

(b) without limiting clause 13.4(a), no representation, no advice, no warranty, no undertaking, no promise and no forecast is given in relation to:

(i) any economic, fiscal or other similar interpretations or evaluations by a Seller or any person acting on behalf of or associated with that Seller or any other person;

(ii) future matters, including future or forecast costs, prices, revenues or profits;

(iii) the principles to be applied by any Government Agency with respect to the regulation of the malt or barley industry or any part of it and, in particular, matters affecting revenue, prices, charges and service levels; or

(iv) the regulation of the malt or barley industry (including any act or omission by any Government Agency);

(c) it has had the opportunity to conduct Due Diligence and to review the Disclosure Material;

(d) irrespective of whether or not the Due Diligence was as full or exhaustive as the Buyer would have wished, it has nevertheless independently and without the benefit of any inducement, representations or warranty (other than the Warranties) from any Seller or any Representatives of a Seller, determined to enter into the Transaction Documents;

(e) no Seller or any of its Representatives has made or makes any representation or warranty as to the accuracy or completeness of those disclosures regarding the Company, the Employees, the Shares, the Malt Assets and the Business (including the information, forecasts and statements of intent contained in

material provided to the Buyer and made in management presentations) other than the Warranties;

(f) no Seller or any of its Representatives:

(i) accepts any duty of care in relation to the Buyer, the Buyer's Related Bodies Corporate or a Representative of the Buyer in respect of any disclosure or the provision of any information (including, the information, forecasts and statements of intent contained in material provided to the Buyer and made in management presentations); or

(ii) in the absence of fraud, is to be liable (except under the Warranties) to the Buyer, the Buyer's Related Bodies Corporate or a Representative of the Buyer if, for whatever reason, any such information is or becomes inaccurate, incomplete or misleading in any particular way;

(g) subject to any Law to the contrary and except as provided in the Warranties, all terms, conditions, warranties and statements, whether express, implied, written, oral, collateral, statutory or otherwise, are excluded, and the Sellers disclaim all Liability in relation to them, to the maximum extent permitted by Law;

…

13.5 Opinions, estimates and forecasts

The parties acknowledge that no Seller has provided and that no Seller is under any obligation to provide the Buyer or a Related Body Corporate or Representative of the Buyer with any information on the future financial performance or prospects of the Company. If the Buyer or a Related Body Corporate or Representative of the Buyer have received opinions, estimates, projections, future business plans, future budget information or other forecasts in respect of the Company, the Buyer acknowledges and agrees that:

(a) there are uncertainties inherent in attempting to make these estimates, projections, future business plans, future budgets and forecasts and the Buyer is familiar with these uncertainties; and

(b) no Seller is liable (except under the Warranties) under any Claim arising out of or relating to any opinions, estimates, projections, future business plans, future budgets or forecasts in respect of the Company.

…

13.7 Sellers' acknowledgments

Each Seller acknowledges that:

(a) the Buyer has entered into this agreement and will Complete in reliance on the Warranties as they are given on the terms of this agreement; and

(b) the matters agreed by the Buyer in clause 13.4 do not give that Seller a cause of Action against the Buyer and may only be raised by that Seller as a defence to any Claim by the Buyer.

13.8 Disclosure

(a) In the period from the date of this agreement until Completion, the Sellers must as soon as reasonably practicable disclose to the Buyer in writing any fact, matter or circumstance of which it becomes aware and which in its reasonable opinion would result or would be likely to result in any Warranty not being correct or being misleading in any material respect and for the purpose only of this clause 13.8 any reference in a Warranty to the term 'as at the date of this agreement' shall be disregarded.

(b) Subject to clause 13.8(c), the Seller must use all reasonable endeavours to remedy (if capable of remedy) the relevant fact, matter or circumstance before Completion.

(c) Nothing in clause 13.8(b) will require the Sellers or a Related Body Corporate of a Seller to pay any money or provide other valuable consideration to or for the benefit of any person or otherwise take any action which, in that Seller's reasonable opinion, would or may impact adversely on or otherwise be contrary to its interests or the interests of a Related Body Corporate of the party.

1030 Clause 15 was entitled "Limitations of Liability". Clause 15.1 set out the procedure for the Buyer to give notice to the Seller of "any matter or circumstance" that it considered may give rise to a legal claim, including a breach of Warranty. Clause 15.2 dealt with third party claims. If circumstances arose which did give, or might have given, rise to a Claim "against the Seller",[659] Cargill Australia was required to give prompt notice of the Claim or potential Claim[660] and, amongst other things, was not permitted to settle or make any admission with respect to any Claim without prior written consent.[661] Clause 15 also included:

15.4 Seller not liable

No Seller is liable to the Buyer (or any person deriving title from the Buyer) for any Claim under or in relation to or arising out of the Transaction Documents:

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659 The particular Seller was not specified.

660 Clause 15.2(a).

661 Clause 15.2(d).

(a) to the extent the Claim is increased as a result of a failure by the Buyer to comply strictly with clause 15.1 or clause 15.2 as the case may be;

(b) If the Buyer Guarantor has ceased after Completion to Control the Company or the Business;

…

(e) to the extent that the Claim arises or is increased as a result only of an increase in the rates, method of calculation or scope of taxation after Completion unless the increase is announced before the date of this agreement and enacted in accordance with that announcement;

(f) to the extent that the Claim arises or is increased as a result of any change in Accounting Standards after Completion unless the increase is announced before the date of this agreement and enacted in accordance with that announcement;

(g) to the extent that the Claim arises or is increased as a result of action taken or not taken by the Seller after consultation with and the prior written approval of the Buyer;

…

15.5 Reduction in Purchase Price

If payment is made for a breach of any Warranty or otherwise in respect of a Claim under this agreement:

(a) to the extent that it relates to the Shares or the Share Seller, the payment is to be treated as a reduction in the Share Purchase Price;

(b) to the extent it relates to the Malt Assets or the Land Seller, the payment is to be treated as a reduction in the Malt Assets Purchase Price; or

(c) to the extent that it relates to the Dom Boxes or the Dom Box Seller, the payment is to be treated as a reduction in the Dom Box Purchase Price,

but in no case will the relevant purchase price be reduced below A$1.00.

…

15.7 Minimum amount of Claim

(a) The Buyer may not make any Claim under the Transaction Documents including for a breach of Warranty:

(i) if the amount of the Claim is less than $500,000; and

(ii) unless and until the aggregate amount of all Claims properly made under the Transaction Documents exceeds $3.5 million.

…

15.8 Maximum Liability

Notwithstanding any provision in the Transaction Documents, in the absence of fraud, the total aggregate liability of the Sellers for all Claims made by the Buyer or a Related Body Corporate or Representative of the Buyer shall be capped at:

(a) the Purchase Price (before any reduction pursuant to clause 15.5 or otherwise under this agreement) for all Claims arising from any breach of any of the Share Seller Title Warranties, Land Seller Title Warranties or Dom Box Seller Title Warranties; and

(b) $100 million for all other Claims.

15.9 Exclusion of consequential liability

Notwithstanding any other provision of this agreement, no party will be liable for any indirect Loss arising in connection with this agreement or its subject matter. The parties agree that "indirect Loss" includes:

(a) loss of income, profits or business;

(b) any failure to achieve any anticipated savings;

(c) damage to goodwill or reputation; and

(d) punitive or exemplary damages that may otherwise be awarded against it.

15.11 Obligation to mitigate

Nothing in this clause 14 (sic) in any way restricts or limits the general obligation at Law of the Buyer to mitigate any Loss which it may incur in consequence of any breach by the Seller of the terms of the Transaction Documents including a breach of a Warranty.

…

15.13 Independence

Each qualification and limitation in this clause 15 is to be construed independently of the others and is not limited by any other qualification or limitation.

1031 Clause 17 provided for the transfer of assets upon Completion, including the Assets, the Malt Assets and the Dom Boxes as follows:

17.1 Completion

The Sellers must procure that, in addition to the Malt Assets and the Dom Boxes, any Asset owned by the Share Seller or a Related Body Corporate (other than the Company) which is used exclusively to conduct the Business is transferred, at no cost, to the Buyer at Completion free from any Encumbrance.

1032 Clause 19 covered default and termination of the Acquisition Agreement. Clause 20,

entitled "Guarantee and indemnity", contained the following:

> **20.1 Consideration**
>
> The Buyer Guarantor acknowledges that the Sellers are acting in reliance on the Buyer Guarantor incurring obligations and giving rights under this Guarantee.
>
> …
>
> **20.3 Indemnity**
>
> (a) The Buyer Guarantor indemnifies the Sellers against any Liability or Loss arising from, and any reasonable Costs it incurs, if:
>
> (i) the Buyer does not, or is unable to, comply with an obligation it has (including any obligation to pay money) in connection with the Transaction Documents;
>
> (ii) an obligation the Buyer would otherwise have under the Transaction Documents (including an obligation to pay money) is found to be void, voidable or unenforceable; or
>
> (iii) an obligation the Buyer Guarantor would otherwise have under clause 20.2 is found to be void or unenforceable;[662] or
>
> (iv) a representation or warranty by the Buyer in the Transaction Documents is found to have been incorrect or misleading when made or taken to be made.
>
> …
>
> **20.7 No merger**
>
> This Guarantee does not merge with or adversely affect, and is not adversely affected by, any of the following:
>
> (a) any other guarantee, indemnity, mortgage, charge or other encumbrance, or other right or remedy to which the Seller is entitled; or
>
> …
>
> The Seller may still exercise its rights under this Guarantee as well as under the judgment, mortgage, charge or other encumbrance or the right or remedy.
>
> …

1033 Clause 21 imposed various confidentiality obligations on the parties. Under clause 31, entitled "General", the following appeared:

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662 Clause 20.2 set out Cargill, Inc's guarantee of Cargill Australia's compliance with the Acquisition Agreement.

31.12 Entire agreement

The Transaction Documents constitute the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter.

…

31.15 Knowledge and belief

Where a Warranty is given to a Seller's awareness or knowledge, including to the best of its knowledge or awareness or so far as the Seller is aware, the Seller will be deemed to know or be aware of a particular fact, matter or circumstance only if one or more of [Rees], [Fitzgerald], [Mann] or [Mattiske] are actually aware of that fact, matter or circumstance *on the date the Warranty is given* or would have been aware had they made reasonable enquiries on the date the Warranty is given. The individuals referred to in this clause 31.15 are not in any way personally responsible for the accuracy of the Warranties and will not be personally liable for any Claim.

(Emphasis added.)

Pursuant to clause 13.1, each Warranty was given on the date of the Acquisition Agreement and on the date of Completion.[663] This part of the Acquisition Agreement also contained a severability clause: clause 31.14.

1034 The Acquisition Agreement contained 14 schedules. Schedule 4 contained the Warranties. Under the heading "Part 1 – Share Seller Warranties" appeared the following:

4 Documents and Records

…

4.2 Records

The Records:

(a) have been compiled and maintained in good faith;

(b) to the best of the Share Seller's knowledge and awareness, do not contravene any Law; and

(c) are complete and up-to-date in all material respects.

…

663 See par 1029 above.

6 Assets and Licences

6.1 Assets

The Assets:

(a) are legally and beneficially owned by the Company;

(b) are free from Encumbrances;

(c) on the Completion Date will be in the possession of the Company;

(d) are not the subject of any lease or hire purchase agreement or contract for purchase on deferred terms; and

(e) along with the Malt Assets and the Dom Boxes, sufficient to enable the effective conduct of the Business after Completion as it is carried on at the date of this agreement, and as it has been carried on since the Last Balance Sheet Date.

…

7 Contracts

…

7.3 No default by the Company

To the Share Seller's knowledge and awareness, the Company is not in material default of any Material Contract, nor has anything occurred or been omitted which would be a material default but for the requirement of notice or the lapse of time or both.

…

9 Litigation

…

9.2 No claims or disputes

At the date of this agreement, there are no Claims or disputes relating to the Business and, to the best of the Share Seller's knowledge and awareness, there are no facts or circumstances which may give rise to a Claim or to any legal, administrative or government proceedings.

…

12 Data Room Documentation

(a) The Data Room Documentation has been collated and disclosed in good faith and with reasonable care.

(b) To the Share Seller's knowledge and awareness, no material information has been omitted from the Data Room Documentation.

(c) To the Share Seller's knowledge and awareness, the Data Room Documentation is true and accurate in all material respects.

…

13 Position since the Last Balance Sheet Date

…

13.4 Business carried on

Since the Last Balance Sheet Date, the Business has been conducted in the ordinary course in a proper and efficient manner, without any interruption or alteration in its nature, scope and manner.

…

17 Compliance with Laws

(a) The Business has been conducted in accordance with applicable Laws and ISO Standards in all material respects.[664]

1035 In addition to the schedules, the Acquisition Agreement contained 5 annexures. Annexure A contained the "Last Accounts" of Joe White. Annexure B contained a Data Room document index, which recorded the documents uploaded to the Data Room, their file names, file type and folder path (including those located in the black box). Annexure C was entitled "Q&A". It contained a table of a large number of questions submitted to the Data Room and the answers, including the date submitted, the date answered, the category of question, and the user of the Data Room that had submitted the question and answered it. Relevantly, the table recorded the following exchanges:

(1) On 9 July 2013, a question was submitted, the response to which was that Viterra Ltd employed all staff within the Joe White Business and had done so since 2009.

(2) On 9 July 2013, the question "How does [Joe White] compensate if minimum germination time is required by customers of more than 4 days?" was submitted. On 15 July 2013, the answer "This rarely occurs" was submitted.

(3) On 9 July 2013, the question "How does [Joe White] assure that if delta T requirements are not met for certain customers, that malt is not used

664 ISO Standard was defined to mean "a management system that complies with the requirements of ISO 22000:2005 (Food Safety Management Systems), incorporating the quality elements of ISO 9001:2008 (Quality Management Systems)". According to Stewart's evidence, the International Organisation for Standardisation certification was not an overall audit or qualitative assessment of the entire Joe White Business, but rather ascertained the existence of various processes.

in blends for these customers?" was submitted. On 15 July 2013, the answer "Not relevant to value" was submitted.

(4) On 9 July 2013, the question "Do employees in (sic) [Joe White] have to annually sign a Company Ethics Charter?" was submitted. On 12 July 2013, the answer "Employees in (sic) [Joe White] are required to read and acknowledge that they understand and comply with the Business Code of Conduct on an annual basis" was submitted.

1036 Annexure D contained a document with the title "Joe White Maltings – Management Presentation Questions & Answers – Cargill 26-June-2013". The document recorded the same "objective" as the notes to the Commercial Call[665] and the Barley Inventory Call.

1037 Annexure E was the final annexure. It was entitled "Any Additional Q&A from Subsequent Management Meetings". It contained 5 documents. The first was a record of a "finance and accounting discussion" held on 5 July 2013.

1038 The second document was entitled "Joe White Maltings Operations Call – Cargill 18 July-2013".[666]

1039 Notes to the Commercial Call and the Barley Inventory Call were the third and fourth documents contained in this annexure.[667] The final document was a record of a phone call in relation to environmental issues, held on 26 July 2013.

T. Post-Acquisition Agreement to Completion

1040 On 5 August 2013, Purser spoke with Mattiske. Mattiske told Purser that the Joe White executives were delighted at the outcome. Purser passed this on by email to Eden, Viers and Sagaert. Eden responded that he sensed as much. He said that when they got away from Merrill Lynch and the legal team, the Joe White group seemed genuinely eager to help Cargill better understand the business. Eden said they were

665 See par 910 above.
666 See par 884 above.
667 See pars 910-912, 924-929 above.

professional and willing to help. He concluded the email by stating, "I could not say as much for the rest of the mob".

1041 Following the execution of the Acquisition Agreement and prior to the Completion Date of 31 October 2013, a period of business integration between Joe White and Cargill Australia commenced. But before it commenced in earnest, Van Lierde queried with Eden whether Jody Scaife ("Scaife")[668] would be more appropriate for the position of integration manager than Viers.[669] In response, Eden stated he would not feel comfortable not having a senior member of the malt team in that position. Eden noted that this was not the first time Viers was involved in integration work, and set out his previous experience. Further, Eden stated that Viers had been intimately involved in the strategy behind the purchase of Joe White and had done incredible work through the Acquisition to that time. Eden suggested that Viers was already on the line for the promised synergies and he could not think of a better way to make the connection than to have Viers in the role of integration manager.

1042 As part of his response to Van Lierde, Eden also made some observations about his views concerning Joe White management. He said that they had been "through this from Adelaide Malting, to Ausbulk, to ABB, and then Viterra". Eden stated that through all they had been loyal and agile. After referring to their extensive experience, Eden stated that the feedback he had "from the Viterra team" was that Joe White was great operationally but not very commercial. Viers' previous experience was on the commercial side of malt, rather than operational. Plainly, at this point, Eden did not

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668 Scaife was the national sales leader for Cargill's "Ag Horizons" business in 2013 and was located in Minnesota. Scaife had commenced full time employment with Cargill in January 1995 as a graduate chemical engineer, and for her first 5½ years worked at various Cargill plants around Australia. She then moved into various business development roles and was involved in Cargill's acquisition of the Australian Wheat Board in 2011, and its subsequent integration into Cargill's business in Australia. In that role she was involved in due diligence, private acquisition and then the subsequent integration. At the time she gave evidence, she was no longer employed by Cargill. She has a bachelor of chemical engineering degree (with honours) from Royal Melbourne Institute of Technology.

669 During cross-examination, it was put to Van Lierde that he was expressing concerns in his email about Viers' abilities. This was rejected. When Van Lierde sought to explain what his concerns were more specifically, he was cut off by the Viterra Parties' senior counsel on the basis that the question as put had been answered. Contrary to the Viterra Parties' submission, in these circumstances, his evidence ought to be accepted. Van Lierde was a credible witness.

have any material concerns about operations at Joe White.

1043 During this period, Joe White received complaints from customers regarding malt quality. On 26 August 2013, Stewart received an email from a representative of Oriental Brewery in Korea,[670] complaining that Joe White's malt was "overmodified" and causing some "high [colour] malt problems". Stewart responded by offering to modify the Kolbach Index[671] of the malt Joe White was providing, but noted that there would be "flow on effects of such a change". In response, the customer wrote that "[o]ur conclusion is your malt has too high (sic) [Kolbach Index] and low total protein", to which Stewart responded on 28 August 2013:

> Our malt is within the current specification for Kolbach Index, total protein, FAN[672] and colour and so I am confused by your comments that our malt is out of specification.

1044 In response, in a demonstration of the importance of malt specifications to it, and the repeated problems which it had experienced, the customer wrote to Stewart on 30 August 2013:

> I think you have some misunderstand (sic) about our malt specifications.
>
> The Kolbach index specification was changed in June 2011 and from 40 ~ 45 to 40 ~ 48 temporarily for 2010/2011 crop.
>
> From 2011/2012 crop the KI returned to 40 ~ 45 and [colour] was changed from 3.6 ~ 4.2 to 3.8 ~ 4.4 in April 2012.
>
> We did not changed (sic) KI specification from that time during DP change in September 2012 and Total protein change in January 2013.

---

670 Stewart's evidence was that Oriental Brewery's laboratory was notorious for having difficulties. He referred to this in responding to earlier complaints from Oriental Brewery in December 2010. At that time, Oriental Brewery emailed Joe White stating that the test results from its laboratory were very different to Joe White's Certificate of Analysis in most fields. In Joe White's responding email, Wicks said he would have the sample re-analysed. With respect to the extract result, Wicks suggested that Oriental Brewery's result was so low as to be unbelievable. However, he did not comment on the other parameters that were also inconsistent. Stewart gave similar evidence when taken to an email sent by Oriental Brewery in November 2010, when a complaint about colour was made. In this email, Oriental Brewery stated the view that the error was made by Joe White because test results produced by a third party were exactly the same as Oriental Brewery's results. In any event, any attempt to blame all discrepancies or inaccuracies with results for malt shipped to Oriental Brewery on that customer's laboratory performance would be to put an artificial gloss on what was occurring: see par 79 above.

671 The Kolbach Index is a measure of the extent of protein modification of barley, calculated by dividing soluble nitrogen by total nitrogen. The Kolbach Index is important because it is the best indicator of malt modification, being the degree to which germination proceeded during the malting process.

672 FAN stands for "free amino nitrogen".

> For your understand (sic) I attach our Malt specification files.
>
> And the *problem is your [Certificate of Analysis] is in specification*, but our warehoused malt analysis data is *out of specification* in [colour].
>
> Our plants *complaint* (*sic*) *about this many times*. Why you permit (sic) this kind of malt? They said they *cannot have confidence in your [Certificate of Analysis]*.
>
> (If your data and our data are both correct, then we have to check if there is some malt change from the process of containerizing, shipping and sailing period, especially in your summer season.)

The email then set out specific details with respect to colour and the Kolbach Index for 10 separate lots of malt which were nearly all out of specification, and continued:

> We checked other brewing parameters thoroughly at first but there were no negative changes and in some cases positive changes.
>
> But your malt has negative changes such as high KI, high FAN, high soluble protein and low total protein as I [summarised] [in the] below e-mail.
>
> The *batches of high [Joe White] malt ratio have severe foam problems*.
>
> In the case of we (sic) use other supplier malt there was no foam problem.
>
> *If you cannot supply malt in our specification, we have to change the malt supplier*.
>
> If we need more discussion I think it will be better you may (sic) visit Korea.
>
> (Emphasis added.)
>
> …

This email chain was copied to Wicks on 30 August 2013.

1045 When Stewart was taken to this email chain, he gave evidence that it was not uncommon for customers to identify discrepancies between the malt supplied that was represented as being in specification and what they were able to detect themselves. However, Stewart's evidence was that the instances of this occurring were reasonably infrequent when the volume of malt Joe White shipped was taken into account. Further, Stewart swore that he was relying on the fact that many customers of Joe White did not test the malt delivered and that they had no problem with the malt.

1046 While Stewart accepted that, on the face of it, it was possibly damaging to Joe White's reputation to have discrepancies between what was represented as being supplied

and in fact what had been supplied, he also stated that Joe White had an excellent reputation in the industry. He further suggested that the email chain showed a large variation in analysis and stated that it was a perfect example of how malt analysis was quite variable. Having given this evidence, Stewart acknowledged the customer was venting "a bit of frustration" and that the threat of changing malt supplier was not surprising, although he did not think they in fact made the change.

1047 By way of observation, although there was evidence of some Joe White customers detecting differences between the results reported in Certificates of Analysis and the parameters as subsequently tested or observed, there was also a substantial body of evidence which demonstrated that Joe White customers did not detect such differences.

1048 The practice of recording incorrect barley varieties continued during the integration period. At least in some circumstances, there was still a deliberate intention to deceive. For example, on 1 September 2013, a plant manager emailed Moller, Sheehy and McIntyre referring to a shipment about to take place for Sapporo. The plant manager stated that he was not sure which of them was looking after the 2 pre-shipment spreadsheets the following day, so he had sent the information to all of them. He stated that both were "way out of spec". The email continued:

> We mixed some non-CCFS[673] Gairdner into the blends which I can't reflect on the [pre-shipments] so they *will need a bit of a creative touch*. Give me a call if you want to discuss.

(Emphasis added.)

There was nothing in the email to suggest the request was out of the ordinary or out of line. Further, the pre-shipment report that was sent (and was signed off by Sheehy) stated that CCFS Gairdner (and not anything else) had been used.

1049 On 4 September 2013, Mattiske sent an email to Engle, copied to various others. That email confirmed Glencore's project team leads for the transition. Team lead was Mattiske himself. Hughes was in charge of malt operations; Rees was in charge of

673 CCFS stands for collaborative contract farming system.

finance; Norman was in charge of human relations; and Fitzgerald was in charge of legal. Mattiske asked that all of the team members be kept up-to-date with respect to requests.

1050 On 7 September 2013, Viers emailed a large number of Cargill employees with the subject "Integration planning and kick-off". After welcoming everybody to the integration team, Viers noted the point had been reached where Cargill was nearly set to commence the integration. Viers attached legal advice concerning anti-trust guidelines for integration. That advice stated that until Completion, Cargill and Joe White had to continue to operate as independent companies and to compete against each other. The integration team was advised that they were not allowed to "jump the gun" by starting to act other than on an arms-length basis before obtaining regulatory approval and Completion. The advice stated that, without the approval of counsel, the integration team were not to discuss with Joe White or Glencore the following matters:

- Specific customer or supplier relationships or negotiations.
- Prices (present or future), pricing policies or patterns, price changes, or other terms and conditions of sales to customers.
- Bids, contracts or requests for proposals for particular products or services.
- Territorial restrictions, allocations of customers, restrictions on types of products, or any other kind of market division.
- Costs (including freight and production), market conditions, capacity, industry production policies or patterns, inventory or sales, or plans regarding the design, production, distribution or marketing specific products.

1051 Accordingly, although the integration was about to commence, the amount of information that Cargill could seek, and equally the amount of information that Glencore, Viterra or Joe White could provide, was limited by the necessity of all the parties to avoid breaching Australian competition laws.

1052 On 9 September 2013, Deloitte agreed to prepare an estimate of the fair market value of the assets Cargill Australia acquired pursuant to the Acquisition Agreement.[674]

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674 Ultimately, Deloitte was instructed that the valuation date was 31 October 2013, being the Completion Date. The valuation was not completed until late 2014. Further, Breszee, Cargill, Inc's technical accounting director, instructed Deloitte not to take into account the Operational Practices or the

1053 On 13 September 2013, Mattiske emailed Viers stating he would be away the following week and directing Viers to co-ordinate all details and requests through Rees. Two days later, Mattiske emailed Viers confirming Completion would occur on 31 October 2013, which was agreed to by all parties the following day.

1054 Also on 13 September 2013, a draft project charter was being prepared by Cargill with respect to the Acquisition. Jewison gave evidence that much of the document was compiled by her based on information she received from others.

1055 The draft charter noted that the Acquisition would complete Cargill's global footprint and enable it to better serve global and regional brewers in the growing Southeast Asian market. The internal rate of return was recorded as 9.7 percent, with the payback on the total investment expected to be 10.7 years. The charter covered topics including the strategic fit of Joe White, an industry overview and the competitive advantage Cargill would gain from becoming the largest maltster in the world.

1056 As for the "critical assumptions" that had been made, the charter stated there was a desire to enter into long-term agreements with Joe White's customers in circumstances where, since Glencore's purchase of Viterra, contracts had only been rolled over from year to year. Further, the issue of limited storage capacity was addressed on the basis that Cargill would need to retain key production management and maintain production volume "with a product that meets customer specifications based on Cargill standards".

1057 When it was put to Jewison that by this comment she was linking it to the ability to produce malt in accordance with customer specifications based on Cargill standards and acknowledging the risk that this might not be able to be achieved because of the limited storage, she rejected the proposition. In essence, she said that the comment

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performance of Joe White after 1 November 2013. Accordingly, the valuation was not relied upon by Cargill as the basis for determining Cargill Australia's loss for the purposes of this proceeding, albeit some assumptions contained in it were used as part of the expert evidence concerning loss. That said, Deloitte's valuation, dated 18 December 2014, was tendered. It recorded a fair market value for: Land and buildings of $63.2 million; and plant and equipment of $174.8 million on a depreciated replacement cost method. Thus, based on a purchase price of $420 million, the residual goodwill was estimated to be $104.4 million (after taking into account the value of customer relationships at $38.8 million and a backlog of customer contracts at negative $3.8 million).

was there to identify that the Joe White production team became key in understanding how to manage limited storage.

1058 Under cross-examination, De Samblanx was asked whether he knew from where the assumption with respect to limited capacity had come. While he acknowledged that he saw the charter at the time, he was unable to state from where it came, other than to say that he had previously stated there was limited storage capacity.

1059 When it was put to him that if he had been asked in September 2013 whether the assumption concerning limited storage capacity as set out in the charter should have been made and that he would have responded that it involved a considerable risk, he did not accept this. De Samblanx gave evidence that at the time, based on the information with which he had been provided, he considered that storage capacity was manageable. When it was put to him that he was giving untruthful evidence, De Samblanx stated that he had gotten answers to all these questions and it was important to approach the issue end to end, which made it possible to deliver with the storage capacity available (which he suggested Cargill was doing at the time he gave his evidence). He acknowledged that in order to make a proper assessment he would need to know the details of customer contracts, what barley varieties Joe White had, the ability to group customers and to switch from 1 plant to another if needed.

1060 Further, when asked whether anyone ever asked him if the assumption with respect to limited storage capacity could be satisfied, De Samblanx gave evidence that he was asked the question when he was in Minneapolis (on 17 and 18 July 2013). Self-evidently from the evidence that is set out above in relation to the events on those 2 days,[675] he must have answered the question in the affirmative. Not surprisingly, he also readily acknowledged that there was always a risk in delivering malt that complied with customer specifications.

1061 Van Lierde was also taken to the comments concerning limited storage capacity during his cross-examination. It was put to him that he knew Joe White was running

675 See pars 862-909 above.

its operations with inadequate storage in comparison to how Cargill would run the operations. He rejected the proposition.

1062 Returning to the contents of the charter, after referring to "critical value drivers", and listing various risks which were all rated either medium or low, except for "crop failure/weather risk" which was rated high, the charter then discussed significant financial issues. Some risk was identified around supplying malt within customer specifications without the large amount of storage at the Joe White facilities. As for barley supply, it was stated that there was no significant risk because of the grain and oilseeds supply chain in Australia and Cargill's knowledge of the market.

1063 When De Samblanx was taken to the significant financial issues identified in the charter, he gave evidence that he was also not the author of these comments but readily acknowledged the risk in relation to customer specifications and barley supply existed all the time.

1064 In relation to the significant financial issues, Van Lierde gave evidence that he did not read the comments as stating that there was a risk that Joe White would not be able to produce malt to customer specifications because of the lack of storage. He also rejected the suggestion that that was his understanding at that time.

1065 The Viterra Parties referred to Jewison's evidence that this draft charter reflected the views of Cargill's management, and submitted that it should be found that, both in September 2013 and at the time the Acquisition Agreement was entered into, Cargill knew there was a real risk that Joe White might not be able to supply malt within customers' specifications due to lack of storage at Joe White's plants. Leaving aside the obvious fact (as acknowledged by De Samblanx)[676] that there would always have been some level of risk in being able to produce malt within customers' specifications, the charter did not reflect any knowledge on the part of Cargill of some significant and appreciable risk of complying with customers' specifications because of the amount of storage capacity of Joe White. Consistent with what had been repeatedly

676 See par 1063 above.

stated to Cargill up to that time, the relevant employees of Cargill believed that the operations of Joe White, including taking into account its storage capacity, were capable of producing malt in accordance with customers' specifications.[677]

1066 Just before mid-September 2013, Eden and Viers travelled to Australia as part of the integration. On 17 and 18 September 2013, Eden and Viers met with management of Joe White, described by Viers as the leadership team with some key "number-twos". On the first of these days, Cargill gave a presentation to introduce Joe White management to Cargill. According to an email Viers sent later that week, the presentation was well received, though questions were asked on numerous topics, including in relation to Cargill's intention with respect to the Joe White brand. The meeting on the second day was used to get "a better sense of [Joe White's] culture", as well as discussing Cargill's thoughts on synergy and the integration process. A facilitator engaged by Cargill was also present.[678] Viers formed the opinion that, as Joe White's management had worked under Viterra for several years, they understood how to work inside a large organisation.

1067 Further, Viers recorded that the sessions held exceeded Cargill's expectations. He said it was clear that the team had very good talent, and that they knew their business and the market quite well. Viers' email included the following:

> They also seem strong on execution and have a very good orientation towards the customer. We noted some best practice on barley/malt/production [optimisation] that we can bring back into our business. Overall this is a group we can work well with and I believe will assimilate into Cargill and malt quite well.

1068 At the time, it was anticipated that verbal approval from the Foreign Investment Review Board would be given prior to mid-October and, from that point in time, Viers anticipated Cargill would then be able to fully engage with Joe White management.

1069 The presentation given by Eden and Viers to Joe White management was reflected in a series of slides that was shown. These slides set out Cargill's background more

677 See further pars 1078-1083 below.

678 Eden said he did not it find helpful, and excused the facilitator early.

generally, and also specifically with respect to malt and plans for the future. One of the slides was concerned with values, and stated that the Cargill values included integrity, which involved, "Doing what is right, no matter what the consequences".

1070 Another slide stated that the Acquisition would fit squarely with Cargill Malt's strategy. It stated that the Acquisition created a footprint in the only major malting barley region not already in Cargill's portfolio, offered the ability to serve competitively in high growth regions including Southeast Asia, strengthened Cargill Malt's global leadership and relevance to global brewers, provided leverage opportunities with Cargill's Australian grain business, and also brought in experienced employees.

1071 After these 2 days with Joe White management, Eden returned to the United States. He had no inkling that anything was untoward or amiss; his impressions suggested quite the opposite. Consistent with Viers' contemporaneous appraisal, his evidence was that both he and Viers left Adelaide feeling really excited about the opportunity Joe White presented. He also had the impression the Joe White executives with whom they had met were excited that Cargill, Inc was a company that cared about malt and that they were very open to working with Cargill. Eden did not visit Australia again before 31 October 2013.

1072 On 24 September 2013, Eden sent an email to Conway and Engle, copied to others. That email referred to many elements that Eden was trying to manage to make the investment deliver what had been promised to Cargill. He informed Conway that the information to date and all the normalisations that were in the Data Room had made it really difficult to draw comparisons with certainty. Eden reported that, up to that time, Cargill had not been able to engage with the Joe White team to learn their perspective on the numbers and Cargill's assumptions.

1073 Eden made a number of observations about his recent visit to Adelaide. These included that he was really impressed with Joe White's technical understanding concerning barley genetics, plant operations, sales segmentation and overall

engagement with customers. Eden said the Joe White team was lean and often wore many hats, which gave them a good understanding of the Joe White Business. He repeated his earlier understanding that Joe White was engaged in plant best practices that Cargill could bring to its existing malting operations.

1074 Eden said he had raised Cargill's projection about revenue synergies with the Joe White team, only to get the response that Glencore had instructed them not to comment in detail. He said that Joe White had come up with its own list of synergies and all they were willing to say was that Joe White's list was higher than Cargill's. The email concluded with the following:

> Bottom line, the individual elements will no doubt fluctuate from our assumptions, but I am more confident today that this will be a great investment for Cargill than when we did the deal. [Viers] and the Integration Team will soon get into the finer details and we are committed not [to] disappoint. We will make it happen.

1075 However, Eden's views of Joe White were about to change within a matter of 3 or so weeks.

1076 On 1 October 2013, a commitment request that Jewison had reviewed and approved was circulated. The projections in this document were taken from Cargill's deal model. Despite the approval of the board and the Cargill leadership team, this request was necessary for the payment of funds upon Completion.[679]

1077 The final form of the commitment model produced an internal rate of return of 9.6 percent. The reason for the drop in the internal rate of return from 10.1 percent as calculated in early July 2013 was the appreciation of the Australian dollar between then and when the commitment report was completed. The commitment model forecast a net operating profit after tax each year from years 2 to 10 of between approximately US$17.9 million and US$29 million.

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679 A commitment request was required in relation to any investment by Cargill over US$1 million. The purpose of a commitment request was to keep track of where Cargill was spending its capital in a standardised format so the Cargill leadership team could monitor whether promises made when funds were sought were kept over the period of time of the investment.

1078 On 3 October 2013, Jewison completed a document entitled "Project Charter", which was based upon documents presented to the board and the Cargill leadership team before the Acquisition Agreement was entered into.[680] A project charter was something Cargill would customarily prepare for its internal purposes. One of its purposes is to state why a transaction was entered into. Another is to allow the Cargill treasury department to track the investment over a 5 year period.

1079 The project charter summary referred to Joe White's capacity of 550,000 tonnes and stated that the Acquisition would complete Cargill's global footprint in the key barley production areas and enable Cargill to serve better the global and regional brewers in the growing Southeast Asian market. After referring to the strategy of being recognised as a leading global malting company, it was stated that the Acquisition fitted within the strategy for the following reasons:

- Offers the ability to serve the highest growth regions, including Southeast Asia with malting barley and malt from a stable and mature country,
- Would result in 57% of Cargill's asset portfolio serving emerging markets,
- Creates a regional presence in the only major malting barley region not in Cargill's portfolio,
- Strengthens Cargill Malt's global leadership and relevance to global brewers,
- Provides a favourable position and share in Australia, which has second highest margins behind Argentina globally,
- Includes roasting technology that serves the super premium and craft segment,
- Aligns with our approach of collaborating with [grain and oilseeds supply chain] on origination and creating mutual value.

1080 After referring to the competitive advantage that would flow from the Acquisition, synergies of US$3.7 million referable to the grain and oilseeds supply chain in Australia were discussed. Some critical assumptions were listed, including avoiding

680 The project charter had a footer indicating it was updated on 4 October 2013. The project charter was updated again on 23 October 2013. The matters set out are taken from the later document. See also pars 1054-1065 above.

disruptions to malting operations. On this issue it was noted that Joe White production facilities operated with limited storage capacity. Accordingly, it was stated that Cargill would need to retain key production management and maintain the production volume with a product that met customer specifications based on Cargill standards. Later in the document, it was noted there was some risk around suppling malt within customer specifications given the amount of storage. When Engle was taken to this in cross-examination, he said he understood that, when he ceased any material involvement in the transaction around 4 August 2013, there was some limited storage capacity at some of Joe White's plants, but he did not believe there was any problem about being able to produce malt in accordance with customer specifications because of this issue. Jewison also gave evidence that she recalled being told by De Samblanx that he thought the Minto plant had low storage, as well as reading his executive summary concerning storage in July 2013.[681]

1081 The project charter identified "Assumptions, Critical Value Drivers, Risks and Mitigating Actions, and Significant Financial Issues". A critical assumption referred to was avoiding disruption to malting operations. In this regard, it was noted again that Joe White's production facilities operated with limited storage capacity. As a result it was stated that upon Completion, Cargill would need to retain key production management and "maintain the production volume with a product that [met] customer specifications based on Cargill standards". When taken to this during his cross-examination, Viers stated that he was not familiar with the document or Cargill's project charters more generally. Viers denied there was any particular concern as at 3 October 2013 about meeting customers' specifications based on Cargill's standards. Viers' evidence was the concern at that time was Joe White was running a high velocity process which was different to what Cargill did and that Cargill would need to make sure it retained "their people", including Hughes. When asked about what Cargill was going to do about limited storage capacity, Viers said Cargill's intention was to retain the people who knew how to manage a high velocity system according to Cargill's standards. However, he acknowledged that on 3 October 2013 he did not

681 See pars 771-772 above.

know whether Joe White's standards accorded with Cargill's standards. Viers also accepted he knew De Samblanx had identified a risk in relation to the amount of storage and that, as at 3 October 2013, Cargill had no idea how significant and prevalent the issue was.

1082 Returning to the project charter, the critical value drivers included synergies. The range of malt synergies was said to be US$5.5 million in the first year to US$12 million average per year from then on. The total synergies were projected at US$7.1 million in the first year "ramping up" to US$15.9 million in year 3 and beyond. The synergies referred to in the project charter had been calculated internally by Cargill.

1083 The project charter also had a section dedicated to potential bidders and what it had been estimated they would have been willing or capable to pay. Those included Co-Operative Bulk at $293 million to $439 million and Sumitomo/Emerald Grain at $290 million to $437 million.

1084 It appeared that Cargill's representatives were first put on notice of the Operational Practices in October 2013. Notwithstanding some doubts expressed in the first half of July 2013 by De Samblanx, these doubts had been allayed and no one had informed Cargill that it ought to have any concerns about the Joe White Business practices and procedures. Quite the contrary.

1085 In early October 2013, De Samblanx travelled to Australia as he had been given the responsibility for "malt operations" as part of the integration process. He spent his first week in Melbourne at Cargill's office, and the remainder of his 4 week-or-so stay in Adelaide.

1086 On the evening of 9 October 2013, De Samblanx and Viers met with Youil and perhaps Stewart at a beer garden in Melbourne. On that occasion, the Cargill Code was discussed between De Samblanx and Youil. Although De Samblanx could not recall the specifics, his evidence was that he told Youil that Cargill was very strict on the Cargill Code, and its application included the production of Certificates of Analysis. Otherwise, De Samblanx said the discussion was at a very general level.

1087 The Viterra Parties submitted that the court should infer that De Samblanx raised the issue with respect to Certificates of Analysis on this occasion because he was concerned that Joe White's processes for the production of Certificates of Analysis were not consistent with the Cargill Blending and Certificate of Analysis Procedure. Further, it was submitted that he held this concern because, amongst other matters, he was aware that Joe White had significantly less storage than that with which Cargill usually operated. There were 2 difficulties with these submissions. *First*, the propositions underlying the submissions were not put to De Samblanx.[682] *Secondly*, despite his initial position, from around 18 July 2013 De Samblanx had expressed no such concerns.

1088 The following morning, Youil told De Samblanx that there was a rule within Joe White that "corrections" could be made to Certificates of Analysis for results within 2 standard deviations of customer specifications. De Samblanx said he was not previously aware of any such rule, and that the information shocked him as he considered 2 standard deviations "big". De Samblanx also said it confirmed some of his doubts from the Due Diligence.

1089 On 10 October 2013, De Samblanx sent an email to Eden and Viers with the subject line "RE: [Certificate of Analysis] compliance [Joe White]". The email stated:

> This morning I had the first opportunity to speak more openly [to Youil].
>
> When speaking about the limited malt storage capacity specifically in Minto and Perth, the discussion turned into [Joe White] policy related to [Certificates of Analysis]. It was said by [Youil] that [Joe White] applies the rule that *values may be corrected within a 2 x standard deviation of a specific parameter*.
>
> This is *clearly not aligned with our [Certificate of Analysis] policy*.
>
> From a technical point of view, the challenge will be to find a solution outside the plant as the [Joe White] silo capacity at site does not allow holding many batches to reach specifications by blending.
>
> From a commercial perspective, we need to look how to manage the issue and how to approach customers.

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682 During closing submissions, the Viterra Parties were invited to provide the court with any references which might indicate that such matters were put during cross-examination. None was forthcoming.

> *If customers would be as rigid as they are with us, the [Certificate of Analysis] issue can have a big negative impact on the business* already on short term (and can have an impact on the fair value of the business?).
>
> Would appreciate your thoughts on how to take this further.
>
> (Emphasis added.)

1090 Viers responded. In an email to both De Samblanx and Eden, he said that he and De Samblanx had discussed how they might quantify how much product produced by Joe White was out of specification. He suggested that Youil be asked to quantify the amount of product being produced that was "not directly usable". However, he stated that "[w]e just don't know how far we can go in questioning or asking him to quantify". Viers' evidence was that he was unsure how far Cargill could go in questioning Youil because Completion had not occurred and, as such, Cargill was still constrained as to what it could discuss with Joe White. He said it was being considered from the perspective of how Cargill would manage the situation following Completion, but they did not know how prevalent the issue was.

1091 Eden gave evidence that this was the first occasion when he learnt of Certificates of Analysis being "corrected" if the results were within 2 standard deviations.[683] Eden responded by reference to past experiences. He stated:

> Maybe a solution would be to talk about [Cargill's guiding principles] and use the example we have found *in all of the businesses we have acquired – "smoothing"*.[684] I think I would try to listen, learn and investigate before we accused (sic). This is really dangerous ground for so many reasons. I will never forget when we stopped smoothing in the U.S. It was right when I took over the [business unit] in 2000. When we stopped our perceived quality went to hell and the customers blamed the new leadership. *We never told them we were cheating in the past and now we are honest. From an employee engagement standpoint, they also hated me as now they had to deal with all of the off spec. So for me, this would be a risk to manage as I see lots of similarities*.
>
> (Emphasis added.)

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683 Eden said he had been aware earlier about maltsters with a plus or minus 2 standard deviation policy or something like that, but where the policy involved the actual results being reported, 1044.20). Eden also accepted that if there were a 2 standard deviation policy, then reporting a result within 2 standard deviations would be reporting an actual result.

684 Eden was not involved in the acquisition process of the businesses referred to in this email. He gave evidence that at the time he had not previously been involved in the acquisition of any malting business.

1092 "Smoothing" is another term for pencilling.[685] In the context of answering questions about this email chain, Eden referred to cheating. When queried about this, he said smoothing was a form of cheating. He said "the businesses" he referred to in this email were related to 2 acquisitions and the facilities for those businesses were in Canada, the United States and China.

1093 The Viterra Parties relied on this evidence to submit that Cargill knew in 2013 that pencilling was prevalent throughout the malting industry. Reliance was also placed upon other evidence, including evidence of Viers to the effect that he had been told of an acquisition, he believed in the 1990s, where a business or businesses had engaged in a similar practice.[686] Viers also gave evidence of his suspicion from time to time that a competitor might be changing results because of its apparent performance, though he said coming across that sort of activity in the malting business would be very rare. No doubt this evidence shows that some at Cargill were fully aware that pencilling occurred or had occurred in some businesses, but, of itself, it did not establish any awareness of some general, or even significant, prevalence of a practice of pencilling by maltsters throughout the industry, especially reputable maltsters.[687]

1094 Eden gave evidence of having to explain the existence of smoothing, after 1 of these acquisitions, to a business conduct committee within Cargill. He said he was threatened with termination, before he explained that he had not been involved in such conduct but had only come across it after that acquisition. He further explained that if an employee was found to be in breach of the Cargill Code, then the employee

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685 See par 36 above. De Samblanx's evidence was that he had never heard of the term "smoothing" before.

686 The other evidence included evidence from De Samblanx: see par 773 above. It also included a Cargill case study, created in November 2012, which referred to a "long-standing practice" of altering Certificates of Analysis. The case study hypothesised that the alleged practice was only discovered generally when a new quality control manager was appointed. The case study was tendered by the Viterra Parties, but was not put to any witness. (For completeness, if such a practice were standard industry practice, then the case study would have made little commercial sense; a generally known industry practice would not have been "discovered" by a new quality control manager if all persons in the industry already knew of such a standard practice: see issue 13 below.)

687 In closing submissions, when asked as to the basis of a written submission contending that Cargill had been engaged in pencilling until at least 2000, the Viterra Parties submitted Eden's evidence "about this matter" was entirely unsatisfactory. It was suggested the words in Eden's email (at par 1091 above), should be taken at their face value. Contrary to the Viterra Parties' submission, Eden's evidence on this issue was plausible. Further, there was no probative evidence to suggest that Cargill itself had engaged in the practice of pencilling up until 2000 other than by reason of businesses it acquired.

would be fired.

1095 Eden gave extensive evidence about the contents of De Samblanx's 10 October 2013 email. He said the email raised various issues for him. These involved concerns over silo capacity, but also issues about how to manage the issues from a customer perspective. Eden knew from past experience that the practice of pencilling had not been tolerated at Cargill, Inc. He gave evidence that the cessation of pencilling by Cargill, Inc after 1 of the acquisitions referred to above had resulted in that business being unable to compete, and the plant being closed and sold off.

1096 On the issue of silo capacity, Eden's evidence was that it was affected by customer requirements, and the number of different grades and specifications.[688] He said the more grades and segregations, the more difficult it became. He stated further that the amount of silo capacity needed also depended on the extent to which a customer allowed flexibility on reporting of the analysis of the malt. Accordingly, he said the issue was broader than it had been referred to in De Samblanx's email.

1097 Eden said he had no knowledge of whether Joe White's customers knew about the approach Joe White was taking and was keen not to make accusations until further information was obtained. In particular, he was concerned about the effect allegations might have had as part of an integration process when Joe White's management were going to be "the new team".

1098 Although Viers could not be precise as to timing, sometime shortly after the email chain which commenced with De Samblanx's email on 10 October 2013, Hughes told him Joe White might not be complying with certain customer requirements. Hughes said words to the effect that for some customers Joe White would not be able to meet specification. Only Viers and Hughes were present when this discussion occurred.

1099 De Samblanx gave evidence that while in Adelaide, he first learnt from Viers about issues concerning barley varieties and gibberellic acid. He said he was surprised to

688 This was Eden's evidence, but it was likely he intended to refer to segregations rather than specifications.

learn of both these matters. He considered he had no reason to question whether Joe White was using incorrect barley varieties during the Due Diligence, and nothing he saw led him to have any concerns regarding barley varieties. With respect to gibberellic acid, Youil had told him previously that it was not used unless permitted by the customer.[689]

1100 As a result of the issues raised, a meeting with Joe White management was arranged by De Samblanx for 15 October 2013. On 14 October 2013, Terry Gray, the human resources director at Cargill, Inc and human relations integration lead, emailed Viers a copy of the Cargill Code. At trial, Viers stated that he could not remember asking for the Cargill Code to be emailed, but accepted that it "would [have been] sensible" to have the Cargill Code available before the upcoming meeting.

1101 Further, around this time, informal notification was given of the Foreign Investment Review Board's impending approval of the Acquisition Agreement proceeding to Completion.[690] While not removing the need for caution in light of the legal advice that had been given,[691] it was generally understood that this occurrence meant that the appropriateness of disclosing sensitive information to Cargill was less restrictive.[692]

1102 The meeting between Cargill and Joe White management was held, as scheduled, and went for around 2 hours ("the 15 October Meeting").[693] Mattiske was aware the meeting was to take place, but did not attend. He understood its purpose was to ensure Cargill had a smooth transition.[694]

1103 There was some inconsistency at trial about who attended the 15 October Meeting.[695]

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689 See par 788 above.

690 On 17 October 2013, formal approval was given.

691 See par 1050 above.

692 See, for example, par 1068 above.

693 This meeting was distinct from the integration meetings that were occurring from time to time.

694 On 15 October 2013, Mattiske was sent an email with the subject "Integration Kick-off meeting". This was also sent to a large number of persons, including each of the Third Party Individuals, Rees, Norman, De Samblanx, Viers and Christianson. The email referred to the meeting that had been held that day (referred to as the "Joe White integration team kickoff meeting"), and purported to attach materials from the meeting. None of the attached materials or the email from the previous day (which was included and set out the agenda, and had also been sent to Mattiske) referred to the Operational Practices.

695 See also par 1236 below.

De Samblanx gave evidence that he, Viers and Chik Liang Tan ("Tan"), associate, strategy and business development at Cargill Asia Pacific, attended on behalf of Cargill, whilst Stewart, Youil, Wicks and Hughes attended on behalf of Joe White. De Samblanx could not remember if Argent attended the meeting. Viers said he attended with De Samblanx for Cargill and that Hughes, Youil, Wicks and Stewart also were present (however, he also sent an email on 19 October 2013 which recorded that Jones was in attendance). Stewart gave evidence that the attendees were himself, Hughes, Youil, Viers and De Samblanx. However, it was common ground that Stewart gave a presentation at that meeting. Argent did not attend.

1104 It was the first time Stewart had given a presentation to a prospective purchaser of a business. He had not read the Information Memorandum.[696] He was instructed by Hughes to prepare a presentation that outlined the way Joe White generated Certificates of Analysis and to also comment on barley, but was not asked to prepare an analysis (nor did Stewart raise the issue) of the impact of the Operational Practices on the Joe White Business.

1105 Stewart gave evidence that, before giving the presentation, he already knew of Cargill's reputation for not tolerating pencilling and that he had been told by a colleague who previously worked for Cargill that Cargill would not permit reported results in Certificates of Analysis which differed from test results. He had also been told that Cargill generated Certificates of Analysis based on the theoretical blend approach.[697] That said, Stewart was hopeful that Cargill might consider Joe White's model as being suitable going forward.

1106 The document Stewart spoke to was entitled "Malt Analysis & Barley Variety Usage".[698] The contents page of the presentation read:

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696 Stewart gave evidence he was not involved in the sale process of Joe White before the Acquisition Agreement was signed, save for being "consulted by the Viterra legal team" on a couple of occasions.

697 This was Stewart's evidence in his witness statement. Further, in his oral evidence in chief, Stewart said, at some stage during the presentation, he was aware Cargill used a theoretical blend approach in its analysis and reporting of results. Under cross-examination, he sought to step away from this, saying he was not "entirely sure" of Cargill's position. See further par 1125 below.

698 Stewart could not recall providing a copy of the document to anyone at the time. In fact, a copy of the presentation was not given to Cargill. Further, Mattiske was not aware of its existence at the time.

- The Cargill model
- Current approval system – What we do and why
- Proposed way forward – Science based, but *recognised (sic) the need for change*
- Barley usage

(Emphasis added.)

1107 Stewart gave evidence that, at the start of the presentation, after briefly touching on the Cargill model, he then summarised how "Viterra Malt" issued Certificates of Analysis. Stewart said Viterra Malt tested the actual shipment, whether it be in a container or a truck, with the results of the analysis put into a Sign-Out Report. That report was reviewed using the 2 standard deviations derived from the Malt Proficiency Scheme and then modified to fit the Certificate of Analysis. Further, Stewart said if the analysis was outside 2 standard deviations, the procedure dictated that 2 managers would meet to discuss the sign-off and release of the shipment.

1108 The next slide was headed "Malt Approval" and stated:

> Overarching philosophy – Meet the customer's quality expectations
>
> - Send malt that is within specification according to the customer for those customer's (sic) that analyse malt
> - Meet the customer's quality expectations for those customers who do not analyse malt (judged on brewery performance and their final product meeting specification).

Stewart accepted that the juxtaposition between these 2 approaches was clear (that is, taking a different approach depending on whether or not a customer did its own analysis of the malt delivered), but rejected the proposition that it was a cynical basis on which to supply malt. Stewart described the overall approach as "the business approach" and the way the Joe White Business operated. Plainly, the "philosophy" demonstrated Joe White was more concerned with meeting customers' specifications when it was likely that any non-compliance would be discovered than it was in circumstances where it was much less likely.

1109 The next slide was headed "Current approval system". It displayed a flowchart, the

starting point of which stated, "Theoretical blend. Is it within guidelines?".

1110 If the theoretical blend was not within guidelines, according to the flowchart the next step was to consult the general manager of "technical". Two options followed that step: either the theoretical blend would be re-blended then packed or the shipment rescheduled, or the shipment could be packed if it was "within analysis variation".

1111 If the theoretical blend was within guidelines, the flowchart indicated that the next step was to pack the shipment. The next step in the flowchart then stated "Is the shipment analysis within specification?". If the answer was yes, a Certificate of Analysis could be issued. If the answer was no, there were 2 further steps.

1112 The first further step asked whether the shipment analysis was "[w]ithin customer tolerance". If the shipment analysis was not in specification, but within customer tolerance, a Certificate of Analysis could be issued. If it was not within specification, and not within customer tolerance, the flowchart stated the "[n]on-conforming shipment" required 2 general managers to sign-off the Certificate of Analysis. Stewart gave evidence he did not need to be personally part of this process, as it "just [needed] to be 2 general managers".

1113 The second further step asked whether the shipment analysis was "[w]ithin 2 [Malt Proficiency Scheme][699] standard deviations". If it was, a Certificate of Analysis could be issued. If it was not, the flowchart stated, "[n]on-conforming shipment. Two [general managers] signoff [Certificate of Analysis]".[700]

1114 Stewart gave evidence that, in substance, he stated orally what was set out in the flowchart. However, during the presentation, he did not volunteer any information about whether Joe White's customers were informed of the practice of pencilling.[701]

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699 See fn 193 and par 216 above.

700 It was not clear on the face of the flowchart whether a Certificate of Analysis could be issued without reference to the general managers if the result was not within customer tolerance, but was within 2 standard deviations. This was not explored in evidence, and it was not clear whether anything was said in that regard with reference to this part of the flowchart.

701 For convenience, the "Current approval system" flowchart was depicted as follows:

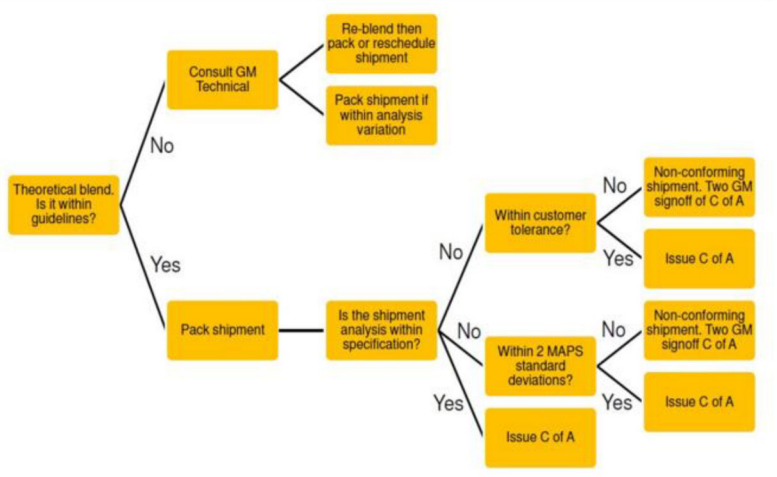
1115 The next 2 slides were entitled "Customer analysis variation". The first of these slides indicated that all laboratories produce variations in results "to a lesser or greater extent". It stated that Joe White "work[s] closely with customers to gain an understanding of how their lab reads certain malt parameters", and "pack[s] and approve[s] shipments based on this intell". On the second of these slides was written:

> Many other examples where the customer expects that they will read within specification, which means that we need to send out of specification according to our own laboratory.

1116 "[Malt Proficiency Scheme] analysis variation" was the title of the next 2 slides. The slides stated that there was an error associated with malt analysis and that there were various sources of accepted error. They continued, in relation to Certificates of Analysis, by explaining that Joe White had chosen the Malt Proficiency Scheme upon which to base their Certificate of Analysis release and that "[t]wo standard deviations are deemed to be 'normal variation'".

1117 The final slide was entitled "Barley variety". In relevant part, the slide read:

- Current philosophy is to provide a customer's desired barley variety
- *If not available, a variety with similar character will be supplied* to ensure the malt meets the customers (sic) expectation
- *Recognise that there will need to be change*
- Will there be a transition period? Start from new crop 2013?
- Some other issues;



- New varieties – Catch 22; there needs to be a critical mass of the new barley before customers will undertake trials, which can take over a year to complete, but growers will not plant a critical mass unless we are buying the barley. Australia is not like Europe regarding new varieties.

- Actively trialling new barley varieties with customers. Able to blend off excess trial barley?

(Emphasis added.)

1118 Stewart gave evidence that he told De Samblanx and Viers that it was "our" philosophy to supply barley nominated by the customer, but, if it was unavailable, to supply a barley variety that would perform in a similar manner. He did not descend to giving details about the particulars of which customers required which varieties, or the extent to which they could not be supplied. Stewart said he could have provided that information if he had been instructed to do so.[702] Interestingly, the prepared script recognised there was a need for a change, rather than seeking to defend the existing practice.

1119 Stewart also gave evidence of Cargill's reaction to the presentation. He said De Samblanx stated that he was impressed by Joe White's procedures and their robustness, and that the procedures aligned with how he thought "Viterra Malt" was operating.[703] In contrast, Stewart said Viers' response was that he was very surprised about the way Viterra Malt was operating, in a quite animated way which appeared to Stewart to be forced or exaggerated.

1120 Although Hughes did not give evidence, his notes of the 15 October meeting , and surrounding events, were tendered by Cargill. On 23 October 2013, the notes were provided by Hughes to Fitzgerald, and then forwarded to Lindner.

1121 Hughes' notes included what purported to be the prelude to the meeting. They stated

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702 Much of this information was readily available to Stewart. Sheehy sent an email to Stewart that same day attaching a spreadsheet dated 8 October 2013, which contained details of barley varieties required, together with notes of customers for whom Joe White was "waiting for feedback" or for whom the required variety attracted the comment "no barley available this year". That same spreadsheet had been sent by McIntyre to Wicks, Stewart, Dickie and Jones, copied to Hughes, on 8 October 2013. The covering email stated the spreadsheet contained the information that Wicks was after, and tracked all the barley variety trials then in progress: see also par 1211 below.

703 See also par 1296 below.

that Cargill had raised issues concerning Certificates of Analysis and barley suitability on several occasions. According to Hughes' notes, Cargill representatives (not identified) had indicated (not stated how or when) "they understood where industry practice sat in this area", but adopting such a practice was not the "Cargill way". He said they had indicated they wanted to get a handle on the situation as soon as possible. What, if anything, Cargill had allegedly said about what the industry practices were in relation to Certificates of Analysis, or barley suitability was not the subject of the notes.

1122 The notes also referred to an earlier meeting, at which Hughes stated he believed "JR" (presumably a reference to Rees) was present, and a subsequent dinner, but it was recorded that no detail was discussed at that time. Precisely what the reference to "no detail" encompassed was not clear on the evidence given the absence of the relevant witnesses.

1123 According to Hughes' notes, the presentation went for 2 hours in the morning of 15 October 2013. The notes stated Stewart's presentation concerned why Joe White did things "with regard to [Certificates of Analysis], confident that it was a robust process".

1124 Importantly, Hughes' notes acknowledged that customer-specific data, prices and volumes were not referred to.[704] (During his cross-examination, Stewart said he went into "some detail about specific customers". He did not elaborate about what was said. If Stewart did mention specific customers during the presentation, there was nothing to suggest it was accompanied by any detail of those customers' particular circumstances.)

1125 The notes stated that during the course of Stewart's presentation, Cargill discussed its own way of handling malt analysis and reporting challenges by using blending results to avoid conflicts arising from the actual results. Hughes' notes stated that this was challenged as less accurate, which attracted the response that Cargill's approach was

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704 This may have been as a result of guidelines published by the authorities concerning disclosure to competitors, but there was no direct evidence on the point.

okay as long as the customers were on board. In response to the suggestion that it was unlikely that Joe White's customers would permit such an approach, it was stated that Cargill's approach was not negotiable.

1126 With respect to barley varieties, the notes stated that Joe White had already been specifically asked to introduce how it managed the situation. On this issue the notes stated:

> Discussed critical mass for new barley variety rollouts in Australia, how the process is slow, and how customer approvals often taken longer than the time it takes farmers to change, particularly in recent years.

1127 Consistent with what was presented on 15 October 2013, more generally Stewart gave evidence there could be a very significant lead time in obtaining a local source for a barley variety if there were no pre-existing arrangements. Further, although Joe White could get the message out as to what was required,[705] it had no control over farmers' decisions as to which barley to grow and was dependent upon the preparedness of farmers to choose a particular variety required.

1128 Returning to the notes, they recorded that Cargill asked point blank if Joe White had sufficient stocks of barley remaining to meet specific customer requirements, to which Cargill was told that that was unlikely. On this topic, the notes continued:

> Consequently they wanted to know in more detail what this looked like and we confirmed we were not able to discuss this at this time but would be prepare (sic) something in the background for when we could, most likely post [Foreign Investment Review Board] approval, when confirmed discussions could be more open.[706]

1129 Although not referred to at all in Stewart's written presentation, Hughes' notes indicated that the use of gibberellic acid was also discussed. The topic was said to have arisen as the result of an enquiry as to whether Joe White used gibberellic acid in the Joe White Business. Hughes' notes recorded that Cargill was informed that gibberellic acid was used, including for "non-gibberellic acid customers". Consistent with this note, Stewart's evidence was that he stated that gibberellic acid was used for

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705 Stewart said this was done typically at industry forums. He also gave evidence that Barley Australia was critical in this role.

706 See par 1210 below.

the majority of Joe White's customers, but there were some customers who objected to its use. He said for the customers that objected gibberellic acid was still used, but there were also several for which gibberellic acid was not used.

1130 On this topic, Hughes' notes stated Cargill was told that in order to meet production and varietal constraints, it was necessary to use gibberellic acid for customers that did not authorise its use. The notes stated that Joe White managed this very carefully to reduce any risk to the Joe White Business.

1131 In response, they were told that, under Cargill, this would need to stop and most likely from legal day 1, being the first day after Completion. When Cargill asked what impact this would have on the Joe White Business, Cargill was informed that some malt production would move from 4 to 5 days, but that it would vary depending on "varieties and year to year". Cargill was informed at the meeting that if increased access "to contacting grain and specific varieties" was achieved, it would result in the problem being minimised.

1132 Finally, the notes stated that the meeting was closed by the Cargill representatives confirming they would communicate with Cargill to determine whether, going forward, there would be any option in a transition period to deal with the issues raised.

1133 De Samblanx's evidence concerning the 15 October Meeting did not accord with Hughes' notes in a number of significant respects. Although De Samblanx could not recall everything that was said, he broadly accepted that what was contained in Stewart's presentation was presented orally as well. However, his reaction to what he was told about Joe White's Certificate of Analysis procedures bore no resemblance to Hughes' summation or Stewart's evidence.[707]

1134 As to his state of mind before this time, De Samblanx gave evidence that during the Due Diligence it never crossed his mind that there would be a practice of using barley varieties that were not permitted by a customer. Further, De Samblanx did not ask

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707 See par 1119 above.

any questions during the Due Diligence about Joe White's Certificate of Analysis policy or procedures because it did not occur to him that there would be an organised system of the kind he discovered in October 2013. De Samblanx said he knew that all Joe White employees were required to sign a code of conduct, which he understood would obviously include representing values or truths to customers, which informed his approach.

1135 De Samblanx gave evidence that he was really surprised and shocked by what he was told. To elaborate, De Samblanx said he was surprised at the documented procedure which permitted sign-off by 2 general managers even when the malt was non-conforming by more than 2 standard deviations. He said he was uncertain as to what 2 general managers could do to make sure the quality of the malt was guaranteed. He understood that 2 standard deviations could give rise to a high out-of-specification value, and stated that it was puzzling to him that Joe White's procedure was presented as something with a science behind it. He said he was not clearly understanding what the procedure was, and whether it was something that had been agreed with the customer. De Samblanx said he was also really surprised that the procedure was palpably spreading throughout the whole of Joe White.[708]

1136 He also gave evidence that, with respect to barley varieties, he could not recall what was said because he was "a little out of the plate at that moment" because of what he had been told. He said that it was a "no-brainer" that Cargill would only sell customers the varieties that customers ordered. He said by reason of this, there was no real discussion about barley varieties when the issue was raised.

1137 In light of this evidence, not surprisingly, De Samblanx rejected the suggestion during his cross-examination that he stated during the course of the meeting that Joe White's approach was a well thought out procedure.

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708 Under cross-examination by Stewart's senior counsel, De Samblanx gave evidence in substance that if there was a properly performing laboratory then results should be "trustable" within 2 standard deviations. This evidence was not inconsistent with the reaction he said he had during the 15 October Meeting as it said nothing about pencilling results in the manner which occurred under the Reporting Practice: see also fn 554 above.

1138 On the issue of De Samblanx's reaction, it is necessary to address some evidence given by Viers. Under cross-examination, Viers acknowledged that during the meeting De Samblanx said he was not surprised.[709] But Viers gave this evidence in rejecting a suggestion put to him that De Samblanx said he suspected Joe White was using pencilling and was not operating in the Cargill way because of Joe White's lack of malt storage capacity. Precisely to what Viers recalled that De Samblanx said he was not surprised about was not explored further with Viers.

1139 De Samblanx accepted some parts of Hughes' notes. He agreed that there was a debate about whether the theoretical blend approach used by Cargill or the Joe White approach was the more accurate form of analysis and reporting. At the end of the discussion on this topic, De Samblanx said Joe White would be required to use Cargill's practices. When asked under cross-examination whether De Samblanx was of the opinion that the theoretical blend approach used by Cargill was better, De Samblanx stated that statistically that was so. He offered to explain his position, which he said was easy to explain, but that offer was declined by the cross-examiner.[710]

1140 Further, De Samblanx accepted that during the meeting he considered the presentation was detailed, uninhibited, frank and forthcoming. He believed that he got direct and specific answers to the questions raised and also gave evidence that he believed he could have asked whatever questions he wanted. However, he gave evidence that he did not ask all the questions he wanted to ask because he knew it would "not fly with Cargill". Although his evidence was that he thought it was discussed, he could not recall any discussion about gibberellic acid.

1141 Viers' recollection of what was actually said by Stewart and Hughes at the 15 October Meeting was very poor. He recalled being told that there was a documented process in relation to the issuing of Certificates of Analysis. Much of what was contained in

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709 See also par 1296 below.

710 For completeness, Testi gave evidence that the initial testing of individual batches by Joe White up to 1 November 2013 was limited to key parameters before the production manager prepared the theoretical blend, whereas under Cargill the initial testing for the theoretical blend was more comprehensive.

Hughes' notes was put to him during cross-examination. In response, he could not recall most of the matters, but equally could not deny the puttage. Viers accepted that he had no doubt after the meeting that the Operational Practices were occurring. However, he did not know the extent to which they were occurring and was certain he was not told that they were occurring routinely or that the processes were being employed daily, which he said he only found out later.[711]

1142 In contrast to De Samblanx's position, Viers gave evidence that, during the meeting, he did not feel that he could ask specific questions about particular customers and their contractual specifications. He said this was because of the anti-trust guidelines for integration, which required Cargill and Joe White to continue to operate as independent and competing companies until Completion.

1143 Shortly after the meeting, Viers sent an email to Eden stating that the issue concerning customer specifications was "very very serious" and broader than might have been expected. Viers told Eden that he, together with De Samblanx, needed to bring Eden up to speed.[712] This gave rise to a series of emails.

1144 Eden responded immediately, asking how Viers knew of the information he had just conveyed. To this, Viers responded stating that Joe White had "shared their process" and there had been a meeting specifically on that subject. Eden further enquired as to whether or not the process had been agreed with the customers. Viers' straightforward response was "No". Eden then asked how much it would cost to fix the problem. Viers stated in a further email that they were trying to get their minds around it, but it was "[significant]. Millions". As a result of this, Eden directed Viers to raise the issue with Cargill's in-house legal counsel, and to discuss with Cargill's lawyers about legal recourse. Eden said that once a legal perspective had been obtained, a conference call could be held.

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711 This state of knowledge is consistent with Hughes' notes of what was not discussed at the meeting: see par 1124 above.

712 This email was sent with a time of 14 October 2013 at 8.55pm. However, Viers gave evidence that his computer remained on Minneapolis time at all times, even when he was in Australia. Further, it is clear from the contents of the relevant emails in the chain, that the exchange took place after the meeting.

1145 Although he could not recall how, Eden's evidence was that around this time he was also told about Joe White's conduct concerning unauthorised use of barley varieties and prohibited use of gibberellic acid.

1146 Eden said he was very concerned about what Viers had told him, and could foresee the costs of fixing the issues relating to Joe White's Certificates of Analysis could be significant. Further, he was "simply astounded" to learn of Joe White's conduct regarding use of unauthorised barley varieties and prohibited gibberellic acid. He said it was shocking and sounded like a "third–world-country-kind-of activity", rather than the "really nice business system" he had been believing in. Eden was further concerned about the lack of detail with respect to the extent of such conduct. Under cross-examination, Eden said he considered arbitrarily making the decision to use another barley variety was not something he believed that anyone would ever try to achieve and that in his view it was the most shocking part of the story.

1147 Under cross-examination, Eden said there was no suggestion from De Samblanx or Viers that the Joe White executives had not been forthcoming about the processes used for Certificates of Analysis, or about their use of barley varieties or gibberellic acid.

1148 It is convenient here to address some conflicts in the evidence concerning the events of 15 October 2013. While much of what was said is documented either in the form of a presentation or contemporaneous emails, there is a stark contrast between the account given by Stewart and Hughes (by his notes) when compared with De Samblanx's evidence of how he reacted to what he was told. Despite Hughes' contemporaneous note, I do not accept that De Samblanx made any representation at the 15 October Meeting to the effect that each of the practices that was disclosed to him (as they were on that day) were what he had expected.

1149 Given the potential importance of the Operational Practices (to the extent they were disclosed on 15 October 2013 and, to a much lesser extent, in the few days leading up to it) to the fundamental operations of Joe White, having them disclosed for the first time in any intelligible manner on 15 October 2013 would be surprising in itself.

1150 Further, it would have been incredible if De Samblanx and Viers were told of the deliberate deception of Joe White's customers with respect to gibberellic acid and had not been surprised. There is no evidence to suggest such conduct had been properly disclosed before October 2013. A like observation can be made with respect to failing to provide contracted varieties of barley and concealing that fact from the customer.

1151 Furthermore, even if Viers' recollection was correct with respect to De Samblanx indicating that he was "not surprised" at some stage during the meeting, that evidence did not equate to De Samblanx indicating his lack of surprise with everything he was told.

1152 Moreover, the correspondence that followed the meeting from De Samblanx and Viers was entirely inconsistent with a lack of surprise, as both of them were plainly concerned about what they had been told and reacted accordingly.

1153 In addition, the countervailing evidence was not compelling. The effect of Stewart's evidence was that De Samblanx was impressed with Joe White's procedures in their entirety and with their robustness.[713] Although De Samblanx was not entirely certain about what he had been told, including the extent to which the preparation of Certificates of Analysis could be scientifically justified, as a person experienced in the production of malt it would be highly unlikely he would have formed the view that the procedures were either impressive or robust. On the face of what De Samblanx was told, they involved deliberate deception and material non-compliance with customers' specifications.

1154 Turning to Hughes' notes, there was no opportunity for their accuracy to be tested in circumstances where Hughes was not called to give evidence. In any event, in mid-October 2013 Hughes was in a difficult position. He was fully aware of the representations that had been made in the Information Memorandum, and at the Management Presentation, together with the question and answer sessions in July 2013, and must have been conscious of the stark contrast between what was stated at

713 See par 1119 above.

the 15 October Meeting and what had been previously represented, including because of what had been omitted. In these circumstances, a self-serving note purporting to record Cargill's position in the manner that he did was something that he may have seen to be in his best interest at the time. Whether in fact that was Hughes' motive or not is not a matter that needs to be explored. Put simply, the contemporaneous documents exchanged within Cargill immediately after the 15 October Meeting, coupled with the fact that De Samblanx was a credible witness, were far more probative of the matters that were disclosed on 15 October 2013 (and in the lead up to it), and of the fact that they were not things about which Cargill was aware or were of a nature which could reasonably have been anticipated.

1155 Hughes spoke to Stewart after the meeting and instructed Stewart to construct a document detailing Joe White's current ability to comply with its contractual obligations, including: meeting customers' specifications as identified in Certificates of Analysis, supplying the correct barley, supplying gibberellic acid free malt to the relevant customers and servicing customers that had a pre-shipment requirement. Although Stewart gave no evidence of Hughes stating the purpose of such a document, he suggested it was to enable the Joe White Business to be looked at in order to consider the changes that might need to be made in the future once Cargill had taken control.

1156 Shortly after the 15 October Meeting, De Samblanx telephoned Van Lierde. Van Lierde asked De Samblanx what impact Joe White's practices (as they had been described to that time) might have on storage capacity at Joe White's various plants. De Samblanx said he thought Cargill would have to build or rent storage capacity and made some comparison to the storage capacity at Cargill's legacy plants. De Samblanx also said it was difficult to know the precise impact as, at that time, he did not know the extent of the problem.

1157 Van Lierde recalled receiving a call on a Saturday in mid-October 2013, during which he was told about a new development of some bad practices in place at Joe White, concerning producing malt contrary to customers' contractual requirements and the

way malt was certified for customers. Van Lierde contacted Conway to inform him of this development.

1158 During a call with Eden around this time, Eden told Van Lierde Joe White's practices breached the Cargill Code. Eden said if what had been reported was correct, then, depending on the extent of the practices, it could be very difficult and expensive to correct once Cargill owned the Joe White Business. Van Lierde was strongly of the view that Cargill should find out as much information as possible. Eden told him that Cargill would find that difficult as Cargill did not have further access to the Joe White managers until after Completion.

1159 This sentiment was also reflected in an email Eden sent to Van Lierde and others on 16 October 2013. Eden stated as a fact, based on previous experience, that correcting practices to comply with the Cargill Code was expensive. Van Lierde's evidence was that he did not know what previous experience Eden was referring to, and did not recall asking him. It was put to Van Lierde in cross-examination that he understood Eden to be telling him that corrective measures would definitely be expensive.[714] Understandably, Van Lierde said he did not read the email that way. The email was plainly premised on the basis of a possibility the practices at Joe White were unacceptable and extensive, rather than any concluded view in that regard.

1160 Eden's evidence was that both Conway and Van Lierde were involved at this point, and they expressed some opinions on what Cargill should do. Eden's evidence was that he acted in accordance with those opinions, but at the time external advice was sought about the alternative courses of action available to protect Cargill's economic and strategic interests.

1161 Early that afternoon, Cargill sought legal advice from Allens. Tina Savona ("Savona"), legal counsel at Cargill Australia, had initially contacted Clark on 15 October 2013 to give instructions. Savona then participated in a further telephone call that day with Viers and De Samblanx, during which Viers instructed Clark as to what Cargill had

714 This proposition was not put to Eden.

been told earlier that day. Viers gave evidence that he could not recall De Samblanx saying anything at the meeting. Viers' recollection of what he said was quite limited. He informed Clark and Savona about a practice allowing for Certificates of Analysis to be altered if the results were within 2 standard deviations of the specification; about varieties being used that were not approved by Joe White's customers; and about the unauthorised use of gibberellic acid. Clark then advised that he would consult with a colleague who was an expert in the area.[715]

1162 According to notes taken by Savona, a discussion was held between her, De Samblanx and Clark. Initially, Cargill made a claim for legal privilege based upon anticipated litigation with respect to these notes. Any privilege that may have existed was subsequently waived. The notes were tendered by the Viterra Parties.

1163 The notes were in point form, and their meaning was not always entirely clear. Savona was not called as a witness, so the lack of clarity remained. The notes indicated that Savona and Clark were instructed on the following matters:

> [Joe White] not reporting accur (sic)
> [Certificates of Analysis] - in spec/not in spec
> "falsifying" to the customers
> …
> Not be able to ship 50% of our exports
> communication to customer
> contractually agreed - meeting specs
> …

The notes then referred to malt analysis and, amongst other things, recorded that if a result was within 2 standard deviations then it was "within spec + general [manager] approvals - freedom to do anything you want". The notes stated that the process for doing this was laid out. Further, Savona noted that plants were limited in being able to meet specifications.

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715 This evidence was given in chief. In re-examination, Viers was asked a question as to whether he told Clark what his state of mind was on 15 October 2013 concerning the extent of the practices (about which Viers had stated he did not have any quantified understanding). When Viers gave this evidence, he was then asked the detail of that communication. This was successfully objected to by the Viterra Parties on the basis that Viers had not been cross-examined about his account of the instructions given to Clark on 15 October 2013.

1164 The notes raised the question as to how Cargill found out. Under this question, it was noted:

- low silo capacity;
- [De Samblanx] wondering
- [Certificate of Analysis] compliance …

1165 Under a heading "barley varieties", it was noted that customers required specific barley varieties and then "+ not using the [required] varieties". It was further noted that customers needed to agree.

1166 Under a heading "chemicals", it was recorded that Joe White was using certain chemicals to treat the malt "which accelerates quality + it is strictly forbidden by certain customers - reduces effectively capacity but rectifiable".

1167 The notes also referred to legal recourse. After referring to the production manager at Minto having previously worked for Cargill and knowing Cargill's procedures very well, a side heading "general perception" had the following notes next to it:

> we had the same issue + we had to stop this
> general practice with all maltsters

1168 Finally, the notice referred to breach of contract or any other laws and questions of liability. The question was raised as to whether or not there was a requirement to go to the customer. Immediately next to that was "OR" and a reference to criminal conduct, fraud and a positive obligation to disclose. After stating that Cargill would have to stop these practices going forward, the notes concluded with "+ how? [Because] some cannot just be <u>stopped</u>" (original emphasis).

1169 During Clark's cross-examination, he stated that he had been shown some of Savona's notes before he gave evidence.[716] Clark gave evidence that he was advised by Viers that there were concerns in relation to storage capacity if the use of gibberellic acid was widespread, and also in relation to the need to produce different batches with different barley varieties. Amongst other things, Clark was instructed that Cargill had been told that it was unlikely Joe White had sufficient stocks of barley to meet specific

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716 These were a different set of notes: see par 1187 below. Clark believed he took notes himself, but disposed of them within the next couple of days.

customer requirements. Viers also instructed that Joe White engaged in a practice of providing Certificates of Analysis that did not reflect the qualities of the malt being provided to customers.

1170 Initial legal advice was provided in the form of a letter of advice dated 17 October 2013 from Clark and Peter O'Donahoo ("O'Donahoo"), another partner at Allens ("the Allens Letter of Advice"). It was addressed to Savona, and Chris Okoroegbe ("Okoroegbe"), a senior lawyer at Cargill, Inc,[717] and entitled "Project Hawk – Malt Quality Issues".

1171 The advice began by noting that the Acquisition was due to close on 31 October 2013. It continued:

> You have informed us that, at integration meetings held between Cargill ([Viers] and [De Samblanx]) and Joe White executives earlier this week, the following practices were disclosed by the Joe White executives.
>
> 1. **Certificates of Analysis** … Some malt buyers (typically brewers) require the malt they purchase to satisfy specific parameters. In connection with its sale of malt, Joe White may issue a [Certificate of Analysis] to a buyer confirming testing results for the relevant parameters. Joe White undertakes this testing in-house. Joe White *may have* issued [Certificates of Analysis] that overstate test results.
>
>   At this point, we do not know whether [Certificate of Analysis] are also issued to the Department of Agriculture, Fisheries and Forestry for the purposes of obtaining export permits.
>
> 2. **Barley varieties**. Some malt buyers require the malt they purchase to be produced from specific barley varieties. Joe White *may have* supplied malt produced from other barley varieties to these buyers.
>
> 3. **Gibberellic acid (*GA3*)**. Some Malt buyers prohibit the use of GA3 in the production of the malt they purchase. GA3 promotes germination of barley. Joe White *may have* supplied such malt to these buyers.
>
> We understand that *no specific examples of these practices occurring were revealed* and no suggestion was made that any malt being sold fails to meet health requirements or is in any way harmful to consumers.
>
> (Emphasis added.)

1172 Allens stated it was providing initial high-level advice on the legal consequences of these practices, "were they to have occurred". The letter noted that the advice was

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717 Okoroegbe was "tagged" to Cargill's malt business.

provided at a time when insufficient information was available to allow Clark and O'Donahoo to form a conclusive view as to the potential legal issues raised.

1173 The first section of the Allens Letter of Advice surveyed possible criminal offences that may have been committed by Joe White or its executives, including offences under Australian "food and consumer law" and offences relating to the giving of misleading statements, fraud and deception. The second section of the letter was entitled "Other Legal Claims and Consequences", and set out the following:

> - adverse commercial impacts eg on business reputation and profitability;
> - claims by buyers for breach of contract, misleading or deceptive conduct (a statutory tort under Australian law), or deceit (a common law tort under Australian law);
> - claims by buyers under foreign laws;
> - investigations by regulators with the Australian Competition and Consumer Commission (in particular) having widespread powers to demand the production of documents and compel testimony;
> - mandatory or voluntary product recalls by Joe White and affected malt buyers; and
> - a breakdown in the relationship between Cargill and Glencore (eg impact on co-operation in the supply of transitional services by Glencore to the Joe White [B]usiness).

1174 The letter addressed the likely consequences of informing Glencore about what had been disclosed. Under the heading "Next Steps – Informing Glencore", it was stated that Allens was currently working with Cargill to determine the most appropriate responses. Allens advised there were "a number of benefits of informing Glencore promptly". These benefits included:

> - As the current owner of the [Joe White] [B]usiness, *Glencore is best placed to investigate* the practices.
> - Cargill satisfies its obligation under the [A]cquisition [A]greement to inform Glencore promptly upon becoming aware of any matter or circumstance that may give rise to a claim under the [A]cquisition [A]greement. A failure to inform promptly may reduce the extent to which Cargill can pursue compensation claims against Glencore.
>
> …
>
> - Informing Glencore before completion will limit its liability to avoid breaching knowledge-qualified warranties, when those warranties are

repeated on 31 October 2013, *because Glencore will have been put on notice about the practices*.

- *Cargill's confidentiality obligations may constrain its ability* to engage with government agencies and buyers on these issues prior to completion. Glencore is not subject to such constraints.

- The nature of business logistics may necessitate that action is taken now so as to ensure that criminal conduct that is now occurring (if any) ceases before Cargill acquires the Joe White [B]usiness on 31 October 2013.

(Emphasis added.)

1175 Conversely, the letter stated that there would be adverse consequences to informing Glencore, in particular "a souring of co-operation between the parties and an impact on Joe White employee morale". It was suggested the most appropriate method of approaching Glencore would be a combination of telephone calls by Cargill executives to their Glencore counterparts, coupled with measured but firm correspondence to Glencore's solicitors, Mallesons.

1176 The advice then set out a number of potential claims against Glencore, again couched in the language of "an initial high-level analysis". The potential claims listed included claims against Glencore for breach of an obligation to carry on the Joe White Business in accordance with all applicable laws prior to Completion, and breaches of various Warranties in the Acquisition Agreement (including Warranties to the effect that the Records had been compiled and maintained in good faith,[718] Data Room Documentation had been collated in good faith and with reasonable care,[719] and that the Joe White Business had been conducted in accordance with applicable laws and ISO Standards).[720] The letter also noted that claims for misleading or deceptive conduct or deceit may be available under Australian law, despite attempts in the Acquisition Agreement to limit liability. The advice noted that each of the Warranties made on 4 August 2013 was required to be repeated on 31 October 2013.[721]

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718 Warranty 4.2(a): see par 1034 above.

719 Warranty 12(a): see par 1034 above.

720 Clause 9.1(d) (see par 1028 above) and Warranty 17.1: see par 1034 above.

721 The Viterra Parties submitted that Cargill failed to disclose various matters known to it when providing instructions to Allens after the 15 October Meeting with the Joe White executives. Each of these matters will not be addressed individually. Some of them were premised on certain findings being made as to

1177 Conway read the advice, but did not consider it very helpful because of the lack of information Cargill was able to give Allens concerning the nature and extent of Joe White's practices.

1178 In order to discuss the Allens Letter of Advice, a telephone meeting was arranged for the afternoon of Friday, 18 October 2013. Clark and O'Donahoo were in attendance. Eden, De Samblanx, Savona, Viers and Arndt attended on behalf of Cargill. During the call, Allens advised it had a number of concerns. These included breaches of the *Food Act 1984* (Vic) (because malt was a food product), breaches of offences relating to misleading and deceptive conduct under food regulations and offences under the Commonwealth Criminal Code. Allens also stated there were concerns arising from the manner in which Certificates of Analysis were being provided, which might have given rise to general offences around fraudulent or deceitful conduct. Further oral advice was given consistent with the Allens Letter of Advice.

1179 Arndt enquired of Clark whether Cargill had a right to terminate the Acquisition Agreement in the circumstances. In response, Clark stated there was no contractual right to terminate, but rights of termination might exist under the common law. He said the right to terminate on this basis required a high standard, and that a high threshold would have to be achieved to have that right.

1180 Further, Clark advised that if a party to a contract decides to exercise a right of termination at common law, that party tends to only find out whether it was justified in retrospect. When pressed by Arndt as to whether or not the right existed, Clark said Allens did not have sufficient information to advise at that stage. Clark said he was unaware of the extent of the practices, whether customers were involved, or the level of variance between what was being certified and the actual product content. Further, he did not have instructions on what impact the cessation of the practices raised would have on the ability of the Joe White Business to fulfil customer contracts

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Cargill's knowledge, which have not been found. In any event, having considered each of the matters raised in the Viterra Parties' submissions, and having reviewed the evidence available to the court as to what was disclosed, including taking into account the uncertainty Cargill had in respect of material matters, there was no substantive basis to suggest that Cargill chose to withhold material information from its external lawyers.

and for Joe White to operate.

1181 Clark also stated that, as it was a highly publicised transaction, a last minute failure of the contract could have an adverse impact on the Joe White Business. He said this could give rise to Glencore having difficulties reselling it and, if any termination was unjustified, may expose Cargill to liability for the difference between what Cargill had been willing to pay and the ultimate price obtained for the Joe White Business.

1182 The Viterra Parties referred to Savona's notes concerning termination and the fact that, on this topic, they were confined to referring to negotiating down the purchase price. It was submitted the court should infer that Clark's advice about termination was not of key importance to Cargill as Cargill wanted to avoid termination.

1183 There can be little doubt that in mid October 2013, Cargill did want to avoid the Acquisition not proceeding to Completion if that course made commercial sense. Numerous members of the Project Hawk team were hoping that the problems that had been identified were not too significant and, accordingly, termination would not have needed to be seriously considered. Further, based on the advice that had been given by Allens, there must have been a wariness about terminating and thereby giving rise to a possible exposure to a substantial claim for damages by Glencore and Viterra if that path were adopted. However, it did not follow that these factors excluded termination being a real possibility, and it being taken seriously. Whatever might have been the state of mind of Savona at the time, the evidence of the Cargill witnesses made it plain that Cargill wanted to know its rights in relation to termination,[722] and that it would have been seriously considered in the event that Cargill was reliably informed about the extent of the problems such that Cargill would have considered those problems to be substantial.

1184 In addition, Clark gave advice on possible claims for breach of Warranty under the Acquisition Agreement. Further, in this context, he discussed statutory causes of action based on misleading or deceptive conduct and that the Acquisition Agreement

722 See, for example, par 1272 below. See also issue 33 below.

had attempted to exclude them, but said the exclusions might not be entirely effective under Australian law.

1185 During the course of the call, the Cargill Code was raised. Clark was instructed that if Joe White was engaging in any criminal conduct, that would have to cease immediately on Completion. Clark gave evidence that Cargill's position on this point had been mentioned to him previously on 15 October 2013 by Savona.

1186 Under cross-examination, Clark stated he was not told that Cargill had informed the Joe White executives on 15 October 2013 that Cargill's practices would have to be adopted from the first day after Completion. He was also not told these discussions had involved the topic of variances between customers' testing of specifications of malt and the testing undertaken by suppliers of malt. Further, he was not aware that there were differences between laboratories' results of testing of the same samples of malt. Furthermore, he was not told that there were new barley varieties that would become available in Australia. However, he was instructed that the Joe White executives had referred to the unlikelihood of Joe White having sufficient stocks of barley to meet certain requirements.

1187 For the purpose of preparing Clark to give evidence, the Cargill Parties' solicitors provided Clark with a number of documents.[723] These documents included a file note prepared by Savona. It read as follows:

> **Subject:** Confidential - not to be distributed beyond the recipient list
>
> **Discussion with Allens (Marcus Clark and Peter O'Donahoo) – Advice from Allens dated 17 October 2013.**
> **Cargill participants: Doug Eden, Brenda Arndt, Chris Okoroegbe, Marc Viers, Steven De Samblanx, Tina Savona.**
>
> **Key points**
>
> **We have limited information at this time.**
>
> We are not *clear as to whether these practices are actually occurring*/allegations; whether they are systematic or otherwise.

723 For further background on this issue, see *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 11)* [2018] VSC 453, [7]-[8], [16].

Cargill will not tolerate any continuance of illegal practices on November 1 (completion).

[Certificate of Analysis], barley varieties and [g]ibberellic acid practices – *not clear to what extent* that is being done and the cost to remedy it but *feeling is that it would be substantial* and would have a negative impact on the valuation model we are using and price.

Australian law – misleading and deceptive conduct – possibility that if you supply a product coupled with misleading representations you are exposed to possible prosecution by [the Australian Competition and Consumer Commission]. This is independent of the falsification of a record provided to a government regulator. This is in respect of the contract between [Joe White] and its customers. There are also additional offences under food laws. While most food laws focus on safety some are broader and pick up concepts of misleading and deceptive conduct or the failure to deliver food of the standards required by the customer. "Malt" is food for that purpose.

[With respect to] [g]ibberellic acid practices – Allens noted that this constitutes a credence claim and Australian regulators currently have a focus on prosecuting credence claims.

[With respect to] the [Certificates of Analysis] Allens noted that:

- we currently have minimal information about whether the [Certificates of Analysis] are being provided to government agencies and to the extent they are, this increases the seriousness of the potential offences committed and the consequences.

- Our ability to find out more is constrained as we don't own the business yet so we are ultimately relying on what Glencore and [Joe White] are willing to tell us.

Cargill will take steps to ensure Glencore is notified promptly of these allegations and put on notice, amongst other things, to use their reasonable endeavours to investigate and explain to Cargill how "big" any issue is, the cost to remedy and how Glencore intends to remedy <u>before</u> going to any customers.

If we form the view that these matters are of the type that may give rise to a claim then we have an obligation under the Acquisition Agreement to give notice of that to Glencore.

As current owner of the business Glencore is best equipped to investigate these matters and respond to our queries.

We would like to know what the extent of the issue is and if there was going to be a claim what range would it be.

The advantages of putting Glencore on notice promptly from a legal perspective, outweigh the disadvantages of not doing so.

We can suggest steps we would like to see taken and it is a matter to see what Glencore considers are reasonable endeavours. If we advised Glencore about what we thought to be reasonable endeavours this does not waive any rights we have. We would say we have limited information but feel we are obliged to

give notice of this and make very clear and reserve all rights we have in relation to these and other issues.

2 levels of communication. Communication between lawyers and also Cargill execs maintaining a dialogue with Glencore execs. *Ultimately we are still going to be buying the business* so there is a degree of co-operation that is required to occur.

To the extent we start incurring costs for breach of warranties then subject to the limitation of liabilities in the Acquisition Agreement we can put Glencore on notice. But we will need to start tracking costs as we incur them.

[Joe White] management currently putting together a risk assessment to give an idea of the size of the issue. We *communicated with them not to share with us* until we felt appropriate (following legal advice and [the Foreign Investment Review Board] approval). Advice is if [Joe White] volunteer this info then there is no downside to Cargill accepting it.

Confidentiality

Our confidentiality obligations fall away come 1 November. Prior to that time we would only be able to bypass the confidentiality with the consent of Glencore or if we had a positive legal obligation to disclose a matter to a government agency. At this point in time our view is that we don't have a positive obligation to inform government agencies.

Practical matters

Leadership of Glencore has told us that upon [the Foreign Investment Review Board] approval closing will be imminent and you will have full access to customers and customer information. We currently have a team of people operating in Glencore offices with 24/7 access. Once this issue raised, likely alternative arrangements will need to be made.

Can we delay completion? No unless Glencore agrees and *a few additional weeks is unlikely to resolve the issue. No advantage or reason to delay closing*.

Can we negotiate down the purchase price? – No if we try to do this *they may very well try to terminate the agreement* for our failure to complete and extricate themselves from the problem. Glencore would need to take reasonable endeavours to remedy the breach but we need to get them on notice. *We would have to pay them full price at the time of close* and then seek remedy from them after the fact depending on what we think it will cost us and we won't know what that will cost will be until after close. Purchase price adjustment process will apply.

Announcements following [the Foreign Investment Review Board] approval

As a practical matter we will announce at completion but if Glencore required to announce for regulatory purposes then we will announce as well.

Next Steps

Allens drafting notice to Glencore + script for our executives. Notice to go out some time at beginning of next week and we won't be able to find out anything

> more in terms of impact on business or cost to remedy because we are not going to have the ability to interact with the team between now and when we close.[724]
>
> (Original emphasis in bold and underline, emphasis added in italics.)

1188 On the face of the file note, it appears to be a record of the discussion between Cargill representatives and Clark and O'Donahoo, held after the Allens Letter of Advice was given. Clark's evidence confirmed a discussion took place on 18 October 2013. Clark also said that some things contained in Savona's notes reflected the Allens Letter of Advice.

1189 When Clark was taken to Savona's note under cross-examination, he agreed it was incorrect to say that Cargill was not clear whether the practices the subject of discussion on 15 October 2013 were actually occurring. He said it was clear to him that the practices were occurring and, with respect to the Certificates of Analysis, they were systematic in the sense that there was an internal policy being followed. He also acknowledged he had no doubt about the use of gibberellic acid, but was not sure of the extent of the practice and whether or not it was in breach of customer contracts.

1190 Clark also said he knew, based on his instructions, that barley varieties would have been used contrary to customer specifications, though he was not sure whether this was done systematically or otherwise. Clark said his instructions seemed to imply a regularity about the use of non-authorised barley varieties, but he gave evidence he was not aware of the frequency of the conduct.

1191 When it was put to Clark that the only matter about which he had minimal information was whether Certificates of Analysis were being provided to government agencies, he rejected the proposition. He said he had minimal information at this time about quite a lot of things. Included in the information Clark did not know was whether or not the alleged practices had been disclosed to customers. Clark's thinking

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724 The Viterra Parties submitted that the fact that Cargill knew access to the Joe White executives was not available until after Completion meant that it was apparent Cargill did not expect the Viterra Parties to "be able" to provide any useful information to Cargill. This simply did not follow, as the Viterra Parties had full access to the Joe White executives and Viterra had been the owner of Joe White since 2009. Further, the subsequent correspondence demonstrated that Cargill did expect meaningful information to be provided before any completion.

at the time was that non-disclosure to customers would be the worst case scenario, but he was unsure of the position.

1192 With respect to the note referring to Cargill notifying Glencore, Clark said he gave advice at the time about there being an obligation to give that notice.

1193 Clark accepted there was nothing contained in Savona's note referring to advice concerning termination of the Acquisition Agreement. Indeed, he acknowledged that the reference to Cargill still going to buy the business appeared to be a contradictory statement. Clark said he had no knowledge at the conference on 18 October 2013 of Cargill's position as to whether it intended to complete the Acquisition Agreement or not, though he did recall discussions about what would happen if Completion occurred.

1194 On the question of whether or not Completion could be delayed, Clark said this was asked by either Arndt or Okoroegbe. Clark said he could not recall whether it was during this conversation or a subsequent conversation that it was decided that a short delay for Completion would not assist Cargill in understanding the issues any better. Further, Clark said that the discussion concerning a renegotiation of the purchase price proceeded on the assumption that Completion would occur upon the reduced purchase price being paid.

1195 Before continuing with the timeline of events, to the extent that it has not been dealt with elsewhere in the judgment, it is convenient to address a bundle of notes (many undated) made by Savona which were tendered by the Viterra Parties.[725] The Viterra Parties relied upon these notes in seeking to establish what Cargill believed after the 15 October Meeting.

1196 A note made by Savona recorded that Joe White permitted changes to be made to Certificates of Analysis to record malt met the customer's specifications if the results were within 2 standard deviations, then further stated if the results were "greater than this" approval could be obtained from general managers. It was further noted that

725 The bundle was the subject of redactions and was largely undated.

this approach applied to more than 50 percent of Joe White's exports and that, to fix it, would require significant capital expenditure because Joe White's plants were limited. On the issue of capital expenditure, a separate note stated it would allow Joe White to blend the malt into specification.

1197 Another note stated that Cargill needed to understand the issue and form its own conclusion. It was further recorded that "On Paper", if Cargill implemented its policy on day 1, Joe White would not be able to ship more than 50 percent. A further note stated that Joe White could not originate the correct barley varieties.

1198 The Viterra Parties submitted that, in circumstances where Cargill knew approximately 80 percent of Joe White's sales were exports, Cargill must have been aware that upon Completion Joe White might be unable to ship at least 40 to 50 percent of its product. However, this submission assumed far too much certainty on the part of Cargill's knowledge. While it is clear that Cargill knew exports represented a very substantial part of Joe White's sales, the evidence overwhelmingly demonstrated that although Cargill had its suspicions and certain beliefs, it was unsure of the full nature and extent of the problem at this time. Savona's notes did not alter this position.

1199 On 18 October 2013, Eden sent an email to Van Lierde and Conway, which referred to a telephone discussion the previous night. Eden stated that the recommendation contained in the memorandum they had reviewed would be followed.[726] He also stated that "we" believed "the issue" was systemic and would require changes that would exceed the minimum thresholds in the Acquisition Agreement for Warranty breaches.

1200 In response, Conway emailed Eden, copied to Van Lierde and Okoroegbe, and stated that he had given MacLennan and Koenig a heads-up. Conway said he would like a full plan of action before Cargill went to Glencore. He also stated that he had read the full memorandum and noted it gave worst-case risks without appearing to know the

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726 Conway gave evidence that the memorandum referred to was the Allens Letter of Advice: see par 1170 above.

details of the incidents, which he said was unhelpful.

1201 In reply, Eden stated, "Got it". He observed that they did not have the freedom to get into the details at that point. He further stated that Cargill's people on the ground were highly pessimistic, but they were very guarded until they got the facts, which he suggested would not happen until after Completion. After noting there were a host of sensitivities, Eden stated that the Acquisition Agreement would be the guide.

1202 Each of Eden, Van Lierde and Conway were taken to this email chain during cross-examination. Eden said he understood the reference to "unhelpful" by Conway was referring to Eden's views. Eden understood he had expressed views inconsistent with Conway's position. Van Lierde gave evidence that when he read the belief that the issue was systemic, he understood that to mean widespread and had no reason to disbelieve Eden. Conway explained that he was irritated by what he had read, and agreed that what was stated by Eden suggested something serious. Otherwise, Conway's recollection of this particular exchange was weak.

1203 Cargill took steps to notify Glencore. An email from Savona to Clark dated 21 October 2013 set out the steps she had recommended Cargill take to inform Glencore, namely an initial call from Koenig followed by a letter setting out Cargill's concerns. The email stated that Viers would advise Joe White management that "this issue" was currently being considered by senior management at Cargill. Savona wrote that as she understood Hughes was keen to discuss matters further with Cargill's integration team. Sometime shortly after this, Clark was instructed that Glencore had directed that all "Joe White employees" were not to talk to Cargill's representatives. Viers gave similar evidence.[727]

1204 By 21 October 2013, the planned letter to Glencore was in the final stages of preparation. Emails between Savona, Clark, Viers and Arndt, copied to Eden, De Samblanx, Okoroegbe and others, between 20 and 21 October 2013 discussed the draft letter and, in particular, the steps Cargill wished Glencore to take. On 21 October

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727 See par 1269 below.

2013, Viers wrote to Savona:

> I think we need [Eden's] signoff and guidance on this. Only considerations for me are, if we are not building mitigation plans by late in the week our risk increases and we need the [Joe White] folks to do same. *To the extent we asked [Joe White's] team for similar risk assessment, should we mention same so as not to appear we being (sic disingenuous when [G]lencore finds out. Keep in mind we have asked the [Joe White team] not to share this yet.*[728]
>
> (Emphasis added.)

1205 The letter went through a number of revisions. An email from Arndt on 21 October 2013 stated that the letter had been revised from its original version after a call between Arndt, Eden, Okoroegbe, Van Lierde and Conway. That email suggested the letter had been "softened" because Cargill Australia was "not clearly entitled to terminate the contract or delay completion" and because of Cargill's limited knowledge of the facts. It was stated that the strategy was to control the information gathering and the remedies. It was further observed that Cargill would not foreclose the possibility of either seeking a delay or of negotiating an economic resolution of the issue up front.

1206 Arndt sent a follow up email to Savona and Clark further explaining the reasoning behind the revision of the letter. The email read:

> A bit of additional background:
>
> Turns out [Conway] and [Van Lierde] wanted a call with us this morning. *[Conway] saw the letter as too demanding given our lack of real knowledge.* He and the other business guys also feel that *we'd rather just get control and manage the problem right away rather than see what Glencore does*. We discussed our rights under 9.4,[729] and that Glencore may try to block us. I suggested that we threaten to delay close whilst we have that as leverage, but for now, the business would rather move forward with a softer tone. They *don't want to escalate* with a top to top call at this point. We'll see what happens.
>
> (Emphasis added.)

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728 Mattiske was not told by Purser that a risk assessment was being done, nor that Cargill had asked it not be shared with Glencore. Precisely what was encapsulated in the risk assessment was not clear as the issue was not raised with Viers, and Savona was not called to give evidence.

729 Clause 9.4 dealt with access rights of Cargill to the Joe White Business prior to Completion: see par 1028 above.

Clark did not have any dealings with Conway, and did not know his position in Cargill. When it was put to Eden during cross-examination that he was told by Conway that he was making the decisions about whether to complete, Eden said he did not recall that. Further, his evidence was that he did not recall Conway making the decision to complete, as it was more of a lawyer's decision (no doubt referring to the advice which had been given about not having sufficient details to be able to determine that Cargill could lawfully terminate with any sort of certainty as to the repercussions). Notably, Conway's evidence was that he had a discussion with Van Lierde in which Conway was told Cargill's advice was that it did not have a right to terminate. Self-evidently, the requirement for a decision from Conway to proceed was not required in light of the legal advice.

1207 On the morning of 21 October 2013, Viers emailed "today's call agenda" to Eden, copied to De Samblanx, and stated that the matters listed were what he and De Samblanx wanted to discuss. Included in the 7 items listed was:

> Risks and potential mitigation plan, customer communication and what we can say, building silos? Renting silos?

1208 Viers explained that the reference to communicating with customers was about honouring their contracts, as well as informing them that something had been done before Cargill took over which was not consistent with Cargill's principles and practices. However, Viers acknowledged that, upon taking control of the Joe White Business, Cargill chose not to communicate the past practices.

1209 With respect to the note about silos, Viers gave evidence that there was a concern of the time that the implication of what they had been told recently would be that Cargill would have to build or rent additional silos because of a shortage of malt storage. Viers' evidence was that Cargill did not know the full extent of the issue at that point and had to assume it was significant and that any contingency that Cargill would build would have to assume the worst. Viers said his feeling at the time was that the issue was significant, and that there would be insufficient storage capacity to produce malt to specification.

1210 Also on 21 October 2013, Stewart sent an email to Hughes, Youil, Wicks, Jones and Robert Dickie ("Dickie"), the marketing manager at Joe White, stating he had dropped a document into a drive of Joe White's computer system for their review. He requested that any changes be marked up. The document was a draft memorandum entitled "Cargill Customer Review – Key Recommendations" ("the Key Recommendations Memorandum").[730]

1211 The Key Recommendations Memorandum referred to a review of Joe White's ability to fully meet all customer requirements. The outcome of that review was recorded in a spreadsheet which had been prepared by Stewart, with the assistance of McIntyre ("the Customer Review Spreadsheet"). Stewart said the Customer Review Spreadsheet was created from an existing document that McIntyre had in place to track barley variety use, which had been expanded. He gave evidence that the original document "probably" only had columns A, B and C.

1212 In the Key Recommendations Memorandum, Stewart recorded that several areas requiring attention had been identified. He listed the main areas requiring such attention, together with the timeframes to achieve a satisfactory outcome, as follows:

> 1. Barley compliance – 6 months for most, to 12 months for others requiring new variety trials.
>
> 2. Pre-shipment sample requirement – 12 months.
>
> 3. Additive free malt – 6 months.[731]
>
> 4. Meeting customer specification on [Certificate of Analysis] – adopt actual blend analysis for [Certificate of Analysis].[732]
>
> 5. Malting processing requirements – Immediate implementation.

1213 The Key Recommendations Memorandum addressed each of these 5 areas. With respect to barley varieties, the position was far from satisfactory. Stewart recorded that, in general, Joe White's plants did not have appropriate varieties to meet the

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730 See fn 728 above. There can be little doubt the product of the risk assessment sought by Cargill included the Key Recommendations Memorandum. Stewart's evidence was that he prepared this document on or about 18 October 2013.

731 The first draft of this memorandum, apparently created on 18 October 2013, referred to a period of 3 to 4 months.

732 Presumably, a reference to Cargill's theoretical blend approach.

current requirements. He suggested it was necessary to purchase appropriate varieties for use from April 2014. In providing some of the detail that underlay this conclusion, Stewart stated that Sydney had 4,500 tonnes of Hindmarsh, but did not have a customer that had approved that variety. In addition to noting that the approved variety for some customers was in short supply, Stewart observed that Joe White's ownership history had caused direct relationships to be eroded and that there was a need to re-engage.[733]

1214 With respect to pre-shipment sample requirements, Stewart simply stated that for Asahi in Sydney there was an inability to meet those requirements due to malt storage constraints.

1215 On the issue of gibberellic acid, Stewart stated that in order to meet the additive free requirements for Asia Pacific Breweries and Sapporo, Joe White would need to add an extra day of germination for a proportion of batches, which would result in a loss of around 14,000 tonnes of production per annum.[734]

1216 Stewart acknowledged that there was inadequate storage for both barley and malt which had the consequence that there was no ability to reliably meet customer specifications, with the exception of customers being supplied by Tamworth. On this topic, Stewart further stated:

> Scheduling of shipments to certain plants is currently heavily influenced by freight rates. *Barley availability and malt quality will now need to factor heavily in the decision making process*. For example Sydney may require customers with a "similar malt type " to simplify shipping.
>
> (Emphasis added.)

1217 On the final topic of malt processing requirements, Stewart observed that some of these requirements were not currently being met, including with respect to SAB Miller and Heineken B Malt. He noted that meeting the requirement would result in

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733 This was a reference to the arrangements whereby Joe White acquired significant portions of barley from Viterra, and then Glencore.

734 It was noted that approval of "D Malt" by Asia Pacific Breweries would drastically decrease the size of the loss of production because D Malt could be made with gibberellic acid. There was no statement as to the likelihood of whether, or when, such approval might be given.

increased gas usage.

1218 Youil provided a comment on the Key Recommendations Memorandum, which demonstrated that he had reviewed the Customer Review Spreadsheet. Youil suggested Stewart include an additional column in the Customer Review Spreadsheet that quantified the potential tonnage impacted per customer as, Youil suggested, Cargill would want to know what its exposure was if Cargill was to adopt a hard line approach on reporting from day 1. Further, Stewart spoke to Hughes and Wicks about the Key Recommendations Memorandum. Both of them said they agreed with its contents.

1219 The Customer Review Spreadsheet included 19 rows dedicated to different customers of Joe White.[735] The document contained numerous columns, which contained relevant details with respect to each of those customers.

1220 The details included the plants from which barley was supplied to the customer, barley varieties approved by the customer, and whether Joe White was able to supply the correct variety for the years 2012/2013 and 2013/2014.

1221 Column D recorded that 8 out of the 18 rows of the large customers were not able to be supplied with the correct variety of barley for the remainder of the 2012/2013 year. Further, in addition to those 8, the Customer Review Spreadsheet recorded in relation to Asahi that the correct varieties could be supplied for Perth, but only a little Baudin (being a required variety) was available in Sydney. As for Sapporo, it was said there was a need to acquire more of the barley variety "CCFS Gairdner".[736] Finally, with respect to Thai Beverages, the ability to supply the required barley for the remainder of 2012/2013 was answered in the affirmative in relation to Adelaide, but it was stated that Buloke barley quality was marginal and "would put pressure on the ability to pack".

1222 In summary, in the 2012/2013 year there were issues with supplying the correct barley

735 18 rows were dedicated to individual customers. The last row listed numerous small customers.
736 See fn 337 above.

for more than half of Joe White's larger customers.

1223 Column E showed a forecast for 2013/2014 which was better than the previous year. It recorded that only 2 customers could not be supplied with malt using the correct barley variety for that year, Joe White's largest customer, Asia Pacific Breweries, being 1 of them.

1224 With respect to the use of gibberellic acid, column K identified the customers with the requirement to be additive free. Those customers were Asahi, Heineken, Kirin Brewery Company Ltd ("Kirin"), SAB Miller, Sapporo and a significant list of "other small customers".[737] Column K also identified that Coopers and Thai Beverages had a maximum level of gibberellic acid that could be included. It was recorded in column L which customers were "currently" not being supplied malt with additives.[738] With the exception of Asahi and SAB Miller, none of the customers who required their malt to be additive free were, in fact, being supplied with additive free malt (or, in the case of Coopers, within the maximum prescribed).[739]

1225 In short, Joe White was materially failing to meet the requirements of its customers that specified gibberellic acid was not to be used, or was to be used to a limited extent.

1226 On the issue of whether or not Joe White was able to meet customers' specifications, the information recorded could only be described as alarming. Column P was entitled "Able to achieve specification without applying [standard deviation] buffer". The Customer Review Spreadsheet recorded that Joe White was unable to meet any of its customers' specifications in their entirety, with the exception of 2 customers where it was recorded that Joe White was able to achieve their specifications "some of the time".

1227 In the response for Asahi, not only was it stated that the specification could not be

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737 Stewart's evidence was that all of the Japanese brewers Joe White supplied, which included Asahi, Kirin, Orion Breweries and Sapporo, prohibited the use of gibberellic acid.

738 See further pars 1233, 1318 below on the meaning of "currently".

739 With respect to Kirin, it appears this requirement may have been met on some occasions as column L recorded "Not always" with respect to this customer. Coopers was not a customer identified in the particulars to Cargill Australia's claim concerning the Gibberellic Acid Practice, but is referred to above as part of the relevant evidence.

met, but it was suggested that the customers should be approached regarding "specification derogation". Presumably, this was in contemplation of the regime that Joe White anticipated Cargill would be introducing.

1228 Columns Q and R recorded potential solutions, short term and long term respectively. The short term solution for each customer was:

> Higher stock levels with longer lead times to shipment packing. Approach customer for blend reporting.[740]

1229 As to the long term potential solution, with respect to each customer it was simply stated that there was a need to increase silo capacity. That is, no other long term solution was identified.

1230 Column S purported to list the implications of complying with the requirements of customer contracts. It read as follows:

> Each batch analysis, substantial change to shipment scheduling process and sales volumes, capital cost for silos.

1231 Column T was concerned with whether there were specific issues with specifications or a customer's laboratory variation. It was stated Boon Rawd's specification was at a very tight Kolbach Index[741] percentage, "high colour low SN". In addition, 3 customers (being Kirin, Nestlé and Phoenix Beverages Ltd ("Phoenix")) were said to have very complex specifications, in addition to the dimethyl sulphite for Phoenix being "a bit difficult". Finally, with respect to Oriental Brewery, it was recorded that a correction was required for the Kolbach Index. Importantly, not only were none of the customers identified as having issues with either specifications or laboratory variations but, most significantly only 1 (SAB Miller) or perhaps 3 (if "correction required" embraced laboratory variation for Oriental Brewery and Sapporo for a limited number of parameters) were said to have issues because of laboratory variation.

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740 Again, a reference to Cargill's theoretical blend approach.

741 See fn 671 above.

1232 Neither the Customer Review Spreadsheet, nor the level of detail it contained, were conveyed to Cargill before Completion.[742] Self-evidently, the details were a far cry from the various forms of exhortations contained in the Information Memorandum[743] and Management Presentation Memorandum[744] to the effect that Joe White met its customers' "exact specifications".

1233 The Cargill Parties submitted that, from the intensity of activity at this time, no doubt including by reason that Cargill had made its position clear regarding its strict adherence to the Cargill Code, it should be inferred that, if anything, the Customer Review Spreadsheet reflected that the Joe White Business was engaging less in the Operational Practices than in the past. As this was not put to Stewart, no such inference will be drawn. That said, it was clear from what was said during the 15 October Meeting that the Joe White executives were mindful of the need for change.[745] In the circumstances, it is equally not appropriate to infer that Joe White was not engaging in the Operational Practices to a similar or a greater extent in the past.

1234 On 22 October 2013, Purser telephoned Mattiske.[746] She referred to the fact that an integration meeting had taken place[747] and, in very broad terms, what had been disclosed. She said she wanted Glencore to know Cargill had been told of such matters and that Cargill wanted to understand whether they were true.[748] She also said Cargill wanted Glencore to understand that Cargill took the matters that had been raised very seriously. Mattiske told Purser it was the first he knew of them, that he

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742 See further pars 1265-1266, 1268, 1402, 1429, 1512, 1524 below. Stewart's evidence was that it was disclosed to Cargill in 1 of several meetings held within days after Completion. However, he was uncertain whether it was the same document or a cut-down summary.

743 See pars 504-505, 515-519, 521-522 above.

744 See pars 716, 718, 727 above.

745 See pars 1106, 1117-1118 above.

746 Purser had some notes scripted by Allens and said she "use[d]" them for the call. Mattiske did not know Purser was going to call.

747 Being a reference to the 15 October Meeting.

748 During her cross-examination, Purser acknowledged that Cargill had been concerned about the potential for activities of the nature of the Operational Practices before the Acquisition Agreement was executed. Although she could not recall who told her of these concerns directly, she said it would have come from the managers of the malt division. This evidence was a reflection of the fact that concerns existed in a number of respects up until around 18 or 19 July 2013 (and to a minor extent 23 July 2013), but, to the extent they still existed up to that time, any remaining concerns were substantially addressed and allayed by the Operations Call and the Commercial Call (and the Barley Inventory Call).

was surprised, and that he would investigate. She said a letter would be sent, but she wanted to give him a heads-up. Purser was not challenged on her account of the conversation. Mattiske's evidence was that Purser said Cargill had been told at an integration meeting that there were 3 specific business practices being undertaken by Joe White. According to Mattiske, she said Cargill had asked about them and that Joe White's executives had "freely admitted or opened up about these business practices that they undertook as they saw nothing wrong with it". However, Mattiske also gave evidence that Purser said Cargill took issue with the 3 business practices. He deposed that Purser said she did not want to make it a big legal issue and it should be able to be resolved commercially. Mattiske also gave evidence that he told Purser that the investigation would be conducted in good faith and that Glencore would try and do its best, and respond and help within the integration period.

1235 In Mattiske's evidence in chief, in response to the simple question as to what he said to Purser during the course of this telephone conversation, after stating the matters set out in the preceding paragraph, Mattiske's answer then went beyond what he had been asked. Mattiske stated that Glencore was genuine in its need or desire to help Cargill have a smooth integration. Mattiske continued by stating that Glencore had just been through an integration itself and knew it was complex and difficult to integrate 2 businesses. He said that was why Glencore "gave [Cargill] open access to our executives to facilitate a smooth transition". Contrary to this assertion, Glencore and Viterra did not give Cargill direct access to any Joe White executives after this point in time for the purpose of satisfying Cargill's queries.[749]

1236 Later on 22 October 2013, Cargill Australia sent the letter to the company secretary of Viterra Malt, Viterra Operations and Viterra Ltd ("the Cargill 22 October Letter"), copied to Mattiske, Lindner and Pappas. It was signed by Purser in her capacity as the managing director of Cargill Australia. The letter read:

> Dear Sir
>
> As part of *our agreed upon transition process* for the acquisition of the [Joe White] [B]usiness, an integration meeting was held on 15 October between Cargill

749 See pars 1203 above and pars 1245, 1265-1269 below.

executives ([Viers] and [De Samblanx]) and Joe White executives ([Hughes], [Wicks], [Youil] and [Stewart]). At the meeting, the *Joe White executives disclosed that the [Joe White] [B]usiness had engaged in the following practices*:

1. issuing *certificates of analysis* to customers which represent that malt supplied to the customers met with particular specifications where the malt supplied did not meet those specifications;

2. supplying malt to customers which had not been produced from the specific *barley varieties* required by those customers; and

3. supplying malt to customers which had been produced from a malting process that involved the addition of *gibberellic acid* (GA_3), where those customers require that GA_3 not be used in the production of malt supplied to them.

Our discussion with the [Joe White] team regarding these practices *was limited* and *we have not determined whether these practices have occurred and, if they have occurred, whether they have been sporadic or widespread, which customers are affected and whether the practices are ongoing*. However, the potential ramifications of these practices, should they have occurred, *may be significant* in terms of business operations and the rights and obligations of the parties.

Bearing in mind that completion is currently scheduled for 31 October 2013, we need your co-operation in investigating and remedying the matters raised in this letter *prior to our taking control*. Hopefully, we can work together to minimise any potential adverse impact. In particular, *please let us know whether one or more of these practices has occurred and, in that event, the respective frequency of each*. And if you identify that any of the practices are ongoing please describe:

- *the measures that you propose* to ensure that the business is conducted in accordance with all applicable laws and customer requirements; and

- *what impact* any such corrective measures are likely to have on the ability of the business to satisfy its supply obligations to customers in terms of both *production output and customer malt specifications*.

As you appreciate, to the extent necessary, we reserve all our rights in relation to these matters.

(Emphasis added.)

1237 Some observations about this letter should be made.

1238 *First*, the Viterra Parties attempted to establish at trial that the suggestion in the Cargill 22 October Letter that Cargill had not determined "whether these practices occurred" was a misleading statement by Cargill. This attempt was without substance. Despite the evidence of Viers that he had no doubt the Operational Practices as described on 15 October 2013 were occurring and this aspect of the letter was contrary to what he "personally knew", this knowledge was based on Viers accepting what he was told at

the 15 October Meeting.[750] In other words, Viers' (and De Samblanx's) knowledge did not materially go beyond what had been represented on 15 October 2013. The fact such representations were made on that occasion and were thereby the source of Cargill's "knowledge" was expressly referred to in the opening paragraph of the Cargill 22 October Letter.

1239 In this circumstance, it was reasonable, and prudent,[751] for Cargill's senior management to disclose that Cargill's understanding was based on what had been said, and to ask Viterra to confirm the position 1 way or the other. Further, nothing stated in the Cargill 22 October Letter could be characterised as misleading in circumstances where the primary source of Cargill's information was disclosed.[752]

1240 *Secondly*, it was correct to state that Cargill did not know the extent or frequency of the Operational Practices, or which customers were affected. None of this information was disclosed on 15 October 2013, nor by way of any other disclosures that preceded the 15 October Meeting.

1241 *Thirdly*, it follows that Cargill did not know the impact the practices had had or would have on the Joe White Business, either as implemented or if they were to be ceased.

1242 *Fourthly*, the Cargill 22 October Letter directly enquired both as to the existence and the frequency of each of the 3 practices. The letter made it plain that Cargill required

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750 In addition, Clark gave evidence that it was not correct to say Cargill was not clear whether the practices were occurring because he had been told that senior officers of Joe White had told representatives of Cargill on 15 October 2013 that the practices were occurring: see par 1189 above.

751 The potential seriousness of the 3 practices identified warranted, if not required, that a cautious approach be taken by Cargill.

752 The Viterra Parties submitted the Cargill 22 October Letter was misleading in other respects. The matters raised were trivial and nothing turned on the points raised. But, for completeness, the additional 2 points are addressed. *First*, the Viterra Parties submitted it was misleading to refer to the 15 October Meeting as "an integration meeting" which was "part of our agreed upon transition process". It was submitted that the meeting was an exception or an addition to the anticipated integration meetings. However, it was a meeting held during the integration process and was part of the integration. If the language used was misleading, it was only based on a strict reading, and further was only marginally and insignificantly so. *Secondly*, exception was taken to the suggestion that the presentation on 15 October 2013 "was limited" in circumstances where the meeting went for about 2 hours and the Joe White executives were frank and forthcoming. While this was broadly an accurate account of the 15 October Meeting, the simple fact was that there was still much material information that had not been disclosed to Cargill when the Cargill 22 October Letter was sent. See further pars 1243-1244 below.

this information to make a proper assessment of the effect on the Joe White Business and the rights and obligations of the parties under the Acquisition Agreement.

1243 The Viterra Parties also submitted the Cargill 22 October Letter was misleading because of the matters Cargill allegedly failed to disclose. According to the submission, Cargill ought to have disclosed the impact Cargill believed ceasing the Operational Practices, coupled with the limited storage and the absence of some of the required barley varieties, would have on the Joe White Business. It was further submitted, by failing to disclose such matters, Cargill misrepresented its knowledge of what was occurring and, in doing so, deliberately deprived the Viterra Parties of important information that would have assisted them in their investigations. It was contended that this was a critical omission.

1244 In my view, there was nothing misleading about Cargill not alluding to any views it had formed leading up to 22 October 2013. The evidence disclosed that many, if not all, of Cargill's views to that point in time were tentative, if not entirely speculative. Such views as it had in relation to the impact of the Operational Practices were subject to Cargill learning the extent, or at least an approximation of the extent, of the relevant conduct. Undoubtedly, a key purpose of the Cargill 22 October Letter was to obtain such information.

1245 Soon after the Cargill 22 October Letter had been emailed, Fitzgerald discussed its contents with Mallesons. Although Lindner could not recall the conversation, she confirmed she sent an email immediately after it to Fitzgerald, copied to Pappas. That email contained a recommendation from Mallesons that informal discussions take place with each of Hughes, Wicks, Youil and Stewart individually to discuss what was said on 15 October 2013. It was further recommended that "we regroup" once the informal discussions had occurred in order to determine whether formal discussions should take place between Mallesons and those employees. Mallesons also advised that a representative of the legal team participate in all future interactions between Joe White employees and Cargill.

1246 When King read the Cargill 22 October Letter, he did not have any real understanding of the allegations it contained. His perception was that it related to detailed operational matters. He did not get involved in formulating a response.[753] That task was left to Mattiske. In performing that task, Mattiske "relied heavily" on Fitzgerald to direct any investigative work that was required.[754]

1247 Mattiske gave evidence he had no knowledge of the subject matter of the allegations. By way of background, Glencore Grain used independent laboratories to test grain quality. He said that, before 22 October 2013, he knew Joe White had its own laboratories, but assumed independent laboratories were used as well (on the basis that, in his experience, customers required independent analysis). Accordingly, Mattiske gave evidence that he was unaware that Joe White might be able to amend test results in Certificates of Analysis. He also was not aware of incorrect barley varieties being used and could not recall being aware of the use of gibberellic acid before 22 October 2013. No evidence before the court provides any basis for doubting this account of Mattiske's knowledge up to 22 October 2013.

1248 Mattiske organised for a telephone meeting to take place with Norman, Fitzgerald, Rees, Hughes, Wicks, Youil and Stewart.[755] As Mattiske was in Melbourne, he asked Norman, Fitzgerald and Rees to arrange the meeting. Mattiske described them as 3 of his deputies, and said they acted like an executive in assisting him to understand everything that was going on. Mattiske went so far as to say that his approach to the investigation was to leave it entirely to Fitzgerald, Norman and Rees as to what should or should not be brought to his attention. Mattiske said it was Fitzgerald who had been charged with the duty of investigating the Operational Practices.

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753 By this stage, King was involved in another, significantly larger, transaction which was taking up a lot of his time.

754 He gave evidence that from this time Fitzgerald usually reported to him at the end of the day or after he had interviewed people.

755 Mattiske's evidence was that he had 3 meetings with Joe White executives after receiving the Cargill 22 October Letter and before Completion: the first on 23 or 24 October; the second a day or 2 later; and the last some time towards the end of October 2013. Some questions put to Mattiske and the answers he gave did not make it clear to which of these meetings the evidence was directed.

1249 Although a telephone call was scheduled to be held between only Mattiske and these 3 executives, in his witness statement Mattiske said he had no recollection of any such call taking place. However, in oral evidence in chief and during cross-examination, Mattiske said he could recall a telephone meeting (after Purser had called) with Fitzgerald, Norman and Rees. During this call, Fitzgerald expressed his surprise and shock,[756] as well as his disappointment that he had not heard about the Operational Practices.[757] Mattiske's evidence was that he said he told the 3 of them "we" needed to investigate and to find out what had actually happened.

1250 The call with the Joe White executives (or at least some of them) took place with Mattiske in Melbourne and the other attendees in Adelaide.[758] It lasted for between 15 to 30 minutes. Under cross-examination, Mattiske gave evidence that he could not be certain that Stewart was actually in attendance during the telephone call and it was possible he was mistaken about Stewart's presence. Mattiske said he had a specific recollection of Hughes speaking, but could not recall anything said by Youil, Wicks or Stewart. However, later in his cross-examination, Mattiske stated of the Joe White executives that "all of them, including Dr Stewart and others, were unwavering in their response that [altering Certificates of Analysis was] completely allowed and they [were] far better experts" than him. Mattiske suggested he had no reason not to believe them. Also, Mattiske purported to recall Stewart making comments on Cargill's methodology. Stewart gave unchallenged evidence that he had no communications at all with Mattiske in 2013. Accordingly, Mattiske's initial unequivocal evidence that Stewart attended this meeting must be rejected.[759]

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756 Although he did not state what was said, in his evidence in chief Mattiske said all 3 of them had no knowledge of the practices and "were quite surprised by the whole thing". In response to a leading question, he then said they all said they were surprised.

757 Mattiske's evidence was that around this time he also asked Maw and Tim Krause, head of Viterra Operations, whether they had known about the practices, to which they both responded that they had not.

758 Mattiske gave evidence that Argent may have been at the telephone meeting as well. There was no evidence to suggest he was. Nor was there anything Mattiske could point to when giving evidence which demonstrated Argent was involved in any way in responding to Cargill.

759 In fairness, the unequivocal evidence was in Mattiske's witness statement, but when giving further evidence in chief orally, Mattiske was already expressing some doubts as to who attended this telephone meeting, albeit he also gave evidence purporting to recount Stewart speaking during the

1251 Mattiske gave evidence that he questioned Hughes as to why he was only hearing about these matters from Cargill, and why Hughes had not told him about the 15 October Meeting. Mattiske said he was disappointed Hughes had not told him about the Operational Practices earlier. In his oral evidence in chief, Mattiske said Hughes responded, stating "these practices" were standard industry practice.[760] Mattiske's evidence was that Hughes kept referring to the fact that there were seasonal issues, "that these 3 business practices are completely standard and completely normal", and that he did not think there were any problems. Mattiske's evidence was that Hughes stated numerous times that there was "no problem here". Hughes said Certificates of Analysis were changed, but that it was allowed under testing standards within 2 standard deviations of test results.

1252 Hughes elaborated on the seasonal issues, stating that Australia had just come through a drought which meant the availability of certain barley varieties was not as it would be in a normal season. Hughes said because of the lack of moisture, the overall production not only within South Australia but across the whole country was well down on the previous year. He said Joe White had substituted other varieties that Joe White believed performed just as well to meet what the customers needed in their brewing processes. Hughes said that customers were all happy, and that there had been no claims. Mattiske gave evidence that Hughes said customers were aware of the seasonal issues and were more than happy with the malt they were receiving. Mattiske's evidence was that, up until that time, he did not know that some customers specified the required barley varieties in their contracts with Joe White. Nonetheless, he said he did not ask Hughes about the significance of the correct barley variety from a customer's perspective.

1253 During cross-examination, Mattiske was asked if he queried Hughes, Stewart or any of the other Joe White executives as to what the consequences might be for the

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meeting: see also par 1257 below.

760 In his evidence in chief, Mattiske purported to summarise Hughes' state of mind when Hughes was giving his initial response. He was then directed to confine himself to giving evidence of what was said. As to Mattiske's evidence of Hughes stating the use of incorrect barley varieties was standard industry practice, compare what Hughes put in writing soon after: see par 1395 below.

capability of Joe White to meet customer contracts and be compliant with specifications as to barley variety if the practice that had been customary of using varieties that did not strictly comply was to cease. Mattiske replied that he did not do that specifically, but generally asked Hughes to confirm that the quality of the malting plants was sufficient to meet "the specifications that we'd sold the business as, and he confirmed that the quality of the malt plants was – they were high-quality malt plants". It was put to Mattiske that he had not answered the question, and he was asked again whether he had discussions with Hughes or others about the consequences for the Joe White Business if only barley varieties as specified by the customer were used. Mattiske's further answer was that Hughes said all "of these issues" would be resolved with the new-crop barley and the varieties would become more readily available. Mattiske could not recall Hughes saying anything about the lead time for the new crop. Mattiske gave evidence that Hughes was also asked to tell him what varieties Joe White needed to meet customer contracts. Mattiske said he did not ask for a thorough investigation on this issue because his focus was on how to solve the issue going forward and what the next steps would be. At the time, Mattiske was unsure whether it would be an ongoing problem and he wanted to find this out.[761]

1254 On the issue of gibberellic acid, Mattiske gave evidence that Hughes said gibberellic acid was a naturally occurring substance in the malt process and was used to increase or decrease the time of germination, particularly in poor seasons, to allow the malting process to happen naturally. Upon being told gibberellic acid was being used notwithstanding some customers' contracts specifically instructed it not be used, Mattiske told Hughes that Joe White had to stop using the substance in these circumstances. Mattiske gave evidence that Hughes said that that would be done and there would be no problems.

1255 Mattiske gave evidence that, in response to a question from him as to why he "or any of us" had not been told, Hughes confirmed that he had not raised the practices specifically "or any of these issues" with "any of the Glencore or Viterra people at that

761 It was not entirely clear from the cross-examination whether each of these matters concerning barley varieties was raised during the first discussion with Hughes or at some later time.

time". Upon Mattiske asking why he had not been told about it, Hughes said the policies or procedures had been endorsed or put in place by Gordon. Mattiske responded that Gordon had been gone for 2 years and if Hughes had had an issue with the policies he could have raised it.

1256 When asked under cross-examination whether Fitzgerald expressed disappointment or criticised Hughes, Mattiske said "I'm sure he did", but then had to concede he did not recall Fitzgerald saying anything to Hughes about it.

1257 Mattiske gave evidence that he asked Hughes to describe what had happened at the 15 October Meeting, to which Hughes said that Cargill had asked whether Joe White was partaking in these practices and that it was openly admitted to.[762] According to Mattiske's evidence, Hughes did not refer to any of the practices being recorded in written policies. Hughes also mentioned that Cargill had a different methodology for analysing results which Cargill preferred to use. Mattiske gave evidence that there was a chorus of agreement, including supposedly from Stewart, about how terrible Cargill's methodology was. Further, his evidence was that Hughes said he thought Cargill's testing was less accurate and would result in a poorer quality malt overall.

1258 Mattiske gave evidence that Hughes was asked about the position going forward, particularly for Cargill if it did not want to participate in the practices. Hughes replied by confirming that the malt plants were of high quality and could deliver on the statements that had been made throughout the Due Diligence. Although Mattiske made no attempt to give his recollection of what was said, his evidence was that this reply was supported by "Youil and the other executives of Joe White". Further, Hughes said there were new varieties of barley coming in that meant the use of gibberellic acid would not be needed as much in the future. Hughes said that, accordingly, it was very much a short term thing for the Joe White Business, as the new crop barley would be ready in the next month and would be available for the new

762 Mattiske's evidence was Hughes said "the Cargill executives" openly admitted to the practices, but plainly he must have intended to refer to the Joe White executives as it would have made no sense, in response to a query from Cargill, for the Cargill executives themselves to be making comments in this regard to answer their own query.

season. Mattiske's evidence was that Hughes said this would then mean that the problem with varieties would be solved and that he did not see any issues with that going forward.

1259 Mattiske said he recalled other Joe White executives speaking at the meeting, but could not recall what they said. That said, Mattiske said various remarks were made by them affirming what Hughes was saying. When counsel for each of the Third Party Individuals who attended this meeting had the opportunity to cross-examine Mattiske, it was not suggested that any of them present expressed disagreement with what Hughes had said.

1260 Pausing here, with respect to barley varieties that Joe White was contractually required to supply, Mattiske fully appreciated that supplying the incorrect variety would amount to a failure to meet a contractual specification. He accepted that either Joe White complied with the specification or it did not, and near enough was not good enough. He further acknowledged that, in normal circumstances, a customer specifying a particular variety of barley necessarily excluded any alternative; and that, if a customer specified a variety but was provided with a different variety without knowing it had occurred, then there would be an issue.

1261 Furthermore, Mattiske appreciated Joe White was not entitled to substitute a variety of barely for the specified variety, whatever the reason, if the variety had been contractually specified. Having accepted those propositions, Mattiske later gave evidence that he did not think the supply of unauthorised barley varieties was that big an issue, as long as the malt was meeting the customer's requirements. After giving this evidence, Mattiske said he acknowledged he was not a person with expertise in malting and that he never raised the issue with Hughes or Stewart to ascertain its significance.

1262 Mattiske's evidence was that, as a result of this call, he believed what he had been told and that the issues Cargill had raised were fairly minor. He also believed, going forward, the issues could be resolved easily. Further, Mattiske gave evidence that he

believed Cargill would have known more about the issues raised than he did because of its experience in the malting industry. His evidence was that this belief was formed despite Mattiske not enquiring as to Cargill's knowledge, including whether the issues had been discovered during the Due Diligence, because he was told Cargill had asked Joe White about them. Accordingly, he deposed that he concluded Cargill knew about them because it knew to ask questions on the topics. Despite apparently holding such a belief, he never suggested to Purser that he had this view of Cargill's knowledge. Whatever belief Mattiske had, his evidence did not suggest that he held a belief that Cargill's enquiries were anything other than genuine. Quite the contrary. Thus, at the very least he must have been unsure as to whether Cargill was fully or even substantially across the issues that had been raised.

1263 Also on 22 October 2013, Stewart sent an email to 15 employees, with the subject "Additive Free Malt".[763] The email directed them, as part of the preparation for transition to ownership by Cargill, to "cease using [gibberellic acid] for 'additive free' customers".[764] Stewart's email stated:

> There may be times that you will need to schedule in an additional day of germination to meet quality requirements; please contact me to discuss on a case by case basis, as I do not want a scenario where there is blanket production of 5 day [gibberellic acid] free customers. Any production impacts will need to be relayed to [Jones] so that he can adjust schedules accordingly.
>
> Please use only additive free malt from 1/11/13 for additive free customers.

1264 In response to a query, by a production manager who was a recipient of Stewart's directive, about whether the new policy would also include lactic acid, Stewart responded:

> Just [gibberellic acid] at this point, but watch this space!

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763 Although nothing of significance turns on the timing, the email was sent at 12.44pm. Hughes submitted that this meant it must have been sent before the Cargill 22 October Letter was received as that was not emailed until 12.49pm. The court was invited to infer Hughes directed Stewart to send the email as a consequence of Purser's call to Mattiske: see par 1234 above. The next person in the email chain, being 1 of the recipients of Stewart's email (see par 1264 below), was based in Sydney. This suggested the time of 12.44pm was eastern standard or summer time: see fn 311 above. (Another version of this email forwarded to Youil in Adelaide was recorded as sent at 12.14pm). Accordingly, the evidence indicated Stewart's email was sent before the Cargill 22 October Letter was received.

764 It was suggested in the email that Asahi and SAB Miller were "already [gibberellic acid] free".

Stewart gave evidence that he had no recollection as to why he sent these emails, including not recalling whether it was sent as a reaction to the Cargill 22 October Letter. The email chain did not address the issue of using unauthorised barley varieties. Further, it is curious that Stewart's directive was for the additive free malt to be instituted from 1 November 2013 in light of the fact that Mattiske directed this conduct to cease immediately during the first telephone call with Joe White executives (albeit, not including Stewart) after Mattiske had been alerted to the practices by Purser.[765]

1265 At 6.06pm on 22 October 2013, Hughes sent an email to Stewart, Wicks, Jones, Youil and Dickie with the subject "Cargill [Customer] Review & Cargill Customer Review Key Recommendations Document". Plainly, this was a reference to the documents Stewart had circulated the previous day.[766] It stated:

> Dear All until further notice please *cease correspondence and alterations/additions to these documents* immediately. I will discuss with you in more detail tomorrow.
>
> Also there should be *no written correspondence regarding this issue* until further notice, including email or other.
>
> (Emphasis added.)

1266 The email was also copied to Fitzgerald. Accordingly, if Fitzgerald was not already aware, it was likely he was put on notice of the existence of documents concerned with a review of Joe White's customers and related recommendations.[767] At the time, in his role as company secretary of Viterra, Fitzgerald was handling and coordinating the response to Cargill Australia's queries.[768]

1267 Mattiske's evidence was that Fitzgerald did not tell him of any review being conducted by Stewart, and that Mattiske was not told of the embargo on such

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765 See pars 1250, 1254 above.

766 See pars 1210-1211 above.

767 The Viterra Parties submitted that it ought not to be inferred that Fitzgerald was aware of the existence of the documents because the documents were not attached. However, given the pivotal role Fitzgerald was fulfilling as a lawyer, and that the body of the email established that "these documents" existed, it must be inferred that Fitzgerald read the email and appreciated the documents, expressly identified and commented upon, were in existence.

768 See further par 1334 below.

correspondence as identified above. Further, he initially gave evidence he was aware that integration meetings between Cargill and Joe White had ceased and that, at that point, communication between them had also ceased. When giving evidence 4 days later however, Mattiske said he had no recollection of whether or not the communications between Cargill and Joe White had ceased.

1268 At 6.11pm on 22 October 2013, Hughes sent an email with the same subject line to the same recipients, including Fitzgerald. The email contained the same text as the email sent at 6.06pm, save for an additional sentence, written in red font:

> Further, the content of *these documents* and the issues discussed in them should not be discussed in any way with Cargill employees or representatives.
>
> (Emphasis added.)

1269 Neither email attached the documents referred to. In circumstances where neither Hughes nor Fitzgerald gave evidence, it cannot be said with absolute certainty whether Hughes gave these instructions at his own instigation or upon the direction of Fitzgerald or someone else from Viterra or Glencore. That said, the position adopted by Hughes at this time was in stark contrast to his own expressed desire, only a short time before, to have ongoing communications between Joe White executives and Cargill. Further, there was no evidence that Fitzgerald took any exception to the directions the subject of Hughes' 2 emails. In short, it was highly likely (and I so find) that Hughes was acting on instructions from his superiors at this time. So much was corroborated by Viers' evidence that Hughes told him around the time that the Cargill 22 October Letter was sent that Glencore had put a "gag order" on Hughes, as he had been told not to comment or share any further information. It was further corroborated by what Clark was told around this time concerning Glencore's position.[769]

1270 Stewart was shown the Cargill 22 October Letter shortly after it was received.[770] It was brought to his attention by Hughes. He understood it enquired as to the

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769 See par 1203 above. See further pars 1334, 1394 below.

770 His evidence was that he did not think he was shown subsequent correspondence.

capability of the Joe White Business having regard to the Operational Practices. Stewart told Fitzgerald that he was in a position to provide information relevant to Cargill's queries. Further, Stewart gave evidence he discussed a "cut-down version" of the Customer Review Spreadsheet with Fitzgerald in a face-to-face meeting in Fitzgerald's office. He said Norman and Lindner were in attendance by telephone. Stewart said he gave Fitzgerald information specifically on barley varieties relating to a specific week, as well as giving "the rest of it" orally. When asked about what was said, Stewart's evidence was vague. He said Fitzgerald asked him about the various practices, and that he answered his questions. Whilst Stewart said he told Fitzgerald that they were occurring, he could not recall whether there was any discussion about the extent of the Operational Practices. Further matters were raised, as set out below.[771] However, Stewart did not provide Fitzgerald, Norman or Lindner with a copy of the Customer Review Spreadsheet.[772]

1271 Shortly after the Cargill 22 October Letter was sent, Viers had a conversation with either Eden or Van Lierde, and made rough notes recording it. Viers was told that the Cargill leadership team was concerned that if the exposure was not quantified then Cargill would not get an appropriate response from Glencore.[773] A question was also

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771 See pars 1296-1303 below. For completeness, Stewart gave evidence about telling Fitzgerald that Joe White was using off-grade barley and gibberellic acid when it was prohibited by customers. During this discussion, he said there was a request for information about barley varieties which he agreed to provide to Fitzgerald. Stewart's evidence was that he expressed an opinion about how much production might be lost if Joe White produced malt without prohibited gibberellic acid. Also during this discussion, Stewart discussed the existence of new barley varieties that would "potentially" be able to be used to produce malt without gibberellic acid and without adding an extra day of germination, but that this was still under development. At the end of this part of Stewart's evidence, he said that he had a recollection this meeting with Fitzgerald (which Norman and Lindner attended) took place "just prior to 1 November". It was unclear on the evidence the extent to which matters discussed with Fitzgerald as deposed to by Stewart were raised on or about 22 or 23 October 2013 or later in October 2013. Most likely, Stewart's recollection of his discussion with Fitzgerald was largely concerned with the meeting held on 23 October 2013 which was the subject of Lindner's notes: see pars 1296-1304 below.

772 Stewart's evidence was that he did not believe Fitzgerald would have been able to properly interpret all of the information in that document.

773 The Viterra Parties submitted that evidence concerning Cargill's view that quantification might have been necessary in order to elicit an appropriate response demonstrated Cargill knew the Viterra Parties would not be able to understand the effect of the issues raised without further and specific information. In making this submission, no reference was given to this proposition being put to any witness. Further, none of the evidence on this topic suggested that the Cargill employees involved had any such thought process. In any event, such an understanding would make little sense; unlike Cargill, the Viterra Parties had unfettered access to the Joe White executives who would have been able to (and to some significant extent did) give their views on the effect on the Joe White Business of desisting with the Operational

raised as to whether or not Cargill could appoint a "clean team" to come in and do an independent risk assessment and understand the extent of the Operational Practices. Another question identified related to criminal activity; in that regard, Cargill wanted to understand whether Joe White had engaged in any. Viers' notes also referred to ongoing discussions, which he said was a reference to Cargill continuing to try and understand the extent of the Operational Practices. To that point in time, Viers believed, correctly, that Cargill had not had the benefit of full disclosure.

1272 Viers gave evidence that he was asked to quantify any potential financial impact of what had been learned on 15 October 2013, and to get an understanding of Cargill's exit rights and its obligations to complete under the Acquisition Agreement. As a result of this instruction, Viers contacted Clark.

1273 Viers asked Clark whether Cargill was obliged to complete the Acquisition Agreement. Clark stated in substance that there were no clear grounds for Cargill not to complete under the Acquisition Agreement, and that Cargill would have to demonstrate that what it had discovered would undermine the transaction. Clark said that there was a risk that if Cargill wrongfully terminated it would be exposed to significant "financial damages" as a result.

1274 During the course of the conversation, Viers stated to Clark that if Joe White's customers were unaware of the Operational Practices, then he considered Joe White had been engaged in misleading and deceptive conduct. Viers' notes also referred to the possibility of 2 years' litigation. They also contained a note "50/50"; Viers having a recollection that Clark said something about a 50 percent impairment.

1275 After speaking to Clark, Viers contacted Van Lierde. He told Van Lierde that Cargill was obligated to complete. He made a note before speaking to Van Lierde so his message was clear. Viers gave evidence he spoke to the note, which included the following:

Practices. It was not necessary to have a proper understanding of Cargill's policies and procedures in order to respond to the questions raised in the Cargill 22 October Letter.

Not a clear exit right.

We would need to establish that it was so material that it undermined deal.

50% impairment.

2 years litigation to resolve.

Risk lose pay [significant] damage for wrongfull (sic) termination.

1276 On 23 October 2013, Fitzgerald and Norman held separate meetings with Hughes, Youil, Stewart and Wicks. Mattiske's evidence was that after each of these meetings, Fitzgerald and Norman telephoned Mattiske to give an update.[774] There were no contemporaneous notes of what Mattiske was told during these calls.

1277 Lindner attended each meeting with the Joe White executives by telephone and took handwritten notes. Lindner considered herself to be a diligent note taker. She said there were no matters raised that she did not note, and stood by her notes as a full record of these discussions with the executives in question.[775] Mattiske was unaware that Fitzgerald had decided to get Mallesons involved in this process, and did not know Lindner was in attendance at the meetings with the executives.[776]

1278 Throughout Lindner's notes of these discussions appeared the numbers 1, 2 and 3, which were circled. This signified the 3 separate topics that had been raised by Cargill in the Cargill 22 October Letter, namely Certificates of Analysis, barley varieties and the use of gibberellic acid when prohibited, respectively.

1279 The meeting with Hughes began at 1.00pm and was recorded as concluded at 1.58pm. Lindner's notes record that Hughes was asked if the "[f]act" that Joe White was issuing "false" certificates was because Joe White's plant did not allow it to meet specifications. Lindner could not recall the question that was actually put. Hughes' response, as recorded by Lindner, was that the issue of certification and barley

774 Cf fn 754 above.

775 Lindner was not challenged by the Viterra Parties about this evidence.

776 Mattiske also gave evidence that Fitzgerald did not report back on the meetings that Lindner had with the Joe White executives. This evidence was given in relation to a question during cross-examination which did not include any reference to Fitzgerald also being in attendance at the meetings with the Joe White executives. In fact, there were no meetings attended only by Lindner and a Joe White executive. Accordingly, this evidence should not be understood to mean that Fitzgerald did not report to Mattiske on meetings with the Joe White executives at which Lindner was also in attendance by telephone.

suitability had been raised "several times" before the 15 October Meeting. Under the heading "Pre mtg" (which Lindner said was a reference to discussions with Cargill), her notes read as follows:

> – issue of CMA (←certificates?) and barley substitutability raised several times pre 15/10 mtg.
>
> – *they knew industry practice*
>
> – wanted to understand how [Joe White] approached it
>
> …
>
> – 15/10 – preso[777] on screen only. Preso didn't discuss data not industry available
>
> – talked about Cargill mode of CVA's (sic)[778]
>
> – what [Joe White] [does] and why they do it
>
> – discussed proposed way forward
>
> – *[Joe White] thought their process was robust and Cargill may want to adopt same practices*
>
> • Cargill went through this process. They use blend analysis, don't do final malt analysis
>
> • Discussed preparation of CVA's and how try [to] use [the Malt Proficiency Scheme]. [The Malt Proficiency Scheme] demonstrate intra laboratory varability (sic). There is much variation.
>
> • *[Hughes] to provide procedure*
>
> • *Use [Malt Proficiency Scheme] data, take to 2nd std dev*[779] variation between malt anysis (sic) + blends within 2 [standard deviations] – ok.
>
> …
>
> (Emphasis added.)

1280 In what appeared to be a new section of the notes, an asterisk contained in a circle was placed on the first line of the note, that read as follows:

> • Glencore know what customers lab will say because of [the Malt Proficiency Scheme] & exchange of data

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777 An abbreviation for presentation.

778 Lindner could not say whether this acronym referred to Certificates of Analysis or if it was referring to the same subject matter as "CMA" earlier in her notes.

779 A reference to 2 standard deviations.

- So make the malt meet customer [specifications] & *represent it meets those [specifications]*
- So on [Joe White] [system] it's a 10, on client it's a 12 *BUT say it's a 12*
- *Some* open [communications] with customers re process
- Why issue *wrong* certificate? Telling them how they can expect it to behave.
- Certificate of analysis:
  - *process documented*
  - ISO audits – no issue ⇒ask [Stewart]
- Whether malt plants can produce what is required
  - *we are not doing this to make up for faults.*
- *How did Cargill respond at [meeting]?*
  - *They expected it*
- *Well known in industry* that there is variation of approx. 2 [standard variations][780]

  …
- *we do this all the time – every plant. For all customers*
- *ongoing* & no customers raised issues with malt quality

…

(Emphasis added.)

1281 On the next page, the number 2 was circled (signifying barley varieties) and then the following was recorded:

- required to go out & find cheaper barley[781]
  - There are some [contracts] where we use *barley inconsistent with the [contract]. ⇒ Forever* [words deleted][782]
  - No claims or allegations made yet

---

780 Lindner's note was "2 stand var" which she said referred to 2 standard variations. Although this was presumably what was said, no doubt it was a reference to 2 standard deviations.

781 No doubt a reference to the transformation projects: see pars 122, 134 above.

782 The Viterra Parties submitted that the reference to "forever" should be understood as Hughes having said the practice of inconsistent barley was long-standing.

– Now until end of March – we *don't always have barley available* to us needed between now & then. [*Could*] *be big $*

– post March: better position

– [Mattiske] not aware

– How much higher [would] *cost base* be if had been using right barley? *About $1.5m/yr higher*[783]

– *None of this discussed with Glencore during acq of [Viterra] by [Glencore]*

(Emphasis added.)

1282 On the following page, the number 3 was circled (signifying gibberellic acid), which was followed by:

Many customers use [gibberellic acid] some don't. We admitted *sometimes we've use (sic) it when we shouldn't have*.

Impact on business – possibly *move to 5 day germination* from 4 day. *If* had access to certain grain, *risk lower*.

Why don't people want it – fear it's an additive

- Some adamant – absolutely don't use it (well some exceptions).
- Prefer not to – more loose about it.
- We do *prob have [contracts] that say don't use it & We use it*.
- *Difficult to detect*
- *Routinely do this when shouldn't at all plants*[784]

---

783 The Viterra Parties accepted in closing submissions that this had been stated by Hughes, and submitted the figure of $1.5 million per annum was Hughes' best guess. Further, senior counsel stated that if it was treated as a generalised statement that was "more or less right", then the Viterra Parties accepted Hughes' remark as representing the fact.

784 Without raising the issue at all with Lindner, the Viterra Parties submitted that it was likely that she may have misunderstood this part of the discussion when taking this note. This was put on the basis that she was on the telephone and that this statement appeared to be inconsistent with the statement that Joe White probably had contracts that said not to use gibberellic acid and Joe White did use it in any event (see 2 bullet points above the bullet point in question). The Viterra Parties submitted "probably" in the earlier statement suggested there was "only a probability that [Joe White uses] it, improbably", before submitting this statement did not sit well with the later statement soon after. It was contended the first statement looked more probable than the later statement. In making this contention, reliance was placed upon Hughes' notes of the 15 October Meeting: see par 1120 above. There were a number of obvious difficulties with the position contended for by the Viterra Parties. *First*, Lindner's uncontroverted evidence was that she was a diligent note taker: see par 1277 above. *Secondly*, it was not suggested that because Lindner was on the telephone it affected her ability to take reliable notes with respect to any other part of this discussion, or any of the other discussions held.

- Who decides whether GA_3 used – technical decision ([Stewart] + local plant)
- No adverse impact to humans.
- 4 → 5 day germination
  - depends on yr whether & have to
  - 10 Kt[785]/year ⟹ not huge < $1/tonne *BUT reduces capacity by say 20%*
- Why we use – *drives capacity*

(Emphasis added.)

1283 At this point on the page there was a line through the paper and 4 further dot points. Lindner gave evidence at trial that she believed these 4 points may have been notes to herself:

- what can we do to comply?
- *Financial impact on business*
  - *[Stewart] pulling [numbers] together*
- Reputation risk
- Did [Hughes] sign off on warranties?

(Emphasis added.)

As to the second point, Lindner had no recollection of following up on any numbers from Stewart.

Thirdly, the word "probably" did not make the 2 statements necessarily inconsistent. In any event, Hughes knew full well that the Gibberellic Acid Practice was in place and being implemented: see, for example, pars 1212, 1215, 1218, 1224 above. *Fourthly*, the account given by Hughes and the other executives was entirely consistent with the statement that Joe White was routinely using gibberellic acid in breach of contractual requirements. *Fifthly*, if it were necessary to decide whether 1 statement was more probable than the other (to the extent it was suggested Hughes was unsure about the contractual position), it was highly unlikely that Hughes was unaware of the key contractual terms of some of Joe White's largest customers. *Sixthly*, Lindner's first note on this topic made it clear Hughes knew some customers did not (knowingly) use gibberellic acid. *Seventhly*, the Viterra Parties' contention invited the court to draw an inference in their favour when they had every opportunity to raise the matter with Lindner and chose not to do so: see par 1990 below. For completeness, it was of no moment that the Cargill Parties did not call Hughes to give evidence that he said this. The note was clear and unambiguous. Further, Hughes' senior counsel cross-examined Lindner at some length. Lindner's note on this point, and for that matter her notes of the discussion with Hughes more generally, were not challenged.

785 Kt stands for kilotonnes.

1284 The final page of Lindner's notes of the meeting with Hughes recorded:

- Do you feel misrepresented?
  - Yes but I was looking at customer practice.
  - I thought process managed risk + no prior issues.

1285 Pausing here, the notes of Lindner demonstrate Glencore was informed by the most senior Joe White executive, Hughes, that each of the Operational Practices identified in the Cargill 22 October Letter existed, and at least to a not insignificant extent. With respect to Certificates of Analysis, Glencore was told there was a written procedure, which could be provided. It was also stated that the procedure was ongoing and adopted for every customer, which Hughes stated was in line with industry practice.

1286 As for barley varieties, Glencore was told the correct barley was not always available, but that supplying the incorrect barley had not resulted in any claims or allegations. Glencore was also told the financial ramifications of this past conduct and the inability to supply the correct barley varieties up to March 2014 could be significant.

1287 In relation to gibberellic acid, Glencore was informed this practice was difficult to detect, that it was in breach of certain contracts, and that it was carried out routinely at all plants when it should not have been. Further, Glencore was told ceasing the practice would have an adverse effect on production schedules, in the order of 20 percent with respect to the relevant customers, which would obviously have flow on effects for other production schedules. Furthermore, it was said that *if* access to certain varieties of barley could be achieved, the risk of an adverse effect on ceasing the practice would be lower.

1288 More generally, it was conveyed that any financial impact on the Joe White Business of the conduct identified had not been ascertained with any precision. Plainly from what Hughes had stated he considered the impact of ceasing the Operational Practices would be significant.

1289 Next, Lindner's notes recorded the meeting with Youil which ran from 1.58 to

2.35pm.[786] Youil discussed the 15 October Meeting. The notes recorded that when "Eden" and Viers came for that meeting they raised "this practice (as they have come across it)[787] and it doesn't comply with [Cargill]'s policies and will have to stop". It was said the 15 October Meeting was to address this issue from "LD 1", signifying legal day 1, being the day after Completion. Youil confirmed that the details concerning particular customers or the impact on the Joe White Business were not discussed on 15 October 2013.

1290 Youil stated that Stewart produced a powerpoint presentation of "what Viterra currently does". Lindner said she did not recall asking for a copy of the presentation, but she believed it was provided by Hughes to Fitzgerald.

1291 Lindner recorded that Youil stated that the requirements placed by brewers on malt companies "are almost impossible to achieve". Youil referred to Cargill using the theoretical blend approach, whereas Joe White also did a shipping analysis. He referred to inherent errors, amongst other things. Relevantly, Lindner's notes continued:

> *Do customers know we do that – don't know.*[788]

> Cargill acknowledged matters haven't address (sic) with brewers.

> Not a plant capability issue. It's a barley variety issue ⇒ *always struggling to meet [specifications]*. We've *lost close contact with procurement team*.

> *Have we sent out of [specification] malt to customer in past? Yes*

> *Has [Cargill] bought something that cannot deliver? Cannot answer that. If adopt theoretical blend model of [Cargill], probably ok.*

---

786 The timing of this meeting, commencing immediately upon Hughes' interview concluding, suggested it was highly unlikely Mattiske was updated after every meeting: compare par 1276 above.

787 It was unclear what this was referring to. On the face of the notes, it may have been a reference to previous experience at Cargill or that "Eden" and Viers had learnt about some of the conduct at Joe White. Further, unless the note reflected a mistake, either it was not a reference to the 15 October Meeting, as Eden did not attend or Youil said Eden was in attendance instead of De Samblanx. It was plainly not a reference to the meetings held in mid September 2013 (see pars 1066-1071 above), as there was no mention of the Operational Practices (or any requirement to stop them) at that time.

788 This followed on from, and appeared to be a comment with respect to, "[laboratory] to [laboratory] differences", Joe White's analysis of customer results and altering results in Certificates of Analysis "to ensure consistent", but it was not entirely clear.

…

(Emphasis added.)

1292 Next to a circled "2", the following appeared:

> Not sure how often we do this. I [presumably, Youil] was surprised

> We have been told to [reduce] quality of product[789]

> *Breach of [contract] – reputation risk? Yes*

> Heineken – very surprised doing it

> How much do we gain by using lesser grade $10/t- $20t (ask [Wicks])

…

> If told to change overnight – impact ?

– *variety a challenge*

– need to source right varieties, possibly have to pay more, or fail to satisfy obligations under [contracts]

(Emphasis added.)

1293 On the topic of gibberellic acid, the following was noted:

[Gibberellic acid]:– by and large where client says no, we don't use it. Sometimes use it.

– even if extend process time, lose capacity. Still doesn't guarantee will meet [specification].

…

– what if we didn't use it, impact output [would] need to make more 5 day malt ⟹ [reduce production] capacity

…

> why do customers not want it? Purity of product. *Hit will be in first 6 [months]*. Once we have right barley.

(Emphasis added.)

1294 Lindner's notes then addressed all 3 issues again. The notes recorded the Certificates of Analysis issue could be overcome by the theoretical blend model. Issues 2 and 3 were dealt with together, the collective observation being there was a cost impact issue. It was further noted that both issues were impacted by barley varieties and that

789 Presumably, a further reference to the transformation projects: see par 1281 above.

purchasing the correct variety would cost more.

1295 Finally, it was noted:[790]

> – *[Mattiske] not aware* of these issues. No idea why not aware. Practice has been *acceptable for yrs. Business as usual*.

(Emphasis added.)

1296 Lindner's notes of the meeting with Stewart recorded that it ran from 3.00 to 3.40pm. As with Hughes and Youil, Stewart discussed the content of the 15 October Meeting. Stewart stated that Joe White had a rigorous procedure. Stewart was asked whether the Cargill 22 October Letter reflected what was discussed at that meeting. Lindner's notes recorded Stewart's response as:

> Yes. But doesn't capture [De Samblanx] (operations in Europe) of Cargill saying, completely what expected. [Viers] – salesman, surprised but doesn't know industry

1297 Lindner's notes relevantly recorded the following from the meeting with Stewart concerning Certificates of Analysis:

- We adopted [the Malt Proficiency Scheme] – we outlines (sic) errors associated with tests [Joe White] uses. But at the same time we have very good intel into what their [laboratories] will say.
- we *ensure customer is always right by changing the result*
- customers have said the [specifications] are a "target"
- Error of test bigger than [specifications].
- Legal implications of [certificate] saying 12 when 10 – *no idea?*

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790 In Youil's closing submissions, it was contended it had not been established that what Youil said on 23 October 2013 in this meeting reflected his knowledge of the Operational Practices in July or August 2013. This was put on the basis that although Youil attended the 15 October Meeting there was no evidence that Youil himself disclosed anything at that time. Further, it was submitted the reference to Youil being surprised and suggesting Wicks should be asked about matters (see par 1292 above) indicated either a lack of knowledge or only recent knowledge of certain matters. Based upon this, it was also contended that it had not been established that Youil knew that what he said to De Samblanx concerning the use of gibberellic acid was wrong: see par 788 above. On the evidence available, it was implausible that Youil was not aware of at least some aspects of the Operational Practices in the period from June to August 2013, and long before that time: see, for example, par 206 above. In circumstances where he chose not to give evidence, it would not be appropriate to draw any inference in his favour in that regard. However, it is unnecessary to make any definitive finding about the exact extent of Youil's knowledge in order to determine the issues in the case.

- Cargill run there (sic) business very differently. Cargill blend & analyse this but don't analyse final shipment. Customer will analyse when received.
- [Just in time] – cost conscious. Cargill have huge storage (not [just in time]) so they can get blend in [specification].
- *To apply Cargill model to [Joe White] will be difficult*.
- Cargill have more flex of blending (by holding more inventory)
- *[Joe White] have been getting bad barley from Glencore.*[791] Getting what they don't want. *Erodes ability to hit [specification]*.[792]
- Sydney – limited storage, everywhere else better storage, extra day of germination, could get there.
- changing specs even if report in, customer read out of specs.
- if had right barley, relax shipping – plant good enough.

(Emphasis added.)

1298 Stewart gave evidence that at this meeting Fitzgerald said he was interested to hear from Stewart about whether the Operational Practices in relation to Certificates of Analysis were occurring, and Stewart responded by saying that they were. Stewart also gave evidence that he probably told Fitzgerald the extent to which they were occurring, but could not recall exactly.

1299 On the issue of failing to use the correct barley varieties, it was noted:

- Trying to make malt as cheap as possible.
- *Did we communicate with customers/around [contracts]? No. MD (Rob Gordon Oct/Nov 2011) at time said to do it.*[793]

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791 After Glencore acquired Viterra, Mattiske's evidence was Glencore Grain sold barley to Joe White "through the Viterra arm".

792 In closing submissions, the Viterra Parties' senior counsel acknowledged there was no dispute this was said, and that it was the fact according to its terms. It was submitted it had to be read in context, and that it was unclear from the note if it was Glencore's fault that bad barley was being supplied. As to Glencore's knowledge, it was submitted that "Glencore" meant 1 of the "thousands of Glencore subsidiaries that happen to be operating in Australia" and selling barley. Further, in circumstances where Glencore did not know Joe White customers' specifications, it was submitted Glencore could not know if the barley was "bad" for Joe White's purposes: but see pars 603-605 above.

793 This note was plainly ambiguous. It may be read to convey that Gordon told the Joe White executives they should communicate with customers concerning contracts. The note makes clear that Joe White, in fact, did not. Equally, the note could be read to mean the absence of communication was the direction Gordon gave. There was nothing on the evidence to suggest the Joe White executives were deliberately acting contrary to Gordon's instructions or that they were seeking to conceal their conduct from Viterra (as opposed to customers and auditors). However, a finding that Gordon directed that Joe White not

- Why not raised with [Mattiske]? Expectation to make margins still there.

- *Glencore doesn't supply required varieties*.

- Now until April – main exposure if need to use varieties specified in [contracts]. *May have to push shipments back*

- We have new varieties - getting close but *need to get brewers on board*. Have been working on this for a long time.

- *We have been breaching contracts & not telling customer*
- New varieties– 75% approved
- *Exposure of [Legal Day 1] cannot use wrong varieties*

…

- Do we substitute with consent? Sometimes occurs for some more often than others.

- 6 [months could] transition out. *Don't think customers [could] find out about it*.

- *Why not informing customers when going outside [contracts]?* Industry [standard]. Brewers knew about it. Not sure re decision making process behind it.

(Emphasis added.)

1300 In giving his evidence on this aspect of the meeting, Stewart said he had told Fitzgerald that Joe White was using off-grade barley, and that, in part, the genesis of this was the Malt Cost Reduction Transformation Project.

1301 The note then addressed the issue of gibberellic acid. In estimating the additional cost for the next 6 months, the following was recorded:

- 120Kt of [gibberellic acid should] be producing [should] be producing about ½ that

- We [would] need to (sic) extra day [production].

On the question of costs pertaining to this issue, the following was recorded:

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communicate with customers around customer contracts would be tantamount to a finding that Gordon directed Joe White executives to deceive their customers. Such a serious matter being found would require more than an ambiguous note of something said (which may have been hearsay) by someone other than the note taker. Accordingly, no specific finding as to what was said is made but, at the very least, it may be said that the note did not provide a basis for finding that Joe White executives were acting in defiance of a direction from Gordon when failing to communicate with customers: see also par 166 above.

– Loss of [production] cost – 15% of 30,000 (extra day)

– Electricity costs – 7% over 30,000t

– we are also moving to alternative malt scheme. *If* we get there, goes away.

Reputational risk! For some customers this is bigger issue (x 2) eg where customer is additive free

Don't market it as additive free. Just a preference.

…

(Emphasis added in italics; original emphasis in underlining.)

1302 Stewart gave evidence that he told Fitzgerald that "we" were using gibberellic acid for some customers who prohibited its use. During his cross-examination, Stewart rejected the proposition that he ignored the proscription with respect to gibberellic acid, stating the decision to use gibberellic acid when prohibited was a decision made by the business.[794]

1303 Finally with respect to the meeting with Stewart the following was recorded:

- Warranty verification process – he was only asked about IPRs.[795]

1304 Although Stewart's memory of the precise instructions was vague, he said he was told by Fitzgerald to provide some information by way of a snapshot of 1 week in September 2013.[796]

1305 The final of this series of meetings on 23 October 2013 was with Wicks. Lindner's notes record that this meeting ran from 3.55 to 4.30pm. Lindner's notes state that Wicks indicated that the Cargill 22 October Letter was a "fair statement of what was said". Relevantly, Lindner's notes of the meeting with Wicks also stated:[797]

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794 Stewart's evidence was that approval to use gibberellic acid despite the customer's contrary requirement was sought from Wicks or Stuart, sometimes through him.

795 IPRs stands for intellectual property rights.

796 See further par 1387 below. Stewart gave evidence of having 2 meetings with Fitzgerald, the first also attended by Norman, and the second when Rees was in attendance: see par 1323 below.

797 To the extent any of these notes might be said to conflict with the accounts given by De Samblanx or Viers, the weight of their sworn evidence must be preferred over the notes of Lindner, which at times were unclear as to whether they recorded what Wicks was stating as the position, rather than what Cargill had been told at the 15 October Meeting. Further, it was significant that Wicks observed what was contained in the Cargill 22 October Letter represented a fair statement of what was said.

- Cargill noted have seen [Joe White's] storage capacity, there is no way [Joe White could] do it the Cargill way
- Cargill are the exception. Industry operates like this
- [Hughes] asked [Viers] is that what you thought? He said prob worse than expected
- Everyone agreed we [should] work out how to do things the Cargill way & the costs
- [Stewart] pulling something together.

…

1306 The notes did not record how the topic of Joe White's use of Certificates of Analysis was introduced, and Lindner had no recollection of it. The notes recorded:

- Customers analyse the malt, they love us, complaints aren't around barley
- Has met [specifications] within error
  - part lab variation/analytical error
  - we're allowing for there (sic) wrong analysis
- Do we communicate with customer that this is what we've done? Don't know. Sometimes

  (Meet specs with sampling or analytical error)

  we can produce to their specs. All we're doing is adjusting.
- *Can we meet [specifications]? Yes with right barley*

(Emphasis added.)

1307 With respect to barley varieties the following was noted:

- Buying barley – difficult to get barley you want
- What do you do? Some test for it/ particular. They get what they want
- Some are less concerned but have [specifications] stated
- Heineken – varieties approved eg [Gairdner, Stirling]. Both hard to get.
- *We don't communicate different variety knowingly*. What about our obligation to communicate varieties [?] That's the balance. We are *trying to guess what the customer wants* & act accordingly rather than just tell them.

- *What happens from [1 November 2013] if have to supply in accord with [the contract]? Commercial suicide. Brand will be decimated.*[798]

- What transitional period [would] be needed. Crop looks good = more barley. [Therefore] more chance of being able to swap barley say with Glencore.

- *We have done this to make as much [profit] as possible whilst keeping customers happy.*

- If we have to buy barley in April it will cost us more. How do you mitigate, back to [contracts] with farmers.

(Emphasis added.)

1308 On the topic of gibberellic acid, the following was recorded:

- None of them advertise as additive free
- If don't use [gibberellic acid] must germinate for longer
- *We do it about 20% of the time when we shouldn't*
- Heineken and Sapporo *do audit. [Wouldn't] know about [gibberellic acid]*

1309 Lastly, there was a space after the notes concerned with gibberellic acid, followed by a single line which read:

- *[Specifications] outside of contract often*

(Emphasis added.)

1310 Although the accounts given by each of Hughes, Youil, Wicks and Stewart differ in material respects, nothing said by Youil, Stewart or Wicks was fundamentally inconsistent with the position as outlined by Hughes.[799]

1311 In short, by means of these interviews, Glencore, through its solicitor Lindner, and Viterra, through the same solicitor and 2 senior executives,[800] were informed that there

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798 The Viterra Parties submitted that this statement and related comments by Wicks were made in the context where interviews had already been conducted with 3 other executives who did not characterise the barley varieties issue in such terms. As to the fact that Mattiske was not told of this by Fitzgerald, the Viterra Parties submitted that was because it was not considered important enough to pass on. There was no evidence as to why it was not passed on. If Fitzgerald decided this information was not important, it was a curious decision. In 2013, Wicks was the executive responsible for barley procurement and customer sales. His opinion on such matters was plainly material.

799 See pars 1285-1288 above.

800 For completeness, Lindner was also acting for Viterra (see fn 299 above); and the 2 Viterra executives were also acting at the direction of Glencore, under Mattiske's instruction.

was substance to what was contained in the Cargill 22 October Letter and that the matters raised had the potential, if not a likelihood, to have a materially adverse financial impact upon the Joe White Business and its reputation.

1312 Following these interviews on 23 October 2013, Lindner was not aware of any further request by any of the Viterra Parties for further interviews or any suggestion that longer or more detailed interviews were needed.

1313 After his meeting with Fitzgerald, Norman and Lindner, Stewart received an email from Fitzgerald noting that Stewart had "mentioned" the Viterra Certificate of Analysis Procedure. Fitzgerald asked if the document was on Pulse, or alternatively if Stewart could send it through to him. It was on Pulse,[801] but Stewart responded via email attaching the "Malt Certificate of Analysis Generation Procedure (3)". What Fitzgerald did with this document remained a mystery. He did not show it to Mattiske, or, it seems on Mattiske's evidence, even bring it to his attention. Mattiske was unaware that under the Viterra Certificate of Analysis Procedure there was the ability to alter results even when they were outside the band of 2 standard deviations. He gave evidence he had not considered whether alterations were permitted for results beyond 2 standard deviations and that he made no enquiries on that question.

1314 At 2.34pm on 23 October 2013, Hughes sent Fitzgerald an email attaching a document prepared in response to the Cargill 22 October Letter. The email stated:

> [M]y response notes supplied to you are based on information I have been provided by my executive, I suggest it important (sic) to review that particularly with [Stewart] to confirm the accuracy of it in case I do not have some of the nuances correct.[802]

1315 The attached 1 page document contained 2 headings: "Certificate of Analysis" and "GA" (a reference to gibberellic acid). Under the first heading, the document stated that the preparation of Certificates of Analysis had been conducted "in line with

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801 See par 278 above.

802 Based on the contents of this email, the Viterra Parties submitted Hughes' reliance on the other Joe White executives indicated Hughes did know the "details of, or the extent to which, Joe White engaged in [the Operational Practices]". No inference could be drawn in light of other evidence demonstrating Hughes' extensive knowledge on the topic: see pars 3260-3261 below.

specific consideration of the accuracy of the tests in question". After referring to the "reproducibility and repeatability accuracy" and the Malt Proficiency Scheme, it stated that the reporting of parameters to within 2 standard deviations was capable of capturing:

> both test variance plus inter-laboratory variance, together with any long term identified variance between the [Joe White] and the end customer inter-laboratory analysis accuracy.

1316 The document described this process as allowing for "natural analytical differences that occur between a prepared blend (the date Cargill uses to assess malt quality) and the final malt packed". Hughes continued:

> This is a *routine* process in the preparation of Certificates of Analysis.
>
> This activity is not unique to [Joe White] and has been an accepted and *documented practice in [Joe White] for many years*. While this does not align with Cargill's usual practise (sic) which relies on the use of the prepared blend analysis results it is a philosophical difference and corrects the result in consideration of this natural analytical variance rather than using the blend analysis and not analysing the final malt delivery which removes the repeatability/reproducibility risk associated with the analysis.
>
> As mentioned above this is a documented process which is *recorded within [Joe White]'s OPG's*[803] and has been in place for a number of years *and many external ISO audits*.
>
> (Emphasis added.)

1317 Under the heading "GA", the document stated that the use of gibberellic acid did not "directly" impact Joe White's declared design capacity which was stated to be 550,000 tonnes.[804] Further, it was recorded that using gibberellic acid allowed for production to occur over a 4 day, rather than a 5 day, germination period. It continued:

> Many customers continue to allow the use of [gibberellic acid] during malt production and *[Joe White] is currently only using [gibberellic acid] on malt produced for customers that allow the use of [gibberellic acid].* [Joe White] has *never been identified* by a customer as supplying non conforming malt on the basis of [gibberellic acid] use.
>
> (Emphasis added.)

1318 Obviously, Hughes' remarks concerning gibberellic acid use were materially different

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803 Presumably OPG's stands for operational guidelines.

804 See pars 488, 1079 above.

to what Fitzgerald had been told by Hughes, and others, orally, earlier that day. The use of "currently" was presumably to distinguish the supposedly new situation[805] with what had occurred in the past, including up until when the Cargill 22 October Letter was sent. The remarks made no reference to deliberately using gibberellic acid contrary to the relevant customers' requirements, nor the change in approach that either had just occurred or was about to occur (with the possible consequences to production capacity). Further, the reference to never being identified by a customer appeared to suggest that no customer had ever caught Joe White using gibberellic acid when prohibited, not that it had not been done.

1319 Earlier on 23 October 2013, Mattiske had called Purser. An email from Purser to Eden, Savona, Arndt and Viers purported to record the substance of the conversation.[806] It stated that Mattiske had acknowledged receipt of the Cargill 22 October Letter and "declared *Glencore's* complete lack of knowledge of the matters raised" (emphasis added). Purser's email further stated that Mattiske had said that "together with Malleson's (sic) they would investigate and revert" to Cargill. Purser's account continued:

> He accepted that, if confirmed as true, the issues were *serious and unacceptable*. He had clearly spoken informally to [Hughes] and/or other employees but had not begun the formal investigation.
>
> He implied that they would ensure the practiced (sic) referred to would stop immediately – I restated our position in the letter that we need to know if that (sic) doing so *impacts the business in any way including profitability* and ability to meet *customer contract specifications*.
>
> *He promised to keep us informed* and revert when they have more information.
>
> (Emphasis added.)

1320 Mattiske gave evidence of having a telephone discussion with Purser on either 23 or 24 October 2013. He said that he told Purser that he did not really have enough time to do a proper investigation or to substantiate any of the statements the Joe White

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805 See par 1555 below.

806 Purser said she took a note of the conversation, which she checked with Savona before sending the email. Savona did not cause any changes to be made to the note.

executives had made. Mattiske said he called Purser in good faith to tell her about the Operational Practices and was trying to help Cargill prepare for what it needed to do post-Completion.[807]

1321 In his evidence in chief, Mattiske was asked whether he would have made a comment that the issues were "serious and unacceptable" if established. Not only did Mattiske say he did not recall the comments, he gave evidence that they were not words he would ordinarily use. However, he also said Purser may have used these words. Nothing really turned on this. The contemporaneous record of the discussion indicated such a sentiment was conveyed and acceded to, regardless of who actually spoke the words.

1322 Mattiske gave further evidence that Purser did not mention anything about the profitability of the Joe White Business. When Purser was taken to her email during cross-examination, it was not put to her that her email on this point was inaccurate. In the circumstances where Purser's contemporaneous unchallenged note was in evidence, the only appropriate conclusion to draw was that Mattiske had forgotten this aspect of the conversation at the time he gave his evidence. In short, Purser's email reflected the best evidence of the substance of the conversation.

1323 At 6.00pm on 23 October 2013, Stewart received an email from Fitzgerald. Fitzgerald asked Stewart to meet with him that evening, together with Rees and Norman, to walk them through the Certificate of Analysis procedure. Stewart met with Fitzgerald and Rees later that night. Stewart's memory of this meeting was dim. He described it as a bit of a recap.

1324 Later, in the evening of 23 October 2013, Fitzgerald emailed Lindner, attaching the Viterra Certificate of Analysis Procedure.[808] The email stated:

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807 Mattiske said he could not recall a telephone conversation with Purser other than the conversation he had with her during which he used prepared talking points: see par 1368 below. However, it is clear that a conversation took place before the talking points were finalised, as reflected in Purser's email: see par 1319 above.

808 This document was actually entitled "Viterra Malt Certificate of Analysis Generation Procedure". It recorded it was in the "Trim Folder CF/04/398 – Obsolete": see pars 284-292 above. Another email indicated Fitzgerald had emailed it to himself shortly before sending it to Lindner.

> As discussed. The Procedure discusses the sign off process if the [specifications] are outside of two standard deviation parameters.
>
> We are checking *whether this Procedure was in the [D]ata [R]oom* – we believe it was – so *they can hardly say they weren't aware of it*.
>
> (Emphasis added.)

Lindner said she could recall asking someone to check the Data Room to see if the document was there, but she could not remember what the outcome of that enquiry was.[809] Of course, it was not there. Further, neither Fitzgerald not Lindner appear to have made any reference to its "obsolete" status.

1325 The Viterra Parties submitted that it should be inferred, on reviewing the Viterra Certificate of Analysis Procedure, Fitzgerald did not understand the document to be recording "(if it were the fact, which is denied)", that Joe White was systematically acting in breach of customer contracts. It was further submitted that, if Fitzgerald had appreciated this to be the case, he would no doubt have raised the issue with Lindner, and also would not have assumed that the information had already been disclosed to Cargill. This submission made assumptions and invited inferences which, with some exceptions, were not established or reasonably open on the evidence.

1326 *First*, it assumed that Fitzgerald raised any material matter of which he became aware with Lindner. There was no evidence to that effect. Indeed, there was no evidence of Fitzgerald reporting to Lindner (or anyone else) the outcome of the search of the Data Room, which, materially, would have disclosed to Fitzgerald that the very document outlining the procedure at the centre of 1 of the key issues raised by Cargill had not been included in the Data Room.

1327 *Secondly*, it assumed that Fitzgerald reviewed the Viterra Certificate of Analysis

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809 For completeness, later in her evidence she was asked whether she accepted that Fitzgerald should have disclosed the Viterra Certificate of Analysis Procedure to Cargill. Somewhat cryptically, she responded that she did not agree with the proposition and was not in a position to respond to it, but then added that she did recall "that particular matter being considered at the time". Precisely what was being referred to in giving this answer was not explored. Further, still later in her evidence she said that Pappas discussed with "the client" if any obligations arose under cl 13.8 of the Acquisition Agreement, but she was not sure to whom Pappas spoke or what the outcome of the discussion was. When the topic was touched upon subsequently, Lindner stated she had no recollection of the Viterra Certificate of Analysis Procedure being considered or being the subject of any advice.

Procedure. This assumption was undoubtedly correct. In his email, Fitzgerald was referring to an aspect of the document and making the salient point that Cargill could not complain about Joe White's conduct in relation to Certificates of Analysis if the documentation fully disclosing the nature of the conduct was contained in the Data Room. Undoubtedly, Fitzgerald would have been keen to know the outcome of the checking. Further, having discovered that the documentation was not included in the Data Room,[810] it must be inferred that Fitzgerald reviewed the Viterra Certificate of Analysis Procedure to properly understand what had not been disclosed as part of his investigations directed towards responding to Cargill's queries. Indeed, to have not done so would have been to have acted recklessly to the issues at hand.

1328 *Thirdly*, by this point in time, Fitzgerald had been informed that Joe White had been breaching customer contracts in various respects to a significant extent and, in some respects, routinely.[811] In these circumstances, at the very least Fitzgerald must have had more than a trivial doubt about whether supplying malt in accordance with the Viterra Certificate of Analysis Procedure was in compliance with customer contracts or whether the existence of the Viterra Certificate of Analysis Procedure meant specifications in customer contracts were being adhered to.

1329 *Fourthly*, the contents of his email disclosed that he and Lindner had been expressly discussing the contents of the Viterra Certificate of Analysis Procedure in relation to the sign-off process in circumstances where specifications were outside of 2 standard deviations. Self-evidently, this did not accord with what Fitzgerald and others had been told about the alleged standard industry practice allowing results within 2 standard deviations to be treated as compliant. Accordingly, the obvious inference was the document was being checked, at least in part, because this aspect of the procedure did not comply with what had been stated as being standard industry practice.

1330 *Fifthly*, there was no evidence to indicate that Fitzgerald was ever told about how often

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810 The Viterra Parties' senior counsel accepted this inference concerning its absence from the Data Room was fairly open.

811 See pars 1281-1282, 1291-1292, 1295 above.

approval was given for malt to be shipped when a parameter was outside 2 standard deviations. In the absence of such information, it was not possible to draw any reasonable inference as to what Fitzgerald might have understood about the regularity or otherwise of the adoption of this part of the Viterra Certificate of Analysis Procedure.

1331 *Sixthly*, Fitzgerald was part of the drafting and approval process of the Viterra Parties' response to the Cargill 22 October Letter.[812] In relation to some talking points, before they were finalised an assertion that the relevant documentation was included in the Data Room was removed from a draft and did not form part of the final version.[813] Further, in circumstances where many material matters (of which Fitzgerald had been informed before the written response was sent) were omitted,[814] there was no proper basis to infer that Fitzgerald's failure to raise a matter must have been because of a lack of knowledge or notice.

1332 Accordingly, in the circumstances leading up to the evening of 23 October 2013, the inference to be drawn from the contents of this email, together with the fact that the Viterra Certificate of Analysis Procedure was not in the Data Room and Fitzgerald must have become aware of that fact, was clear. That is, Fitzgerald must have either appreciated or strongly suspected there was a real risk that customer contracts had not been complied with regarding the sign off of results and the related reporting in Certificates of Analysis, at the bare minimum whenever results were outside 2 standard deviations.

1333 Of course, it must be noted in this context that Fitzgerald was not called as a witness despite having a pivotal role in the period between 22 October 2013 and Completion of the Acquisition on 31 October 2013.

1334 In the early evening of 23 October 2013, Fitzgerald emailed Stewart, copied to Hughes, referring to a discussion they had had. Fitzgerald confirmed that some reports would

812 See par 1405 below.
813 See pars 1363-1365 below.
814 See annexure C to these reasons.

need to be created for the purpose of obtaining legal advice. Stewart was directed that if he communicated with any staff for the purpose of obtaining reports he was to ensure that all emails were marked that they were subject to legal professional privilege. Fitzgerald also requested that Hughes forward his email to all key persons who might be involved in the relevant discussions. Fitzgerald concluded the email by stating that there was a need to restrict email correspondence "on this topic" at that time. Hughes duly forwarded the email to Youil, Wicks, Jones and Dickie. In response to this, Jones dryly noted by email to Wicks and Dickie, "It's getting even better!".

1335 Also later on 23 October 2013, Stewart received an email from a production manager concerning barley varieties that had been packed. The production manager stated that he had been through all shipments packed for a particular week chosen at random and looked at the varieties that were packed for each customer in that week. It was recorded that Joe White had packed 13 shipments for a total of 3,194 tonnes. The email set out the varietal splits for each shipment. Bringing a sense of humour to the situation, but also perhaps reflecting the lack of regard for meeting customer requirements, the production manager stated:

> I noticed that we are reporting [Stirling] for [Asia Pacific Breweries] group. As far as I'm concerned Stirling is the town I grew up in. Other than this the *only customers where the variety matches the [Certificates of Analysis] are the ones where we don't report the variety*.
>
> (Emphasis added.)

1336 Consistent with the production manager's summation, the list indicated that the Asia Pacific Breweries plants that had been supplied that week were delivered varieties other than Stirling.

1337 Although Mattiske largely left the investigation process under the control of Fitzgerald, he also chose to make some limited enquiries concerning whether the Operational Practices were consistent with industry standards. He made a number of enquiries with barley traders within the Glencore and Viterra businesses.[815] The 3

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815 Mattiske's evidence was that in particular he spoke to Wilson, Andrew Freebairn and Lyndon Asser; and "on the technical side" to Kevin Tidmas who was "our" export manager.

traders he spoke to said they did not know anything about the Operational Practices, but also said in substance that it was quite normal to blend barley of different grades within the same variety to meet an average blend for a customer contract.

1338 Mattiske gave evidence that, in response to 1 of his questions, he was also told by at least 1 of the traders that Vlamingh was a barley variety that might provide a solution. Mattiske was also told by 1 of them that they had researched approved varieties for Asia Pacific Breweries on the website and had found varieties that were listed as approved. Having been told this, Mattiske did not seek to verify the information with any of the Joe White executives. Further, Mattiske did not check to see what barley varieties were accredited by Grain Trade Australia as malting varieties as he did not know it was part of that organisation's function to publish a list of approved varieties.

1339 Mattiske gave evidence that he did not make enquiries of Stewart because he presumed that the Viterra traders were talking to Joe White, as they did on a daily basis as barley traders. Mattiske acknowledged that the traders were unable to give him any details of any contract between Joe White and its customers. When it was put to Mattiske that Stewart could have provided that information, Mattiske said he was uncertain about his role and thought Wicks would have been the relevant person. In any event, having obtained some information from Glencore's traders, Mattiske chose not to verify the information with any of the Joe White executives, or to ask Fitzgerald to do so.

1340 When Mattiske spoke to the Viterra export manager, who was responsible for preparing export documentation for sales to international customers and for dealing with laboratories, Mattiske was told that the export manager did not know whether adjusting Certificates of Analysis was standard practice or not, but thought it was reasonable to amend them within 2 standard deviations. Mattiske was told that this employee would follow the question up with a company that prepared documents and laboratory tests on behalf of Glencore and other companies. Mattiske was later informed that this company had said there were a lot of quality deviations in laboratory tests and it was reasonable to think a test could easily be out by 2 standard

deviations. However, this company was not sure about anything specific to the "malt barley industry", but it seemed reasonable to the company that the practice would occur.

1341 As a result of these discussions, Mattiske said he was not sure whether what had been told to Cargill by the Joe White executives about the Operational Practices was right or wrong. As to his state of mind at the time, he believed that providing "malt which was within 2 standard deviations of the actual test result" would be "completely legitimate".

1342 Notwithstanding the lack of knowledge of each of these employees of the subject of Mattiske's enquiries, Mattiske did not seek to enquire of any person in the malting industry as to whether or not the conduct alleged was in fact standard industry practice. Further, he did not direct Fitzgerald or any other person to make such enquiries.

1343 Despite the activity prompted by Cargill within Glencore, Viterra and Joe White, and Mattiske's assurances given to Cargill, pencilling was continuing to take place within Joe White. As an example, a Sign-Out Report for Nestlé dated 23 October 2013, corresponding to a Certificate of Analysis, demonstrated evidence of the conduct.[816] The Sign-Out Report reflected the pencilling of no less than 14 separate specifications. These included where the customer's maximum or minimum tolerances had been exceeded or not reached, the pencilling simply altered the result so that it was reported that the relevant specifications had been satisfied. The Sign-Out Report was signed by Stewart in his capacity as general manager, technical, on 23 October 2013. Despite having the Cargill 22 October Letter drawn to his attention by Hughes on either 22 or 23 October 2013, Stewart gave evidence that he did not seek to withdraw this Certificate of Analysis "because as an employee of Viterra Malt [he] followed the appropriate procedures".

1344 On 24 October 2013, Purser and Mattiske had a further call. As a precursor to this, a

816 The estimated time for delivery recorded in the Certificate of Analysis was 24 October 2013.

first draft of talking points for use by Mattiske during the call was prepared by Mallesons and sent by Lindner to Fitzgerald in the morning of 24 October 2013. Mattiske gave evidence the document was drafted by Mallesons in conjunction with "our internal legal team … led by Fitzgerald".

1345 This first draft of the talking points stated that Glencore had "commenced enquiries" in relation to the Operational Practices, and relevantly stated the following:

- Your concern around the plant not being sufficient to meet the specifications set out in customer contracts is unfounded. *We have confirmed that the plant is adequate to deliver malt that meets customer specifications*.

- *The certificate of analysis issue can be explained by differences between labs and standard variation in testing*.

  - ***Differences between labs***:

    - It is well known and understood within the industry that laboratories have analytical errors. For example, a sample may test as a 12 at [Joe White's] lab, but test as a 10 at Cargill's lab. [Joe White] is aware of these errors *as they are discussed with customers* and also because there is a published program known as [*the Malt Proficiency Scheme*] which details these errors. The *[D]ata [R]oom contained information on [the Malt Proficiency Scheme]*.

    - We now understand from the management team that the practice referred to in your letter involves [Joe White] including on the certificate the specification that the sample would have if tested in the customers' lab rather than the specification it had when tested in [Joe White's] lab …

  - ***Standard variation in testing***:

    - I also understand that when [Joe White] blends barley there is some variation in the results every time the test is repeated. This is well understood in the industry. Given the variation, provided the variation is within an acceptable range, [Joe White] does certify that the specifications are met. But the variation is to be expected and is not significant.

- Hopefully this background has been helpful and provide[s] reassurance that there is an explanation for the certificates being issued as they are and that the (sic) there is *no question* about the plants' ability to deliver malt that *meets customer specifications*.

- In relation to the practice of substituting barley varieties, as we understand it [Joe White] has *at all times* supplied malt that *meets customer specifications* and in doing so [Joe White has] conducted their business in accordance with industry practice.

- In relation to [gibberellic acid], it appears that *from time to time [gibberellic acid] has been included when it should not have been. But we understand that it is very hard to detect and as far as we are aware no customer complaints have been received.*

(Emphasis added.)

1346 Mattiske gave evidence that he understood this draft had been based on information provided to Fitzgerald in the interviews held with Joe White executives, and reflected the instructions Fitzgerald had been given. As to the last of the points raised, under cross-examination Mattiske accepted he knew at this time that gibberellic acid was being used as part of the malting process for customers who had prohibited its use as an additive. Although he said he could not recall reading the last sentence, Mattiske agreed it was not good or ethical business practice to do something that deceived a customer, particularly where the detection of what was occurring was difficult.

1347 Mattiske did not recall asking any questions about the Malt Proficiency Scheme or being told it was not the applicable policy. Mattiske was not aware of the Viterra Certificate of Analysis Procedure at this time.

1348 When asked whether the sentence referring to Joe White being aware of errors and discussing them with its customers conveyed to him that the Certificate of Analysis process was disclosed to customers, Mattiske said he did not recall thinking too technically about that. Then, entirely non-responsively, Mattiske volunteered that he understood "customers would be doing their own testing" to make sure they were happy with the quality of the products they were getting. However, as Mattiske conceded, this understanding was not based on any information provided by Joe White's executives or, as far as he could recall, Fitzgerald. Mattiske said it did not occur to him to ask whether Joe White's customers were not rejecting the malt delivered because they were ignorant of what was occurring.

1349 Mattiske accepted that the draft talking points referred to Certificates of Analysis recording specifications as they would have tested in a customer's laboratory, but said nothing about the practice of altering the test results.

1350 The talking points went through a number of revisions. Mattiske said he did not spend a lot of time reviewing the drafts.

1351 In response to the email attaching the original version of the talking points document, at 10.10am on 24 October 2013, Mattiske sent an email entitled "Ballarat: Talking points for call with Cargill" to Fitzgerald and Lindner, copied to Pappas, in which he sought to contribute to the talking points:

> To clarify, we will still close on the 31st October. And will proceed to this effect.
>
> Can we strongly say we have not had any rejections from our customers and that all deliveries have been accepted by customers and there are no claims outstanding.
>
> [Joe White] management are of the firm opinion that all transactions are considered standard industry practice over the 100 + years of operation.

1352 The first revisions were made by Stewart and emailed to Fitzgerald at 10.28am on 24 October 2013. In the email, he described his changes as small, and stated that the sentiment was fine. Critically, in the context of barley varieties, Stewart suggested deleting the word "specifications" and replacing it with "needs" in the seventh dot point extracted above, so that it read:

> - In relation to the practice of substituting barley varieties, as we understand it [Joe White] has at all times supplied malt that meets customer ~~*specifications*~~ *needs* and in doing so [Joe White has] conducted their business in accordance with industry practice.
>
> (Emphasis added.)

Mattiske said he did not ask about this change and did not recall spending any time considering the difference. Mattiske said he understood at the time that Joe White was talking to its customers about what they needed. However, he acknowledged that he did not know what Joe White was talking about with its customers. Mattiske also gave evidence he did not recall asking any questions about whether customers had agreed to substitute a particular type of barley for another. Further, he could not explain why he did not, given it was a fundamental question he needed to ask to understand whether there was a problem.

1353 As for Stewart, he said the change was his recommendation as he "knew that it was

not the practice of [Joe White] … to meet customers' specifications" and, being "conscious of this disconformity", he made the amendment to "reflect exactly how Joe White was operating". He said, in this context, "needs" was referring to the needs of the customers in Stewart's assessment to produce beer within specification.[817] He did not discuss the change with Mattiske or Fitzgerald. Under cross-examination, Stewart agreed it was a watering down of the wording and avoided the real fact that the specifications were not being complied with. He acceded to the proposition that a good description of the making of this amendment was an "elision".

1354 At 10.35am, Fitzgerald sent an email to Rees and Norman, stating he attached the latest version, after discussion with Norman. He stated he needed to check the contents of the last paragraph. An hour or so later, Fitzgerald sent an email to Lindner, Pappas and Mattiske, attaching a further version of the talking points, marked up for a discussion at midday.

1355 The third version of the talking points contained significant revisions. Underneath the heading "Differences between labs", the following third dot point was added:

> • It is also worth noting that this process is documented in [Joe White]'s quality system which is ISO accredited. There are documented authorisation levels and the whole procedure is a controlled open process. The documentation explaining this was available in the [Data Room] during the due diligence process.

Under cross-examination, Mattiske said he was not aware of any specific documents relating to the Certificate of Analysis procedures. Upon acknowledging this passage put him on notice that procedures were documented, he gave evidence that he did not ask to see the relevant document. Further, he did not know that the document being referred to and the Certificate of Analysis procedure it contained were hidden from auditors of the International Organisation for Standardisation. And to repeat, it was

817 Stewart had a very broad understanding of what he meant by customer's needs. It was subsequently clarified that when Stewart referred to meeting customers' needs, he included within the meaning of that phrase malt that was supplied even in breach of contract, for example by using gibberellic acid when it was prohibited, provided the beer ultimately produced by the customer was within specification.

incorrect to state that the documentation explaining the "controlled open process" was in the Data Room.

1356 The end of the third version of the talking points also contained significant additions and revisions to the final dot points in tracked underlined changes, including those contemplated by Mattiske's email.[818] Following these revisions, the end of the third version read as follows:

> - In relation to the practice of substituting barley varieties, as we understand it [Joe White] has at all times supplied malt that meets customer ~~*specifications*~~ *needs* and in doing so [Joe White] have conducted their business in accordance with industry practice. There are times when, due to supply issues within the Australian barley market, like varieties have been used to satisfy customer needs – this has in no way compromised the quality of malt being produced and the malt has been accepted by customers without complaint.
>
> - In relation to [gibberellic acid], a small number of [Joe White] customers have requested that [gibberellic acid] not be used in the malting process – for those customers where it is clear that this is important to them then [gibberellic acid] has not been used. For a small number of other customers where this is not a high priority [gibberellic acid] has been used to ensure orders were filled. ~~It appears that from time to time GA3 has been included when it should not have been. But we understand that it is very hard to detect and as far as we are aware no customer complaints have been received.~~ Once again, there have not been any customer complaints and if we believed that this would be a significant issue for the customer it would not have been done.
>
> It is important to note that [Joe White] manages each of its customer's expectations carefully and there have never been any rejections by customers due to the issues raised in your letter. [Joe White] management have also made it clear that they operate within parameters that are consistent with accepted industry practice.
>
> (Additions underlined.)

1357 Despite Mattiske advocating the inclusion of a reference to the lack of complaints Joe White had received from customers, he made no enquiry about whether customers had been informed about the fact that barley varieties were being substituted, or whether the lack of complaint arose from an ignorance of what was occurring. He gave evidence that he simply did not know if the customers had been informed.[819] On

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818 See par 1351 above.

819 Both earlier and later in his evidence, Mattiske was not so unequivocal. When first asked under cross-

the question of Mattiske's understanding concerning Joe White's customers' knowledge of the Operational Practices, and his attitude towards having a proper understanding, the following exchange during his cross-examination was informative:

> And it's your evidence your investigation or the 1 that you caused to be undertaken was thorough and searching?---I believe at the time the investigation was sufficient given the size of the issue we thought it was at the time.
>
> Just in that context explain to his Honour again, would you, why you didn't ask any of the [Joe White] executives whether the practices had been disclosed to customers or not?---Because the customers appeared to be very happy and quite accepting of the quality of malt they had been getting; there hadn't been any issues.
>
> They were happy in their ignorance of what was going on?---I don't know.
>
> You didn't even bother to find out whether [Joe White's] customers knew or not, did you?---No, I didn't.
>
> And yet you say to his Honour that because there was no complaint from the customers, without even knowing whether they knew anything, you drew comfort from that?---Absolutely, yes, I did.

A little later in his evidence, Mattiske said he had a belief that Joe White's executives were actively talking to Joe White's customers, and while he did not know explicitly what they were being told "I *guess* I believed that the customers were *generally* aware of those [Operational Practices]" (emphasis added).

1358 As to the sentence struck through in the third version relating to gibberellic acid, Mattiske gave evidence that he did not recall why it was deleted, or if he asked for it to be deleted, but he did not believe so. He did not recall whether he noticed the

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examination, Mattiske said he did not know what Joe White was telling its customers about altering Certificates of Analysis and was not aware of whether Joe White was making alterations without the knowledge of customers. When it was put to Mattiske that he did not even ask Hughes whether customers were aware of the practices occurring, notwithstanding his earlier answers, Mattiske stated that he thought in general terms Hughes said that customers were aware of "these industry practices, generally" but that he did not "recall the exact conversations we had at the time. It was certainly inferred". In addition to this vague and conclusory evidence (there were other similar accounts given by Mattiske), later during the cross-examination Mattiske gave evidence that he may have had a discussion on the topic of whether customers had been informed about substitution of barley varieties with Fitzgerald, but he could not recall. In summary, when Mattiske's evidence was considered as a whole, there was no probative evidence that he ever had a discussion with anyone in which he asked whether customers knew about each of the Operational Practices, or any practice related to them: see further par 1535 below.

change at the time, and could not recall discussing specific changes with Fitzgerald. When asked whether he had discussions about the drafts, Mattiske said he would have, but he did not recall. Having answered the question, Mattiske continued to give evidence, stating Fitzgerald was getting the points "fact-checked by everybody that needed to check it".

1359 In relation to the last added paragraph, Mattiske said a statement to this effect was what he wanted to be included. However, he conceded he was not familiar with the industry practice being referred to, and said that was why Joe White's management was referred to as part of the comment.

1360 At around midday on 24 October 2013, Lindner and Mattiske discussed by telephone the contents of the talking points. Mattiske did not recall being involved in any discussion about whether to make or accept the amendments then proposed, or any discussion considering the effect of those amendments. His involvement cannot be doubted.

1361 Immediately after this telephone call, Lindner sent an email to Mattiske, copied to Fitzgerald and Pappas, referring to the call and attaching both a marked-up and a clean version of the talking points.[820]

1362 The fourth draft of the talking points contained 2 further changes.

1363 *First*, the sentence inserted in the third version, "The documentation explaining this was available in the [Data Room] during the due diligence process", was deleted. Mattiske said he had no recollection of any discussion as to why this was deleted. He said he took no steps personally to check the underlying documents because he was relying on his "team" to make sure the talking points were accurate. Further, Mattiske gave evidence he did not recall having anything to do with what was in the Data Room.

1364 Mattiske also gave evidence that he probably did ask whether any documents relevant

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820 This email was also forwarded to Glencore's in-house counsel, Matthew Weber, and others at Glencore.

to the practices were included in the Data Room, but he did not recall. Shortly after giving this evidence, Mattiske said he could not recall why he did not ask whether the documentation was in the Data Room. Mattiske then said he recalled asking Fitzgerald and Rees about "what was or wasn't disclosed about those practices in the [D]ata [R]oom, and neither of them were sure". Mattiske then changed his evidence yet again, saying he could not recall whether he asked or whether it was volunteered, but he did recall a discussion about what was disclosed in the Data Room.

1365 In the absence of any direct evidence on the point, it must be inferred that someone involved in the settling of the fourth draft of the talking points could not, at the very least, be satisfied that the relevant documentation had been included in the Data Room. Much more likely, given both the issue had been squarely raised and the simplicity of the task of checking, together with Fitzgerald stating the matter would be checked,[821] was that Fitzgerald (and probably also someone under his direction) realised the relevant documents were not in the Data Room. That this occurred is made even more likely by the fact that the talking points specifically stated, correctly, that the Malt Proficiency Scheme was actually in the Data Room, and made no reference directly or otherwise to the Viterra Certificate of Analysis Procedure or any other document. Indeed, the reference to the "documentation explaining" the "authorisation levels and the whole procedure" was consciously deleted.

1366 *Secondly*, the dot point relating to gibberellic acid underwent the following revision:

> - In relation to [gibberellic acid], ~~a small number of [Joe White] customers have requested that GA3 not be used in the malting process – for those customers where it is clear that this is important to them then GA3 has not been used. For a small number of other customers where this is not a high priority GA3 has been used to ensure orders were filled. Once again, there have not been any customer complaints and if we believed that this would be a significant issue for the customer it would not have been done.~~ it appears that from time to time [gibberellic acid] has been included when it should not have been. However, I am not aware of any complaints or claims in relation to this.

Mattiske said he did not recall reading these amendments.

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821 See par 1324 above.

1367 The above revision in relation to gibberellic acid brought the document largely in line with the original draft, aside from the final sentence with the reference to the difficulty of detecting gibberellic acid having been removed.

1368 The final version of the talking points reflected all the changes proposed in the fourth version and read as follows:

> - I am calling in relation to your letter of 22 October. Further to our discussion yesterday, we have commenced our internal enquiries in relation to the 3 practices noted in your letter.
> - Your concern around the plant *not being sufficient to meet the specifications set out in customer contracts is unfounded*. We have confirmed once again with the malt management that the plants are adequate to deliver malt that *meets customer specifications*.
> - The certificate of analysis issue can be explained by differences between labs and standard variation in testing.
>
> - ***Differences between labs***:
>
> - It is well known and understood within the industry that laboratories have analytical errors. For example, a sample may test as a 12 at [Joe White]'s lab, but test as a 10 at Cargill's lab. [Joe White] is aware of these errors *as they are discussed with customers* and also because there is a published program known as [the Malt Proficiency Scheme] which details these errors. *The [D]ata [R]oom contained information on [the Malt Proficiency Scheme].*
>
> - We now understand from the management team that the practice referred to in your letter involves [Joe White] including on the [Certificate of Analysis] the specification that the sample would have if tested in the customers lab rather than the specification it had when tested in [Joe White]'s lab. For example, the certificate would say 10 instead of 12. When issuing the [Certificate of Analysis Joe White] is taking into account the analytical error.
>
> - It is also worth noting that this process *is documented* in [Joe White]'s quality system which is *ISO accredited*. There are *documented* authorisation levels and the whole procedure is a *controlled open process*.
>
> - ***Standard variation in testing***:
>
> - I also understand that when [Joe White] blends malt there is *some variation in the results* every time the test is repeated. *This is well understood in the industry*. Given the variation, *provided the variation is within an acceptable range, [Joe White] does certify that the specifications are met*. But the variation is to be expected and *is not significant*.

- Hopefully this background has been helpful and provide[s] reassurance that there *is an explanation for the [Certificates of Analysis] being issued as they are* and that the there is *no question about the plants ability* to deliver malt that *meets customer specifications*.

- In relation to the practice of substituting *barley varieties*, as we understand it [Joe White] has at all times *supplied malt that meets customer needs* and in doing so [Joe White] *have conducted their business in accordance with industry practice*.[822] There are times when, due to supply issues within the Australian barley market, like varieties have been used to satisfy customer needs – this has in *no way compromised the quality of malt being produced and the malt has been accepted by customers without complaint*.

- In relation to [gibberellic acid], it appears that from time to time *[gibberellic acid] has been included when it should not have been*. However, I am not aware of any complaints or claims in relation to this.

- It is important to note that [Joe White] manages each of its customer's expectations carefully and there have never been any rejections by customers due to the issues raised in your letter. [Joe White] management have also made it clear that they *operate within parameters that are consistent with accepted industry practice*.

(Emphasis added.)

1369 Mattiske gave evidence at trial that although he could not recall "in what order or how" he ran through the matters in the talking points with Purser, he would have had the notes in front of him when making the call. When asked specifically about whether he told Purser Joe White had met customer needs with respect to barley varieties, Mattiske said he would have said something along those lines. Further, although Purser only had a general recollection of this conversation, her evidence was not inconsistent with the talking points.

1370 In addition, Mattiske repeated to Purser he was unaware of any practices as identified by Cargill before 22 October 2013.[823] Mattiske gave evidence that he told Purser that Glencore did not have time to do a proper investigation, and that all Glencore's investigations had been based on interviews with Joe White's executives. When it was suggested to Mattiske during cross-examination that it was within his power to cause enquiries to be made to analyse the extent of the 3 practices, which customers they related to, what percentage of sales they represented, and a thorough analysis,

822 Compare par 1395 below.
823 See par 1234 above.

Mattiske agreed, but then suggested it would have taken months. When challenged about the length of time it would have taken, Mattiske immediately acknowledged he was not sure how long it would have taken, but said he did not think it could have been done in the available timeframe. Mattiske said further he was focused on the solution and did not believe he needed to know the size of the problem to find a solution.

1371 In any event, I find that, in substance, Mattiske stated each of the matters set out in the final version of the talking points. The intention of preparing the document was for him to convey each of the points, and nothing in Mattiske's evidence suggested he did otherwise.

1372 In response, Purser told Mattiske Joe White's conduct was unacceptable and a major issue. She stated that Cargill was maintaining all its rights. Purser further stated that Cargill took offence at the notion that the conduct identified was standard industry practice.[824] She told Mattiske that Cargill would not engage in such conduct. Mattiske gave evidence that he believed he responded by saying that Glencore honoured its contracts and that, if Joe White was acting outside customer contracts, then Glencore would not condone this. Purser said she wanted a written response to the Cargill 22 October Letter. She also gave evidence that, at that time, she considered that, if the alleged conduct were true, then it was a serious matter.

1373 A comparison between the final talking points and the matters that Hughes, Youil, Wicks and Stewart told Fitzgerald during the interviews on 23 October 2013 demonstrated the significant difference between what Cargill was told and what the executives told Glencore and Viterra as part of the investigation. Without being exhaustive, Cargill was not informed of the following matters stated by 1 or more of

824 An interesting feature of this case was that there was no issue that Cargill's stated position to the Viterra Parties in October 2013 was that the Operational Practices were not standard industry practices. Further, despite Purser being the conveyor of Cargill's position, during her cross-examination it was never put to her precisely what the Viterra Parties contended were standard industry practices. Furthermore, Purser's evidence was that she had no knowledge of the suggestion made to her during cross-examination that Cargill was aware of the Operational Practices before the Acquisition Agreement was entered into.

the Joe White executives interviewed:[825]

(1) Joe White was always struggling to meet customer specifications.

(2) Brewers' malt requirements were almost impossible to achieve.

(3) It could not be stated with certainty whether Cargill had purchased a business that could not be delivered.

(4) Specifications were often outside customer contracts.

(5) Hughes did not take exception to a question referring to wrong certificates being issued.

(6) There were *some* open communications with customers regarding the practices (but also see subparagraphs (17), (19), (20), (26), (27), (28), (32) below).

(7) Stewart had no idea of the legal implications of stating a result in a Certificate of Analysis when the laboratory result was different.

(8) If Joe White were required to comply with customer specifications it would create a reputational risk.

(9) Breaches of contract with Joe White's customers were a reputational risk.

(10) If Joe White had to supply malt in accordance with customer contracts it would result in commercial suicide and Joe White's brand would be decimated.

(11) There was legal exposure on legal day 1 if the wrong barley varieties could not be used.

(12) Applying Cargill's model would be difficult.

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825 A similar list of the comparison, which includes a comparison of the 25 and 30 October Reply Letters (see pars 1405, 1512, 1524 below), is to be found in annexure C to these reasons.

(13) Joe White was trying to buy barley as cheap as possible.

(14) It had been suggested that Cargill knew of "industry practice" and wanted to know how Joe White approached the issue.

(15) Joe White was required to source cheaper barley and up until March 2014 would not always have barley available which could mean big monetary losses.

(16) Youil did not know if customers were aware of Joe White's approach.[826]

(17) If Joe White were required to source the correct barley varieties overnight, Joe White would possibly need to pay more or fail to satisfy obligations under customer contracts.

(18) Joe White did not knowingly communicate the substitution of different barley varieties to customers.

(19) Joe White guessed what the customer wanted and acted accordingly rather than telling the customers.

(20) It was difficult to get the required barley.

(21) Glencore did not supply Joe White with the required barley varieties.

(22) Joe White was getting bad barley from Glencore.

(23) Provision of bad barley eroded Joe White's ability to meet customer specifications.

(24) If Joe White was required to use the correct barley varieties, there may be delays with shipments.

(25) Joe White did not communicate with its customers around contracts.

826 From the notes it was not clear to what this was referring: see fn 788 above.

(26) Joe White had been breaching customer contracts by using barley inconsistent with the contracts and not telling the customers.

(27) Gibberellic acid was used at all of Joe White's plants routinely when it should not be used.

(28) Gibberellic acid was used to drive capacity.

(29) Gibberellic acid was used about 20 percent of the time when it should not have been.

(30) Specifications were often outside customers' contractual specifications.

(31) Whilst Heineken and Sapporo conducted audits, they would not know about the use of gibberellic acid.

(32) The use of gibberellic acid was a reputational risk, which was twice as big an issue when the customer required its malt be additive free.

1374 To be clear, there was no evidence to suggest that each of the matters identified in the previous paragraph were actually conveyed to Mattiske. Indeed, in light of his responses both orally and in writing to Cargill, it was likely that they, or at least many of them, were not. Exactly how the various statements of the Joe White executives were reconciled and why they were filtered in the manner that they were was not clear on the evidence, particularly in light of the fact that none of Fitzgerald, Norman, Rees or Hughes were called to give evidence and Lindner's recollection of this issue was almost non-existent.[827]

1375 On the evidence that was available, it seemed that Fitzgerald was the representative of Viterra, also acting on the instructions of Glencore, who was co-ordinating the information and determining the message that ought to be conveyed to Mattiske for the purpose of responding to Cargill.[828] Alternatively, it may have been that there was insufficient rigour in the reporting process so that, through inadvertence or lack of

827 See par 1384 below.
828 See par 1248 above and par 1384 below.

care, material matters were not brought to Mattiske's attention. Viewed objectively, there could have been no basis to conclude that the matters that had been relayed to Fitzgerald were insignificant and therefore need not have been communicated to Mattiske. Many matters apparently not told to Mattiske were highly material to the queries that had been raised. That said, in fairness to Fitzgerald and others who reported to Mattiske, it would not be sound to draw a conclusion too firmly on these matters based on Mattiske's evidence. His recollection of some of the conversations he was involved in at the time was either non-existent or far from reliable.

1376 At 2.30pm on 24 October 2013, Mattiske sent an email to Lindner, Fitzgerald and Pappas, stating that the conversation with Purser was "ok" and that she had requested a written response be provided. Mattiske stated that, during the conversation, he confirmed various matters, including that the changes to the Certificates of Analysis were within the "approved document process" of the International Organisation for Standardisation and referred to in the Malt Proficiency Scheme. His email referred to barley varieties and gibberellic acid, and on both topics stated there had been no claims or disputes. With respect to gibberellic acid, he referred to it being used for customers who specifically excluded it, and said Hughes had confirmed this had now stopped. Mattiske did not refer to any such confirmation of cessation with respect to barley varieties.[829]

1377 He said in his email that he mentioned Completion "about 3 times" and the fact that 31 October 2013 was very close, and Purser gave no indication of an intention to defer. Pappas responded, stating it looked like a good outcome. Mattiske gave evidence that he raised the issue of Completion because of the logistics involved, and not because he had any concern about whether Cargill would complete.

1378 Purser sent an email to Eden, Viers and Savona summarising the telephone discussion with Mattiske.[830] The email, the accuracy of which Purser confirmed in her evidence, referred to Mattiske confirming Glencore had been involved in investigating the

829 See par 1390 below.

830 The email was sent on the following day.

points raised in the Cargill 22 October Letter. The email recorded the main points Mattiske relayed as:

> (1) [Joe White] employees are adamant that the plants are capable of producing the qualities contractually sold to customers.
>
> (2) The policy around how they manage quality certificates *was disclosed in the Data Room in the [Malt Proficiency Scheme] documents*.
>
> (3) All quality issues are *fully and properly documented*.
>
> (4) All testing procedures are within industry standards.
>
> (5) [Joe White] has not received any quality complaints from [its] customers – most of whom [Joe White has] very long relationships with.
>
> (6) [Joe White] has "occasionally" used [gibberellic acid] when supplying malt to customers that have requested that it not be used. He implied the customers were implicitly aware of this although they required the [Certificate of Analysis] saying it had not been used. He said *the practice would stop immediately*.
>
> (7) [Joe White] has sometimes been unable to source a specific barley variety required by a customer because it was unavailable in the market. In such cases they would source and use a variety with the same technical [specifications]. The *customers might be aware* but the process was *not documented*.
>
> (Emphasis added.)

The email also recorded Mattiske's stated belief that while a couple of Joe White's practices needed tightening up, there was no fundamental issue. Mattiske also repeated that Glencore had been completely unaware of the practices. In her evidence in chief, Purser said that she could not recall the exact words, but that Mattiske told her that Joe White's plants were able to produce to the required specifications, that the

testing standards were as expected and that as a result of the conversation she believed the problem was not that severe.[831]

1379 In closing submissions, the Viterra Parties noted that the email had not been put to Mattiske during his cross-examination. Little, if anything, arose from this fact. After giving evidence her email was accurate and the email having been tendered, Purser was not taken to this document during her cross-examination. In the circumstances where the contents of the email was not put in issue with Purser, the decision not to cross-examine Mattiske on its contents was perfectly understandable.

1380 There are a number of observations to make about what Mattiske said to Purser. *First*, all the Joe White executives were not adamant Joe White's plants were capable of producing malt of the quality contractually agreed to be sold to its customers. Quite the contrary.[832] *Secondly*, not only were the policy or procedures around managing Certificates of Analysis not disclosed in the Data Room, but neither the Viterra Certificate of Analysis Procedure nor the Malt Blend Parameters Procedure was referred to by Mattiske. Further, the Malt Proficiency Scheme document (which was in the Data Room and was referred to) did not disclose the Operational Practices. Rather, what was disclosed merely represented a component of some of the procedures concerning Certificates of Analysis, but the manner in which it did so could not be discerned from the Malt Proficiency Scheme document itself. *Thirdly*, Mattiske had obviously been informed that there were documents available which disclosed "[a]ll quality issues". *Fourthly*, Mattiske was sufficiently concerned about the use of gibberellic acid contrary to customers' instructions to direct it must stop immediately. Further, Purser understood from what Mattiske said that a level of

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831 The Viterra Parties submitted it should not be found that Mattiske said words to the effect that there was no fundamental issue because the effect of Purser's evidence was that that was the impression Purser formed, and it was not the evidence of what was said. This submission is rejected for a number of reasons. The contemporaneous email recorded that Mattiske's belief was "there was no fundamental issue" in the context where she was purporting to record what he had said. (The fact that the words "he told me" do not preface the relevant statement does not detract from the relevant context.) Further, the proposition that Mattiske did not say these words was not put to Purser. Furthermore, her evidence of her belief was entirely consistent with the words having been spoken. Finally, it is highly likely Mattiske would have said words to that effect; it was consistent with the message that was being conveyed by the Viterra Parties at that time: see par 1405 below.

832 See, for example, pars 1280, 1281, 1291, 1292, 1297, 1299, 1307 above. Compare par 1306, but, obviously, Joe White did not have the "right barley" for all its customers.

misreporting had been involved. *Fifthly*, with respect to the use of unauthorised barley varieties, Mattiske could only say that customers "might" be aware; in short, he did not express any belief that they were aware. He also appreciated the practice was not recorded in any written policy or other document. Further, in contrast to the prohibited use of gibberellic acid, he gave no assurance that the Varieties Practice would stop.

1381 Lindner sent a first draft of the proposed response as an attachment to an email to Fitzgerald, copied to Pappas and Mattiske, at 4.38pm on 24 October 2013. This draft of the letter stated:

> Dear Philippa
>
> I refer to your letter dated 22 October 2013 and our subsequent discussions on 23 October 2013 and 24 October 2013. As discussed, *Glencore* was surprised by your letter and had no knowledge of [Joe White] engaging in the practices referred to. *Glencore has since made inquiries of [Joe White] management* and can advise as follows:
>
> 1. **Issuing certificates of analysis to customers which represent that malt supplied to the customers met with particular specifications where the malt supplied did not meet those specifications**
>
>   We understand that you are concerned that the plant is not sufficient to meet the specifications set out in customer contracts. *This concern is unfounded*. We have confirmed that the *plants are adequate to deliver malt that meets customer specifications*.
>
>   [Joe White] *issues certificates of analysis in compliance with its ISO accredited quality system*. It is well understood within the industry that variations exist between labs and arise when the same sample is repeatedly tested within the same lab. The *discrepancy referred to is within tolerances permitted by the ISO certified quality system*.
>
> 2. **Supplying malt to customers which has not been produced from the specific barley varieties required by those customers**
>
>   *There have been instances* where barley other than that specified in a particular contract has been used. However, *the malt delivered has, as far as we are aware, always met the technical specifications* required by the customer. We are *not aware of any complaints* or claims from customers about this.
>
> 3. **Supplying of malt to customers which had been produced from a malting process that involves the addition of gibberellic acid (GA3), where those customers require that GA3 not be used in the production of malt supplied to them**
>
>   *There has been non-compliance* with customer requirements around GA3. However, we are *not aware of any complaints* or claims in relation to this.

> [Joe White] manages each customer's expectations carefully and as far as we are aware no customer has ever rejected malt due to the issues raised in your letter. The senior managers of [Joe White] have made it clear that *they operate within parameters that are consistent with industry practice*. (Given this and the short time between now and completion, we don't propose to introduce changes to the processes and procedures of [Joe White]. We believe that it would be more appropriate for Cargill to consider what (if any) changes are required once it takes control.)
>
> (Emphasis added.)

1382 At 5.02pm on 24 October 2013, Lindner sent a further email to Mattiske, copied to Pappas and Fitzgerald, that attached a second draft of the letter "incorporating [Fitzgerald]'s comments".

1383 Lindner sent an email to herself on the evening of 24 October 2013.[833] It recorded a conversation she had had with Fitzgerald that afternoon concerning the proposed response. Lindner recorded that in that conversation she asked Fitzgerald whether there was any risk that the "responses under headings [numbered] 2 and 3 could be considered misleading on the basis that they understated the frequency of the practices referred to". Lindner's note recorded:

> Subject to making the amendments in the attached revised draft emailed to [Mattiske], [Fitzgerald]'s view was that the responses were not misleading.

1384 Although Lindner said she could not recall the specific conversation with Fitzgerald, she gave evidence that she discussed her concerns with Fitzgerald and she was "satisfied with where we landed". She said that neither herself nor Pappas had verified anything and that they were being very mindful of the specific words being used.

1385 The Viterra Parties submitted that this exchange demonstrated that the Viterra Parties were determined not to mislead Cargill and to do their best in the circumstances, including the tight timeframe. This submission overstated the position. It was clear that Lindner was conscious that there might have been a risk that the responses concerning unauthorised barley varieties and gibberellic acid were misleading in light

833 The email Lindner sent herself attached both the email she sent to Fitzgerald at 4.38pm on 24 October 2013 and the email she sent to Mattiske at 5.02pm on the same day.

of her understanding of the frequency of the relevant practices. In the absence of any evidence about what Fitzgerald said to her to alleviate her concerns, it would not be plausible to find that her state of mind after her discussion with Fitzgerald exhaustively reflected the state of mind of each of the Viterra Parties, or even that her state of mind was necessarily consistent with others acting for or on behalf of the Viterra Parties.

1386 Shortly after, Mattiske made a suggestion with respect to the paragraph numbered 3 in the draft. He asked Lindner to add that Joe White management had confirmed that they were able to produce the required customer specifications without adding gibberellic acid. He also asked for the last sentence in brackets to be removed on the basis that he did not want to "infer anything at this stage". On the draft being amended by Lindner as directed, Mattiske said he would discuss it with Glencore Grain BV[834] overnight.

1387 Also in the late afternoon on 24 October 2013, Stewart sent an email to Fitzgerald, copied to Hughes. Stewart stated the email contained the information requested for barley variety use and additive free malting, and that it was subject to legal professional privilege. The attachment entitled "Barley Use and Additive Free Malting" provided a snapshot of Joe White's position. Stewart stated a survey had been conducted of barley varieties used across Joe White's plants for the week of 9 to 15 September 2013. Stewart stated: "Compliance to the correct barley variety is expressed in the table below". That survey revealed an average compliance rate of 74 percent. Some plants were well below this level, with Port Adelaide only complying 42 percent of the time, Perth complying 60 percent and Sydney 68 percent. Stewart observed that the off-specification barley usage was in line with the "Transformation Project targets".[835]

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834 Glencore Grain BV was the head company of Glencore's grain business.

835 The Viterra Parties submitted the attachment was unclear as to its meaning. It was suggested the percentage figures Stewart provided may have reflected the percentage of total barley used that was the correct variety, or they may have reflected the percentage of shipments in respect of which there was some level of non-compliance with the customer's specified varieties. In my view, the plain words used, being "Compliance to the correct barley variety" and "Compliance to Barley Variety" have the

1388 Consistent with the Key Recommendations Memorandum circulated on 21 October 2013,[836] Stewart estimated a loss in production of around 14,000 tonnes, or 2.5 percent, if "the appropriate malt quality" was to be achieved without using exogenous gibberellic acid where prohibited. Stewart expected these figures would decrease as new varieties became available, as it was anticipated they would have higher levels of vigour.

1389 Stewart gave evidence the email was forwarded to Fitzgerald following a request from Fitzgerald at a meeting on 23 October 2013.[837]

1390 Pausing here, Mattiske gave evidence that "[o]n or prior to 24 October 2013" he had at least 1 further conversation about the Cargill 22 October Letter with Hughes, and possibly others, but he could not recall the specific details. However, Mattiske did recall telling Hughes in the conversation or conversations that "the practices" needed to stop immediately. According to Mattiske's evidence in his witness statement, Hughes accepted that both the use of "non-prescribed" barley varieties and the prohibited use of gibberellic acid should be stopped.[838] But Hughes continued, stating the Certificate of Analysis issue was not a problem. During this conversation Mattiske's evidence was that Hughes also said that the use of gibberellic acid would be resolved in the near future, and that the barley varieties issue was a "one-off". Finally, Mattiske deposed that Hughes said there were no issues and that the customers were happy.

1391 There was an obvious conflict between Mattiske's account of what was said concerning the use of unauthorised barley varieties. On the account referred to immediately above, Hughes accepted the practice should stop. In his initial

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clear meaning that the figures stated represented the level of compliance. Further, it was noteworthy that the suggested ambiguity was not raised with Stewart. He was taken to this document during his cross-examination to confirm its contents. No uncertainty as to the meaning of the document was raised. The Viterra Parties chose not to raise any issue in this regard in re-examination.

836 See pars 1210, 1215 above.

837 See par 1304 above.

838 Contrast this evidence with what Mattiske said Hughes had said at the first meeting between them after receipt of the Cargill 22 October Letter concerning the acceptability of using alternate barley varieties: see pars 1251-1252 above. See also par 1351 above.

response,[839] Mattiske gave evidence that Hughes said there was nothing wrong with the practice. There was no suggestion Hughes changed his mind, or was persuaded to alter his position over this short period of time.

1392 Further, there was also a tension between Mattiske's position that he believed there was nothing wrong with any of the practices, and telling Hughes that they were to stop immediately. On this version of his evidence, Hughes only sought to persuade him Joe White's conduct was satisfactory with respect to Certificates of Analysis.[840]

1393 Mattiske also gave evidence of another discussion about which he was not precise with respect to its timing. His evidence was that "the Joe White executives around this time"[841] stated that the practices relating to Certificates of Analysis were fine. Further, Mattiske said 1 or more of them stated that Cargill had a different process and that if Joe White started using that different process it would mean that Joe White's current process would not be required in any event. Mattiske was further told that Joe White engaged in far more extensive testing, which resulted in much higher levels of subjectivity, which gave rise to the need to amend to reflect what the customer would see in its own tests. Finally, Mattiske was told Cargill's process involved a far narrower form of testing which might resolve the issue.

1394 No doubt in response to what Mattiske had told Purser the day before,[842] on the morning of 25 October 2013 Savona sent an email to Eden and Viers attaching the Malt Proficiency Scheme. The email simply said, "Document discussed with [Purser]". On the same day, Viers sent an email to Van Lierde and Eden. The subject of the email was "recap on conversation with [G]lencore", and referred to Purser's email setting out the details of her discussion with Mattiske. Viers stated that he had been approached by the chief financial officer of Viterra (presumably Rees) earlier that day,

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839 Ibid.

840 See further pars 1536-1537 below.

841 Although this evidence was plainly indiscriminate, it was contained in Mattiske's witness statement and not the subject of objection. However, the evidence will not be treated as establishing each and every executive made the statements attributable to them. In particular, the statements will not be attributed to Stewart or Argent as there is no probative evidence that either of these executives ever discussed these subject matters with Mattiske in October 2013 (or, for that matter, at any other time).

842 See par 1378(2) above.

and had been told that customer and competitive information would be locked down until Completion. Viers said that the chief financial officer had also stated that "their sensitivity was up" in light of Cargill's communication to discuss the matter of Certificates of Analysis (being a reference to the Cargill 22 October Letter). Viers recorded his understanding that Hughes and his team were not to discuss the matter with Cargill. Viers suggested there were a number of issues for Glencore to deal with, and expressed the view that Cargill would not be completely clear about them until Completion. Viers then made specific reference to the second matter raised in Purser's email,[843] and stated that on De Samblanx's initial review of the Malt Proficiency Scheme it was unclear how the Viterra Parties were making a connection to the Certificates of Analysis, given it was simply an industry calibration exercise.

1395 Also on 25 October 2013, Fitzgerald forwarded the draft letter to Hughes, requesting confirmation that Hughes was "comfortable" with the contents of the letter.[844] The last sentence of the draft sent to Hughes recorded that senior managers of Joe White had made it clear that they operated within parameters that were consistent with industry practices. At 2.52pm, Hughes replied, attaching an amended draft and stating in his email:[845]

> [Fitzgerald] please call me when you get back in your office to discuss, I have made some changes. Comfortable with it now but I would point out that the last sentence applies to 1 and 3 but is probably stretching it for point 2 *as this was an internal Viterra driven initiative to use cheaper barley to improve profitability, this does happen elsewhere but is stretching the industry practice comment.*
>
> I reviewed together with [Stewart].

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843 Ibid.

844 Obviously, Hughes was aware that Fitzgerald had been provided with far more information about the Operational Practices in the preceding days as Hughes himself had given substantially more detail than was contained in the draft letter: see pars 1279-1288 above. Presumably, Hughes accepted that Fitzgerald, as in-house counsel who had been told directly by Hughes of the more detailed information, had decided it was appropriate to give such a limited response and that the query about Hughes being "comfortable" was directed to what was actually contained in the draft rather than a more probative request about what could be included to properly respond. Interestingly, when Hughes' senior counsel was asked during closing submissions about the level of disclosure contained in the Viterra Parties' draft response to the Cargill 22 October Letter, he declined the opportunity and said he did not want to make any submission on the issue. It was perfectly understandable why such an approach was adopted.

845 As per the draft at par 1381 above, the references to 1, 2 and 3 in Hughes' email reflected respectively the 3 practices that had been raised by Cargill.

(Emphasis added.)

Mattiske was not certain whether Hughes had specifically referred to the internal Viterra driven initiative when Mattiske first telephoned Hughes and others after receipt of the Cargill 22 October Letter.

1396 The draft of the letter, as amended by Hughes, contained a number of significant changes from Lindner's original draft.

1397 *First*, the words "and have been audited and approved by customers as required" were added to the last sentence in the first paragraph under point 1, so that it read:

> We have confirmed that the plants are adequate to deliver malt that meets customer specifications and have been audited and approved by customers as required.

1398 *Secondly,* the sentence "[t]he discrepancy referred to is within tolerances permitted by the ISO certified quality system" was deleted from the second paragraph under point 1.

1399 *Thirdly*, the second sentence under point 2 was amended, to read:

> However, the malt delivered has, as far as we are aware, always met the technical ~~specifications required by~~ <u>needs of the customer</u>.

1400 *Fourthly*, the words "although modified production conditions may be required" were added to the last sentence of the first paragraph under point 3, so that it read:

> However, we are not aware of any complaints or claims in relation to this and [Joe White] management has confirmed that they are able to produce the specification of malt required to meet customer demands without adding GA3 although modified production conditions may be required.

1401 In the early afternoon of 25 October 2013, Fitzgerald forwarded Hughes' email and the attached revised letter to Mattiske and, separately, to Lindner and Pappas. Fitzgerald wrote that he had asked Hughes to consider the draft letter, and drew attention in both emails to the fact that Hughes was not comfortable saying that point 2 was industry practice. He said he would speak with Lindner to vary the wording "a bit". Fitzgerald took no exception to Hughes' suggestion in the email that the issue being addressed in point 2 was because of Viterra's initiative to use cheaper barley to

improve profitability.

1402 In stark contrast to much of Mattiske's evidence about being unable to recall what Fitzgerald, Norman or Rees told him about the interviews with Hughes, Youil, Wicks and Stewart in response to the Cargill 22 October Letter, Mattiske purported to be able to recall specifically a conversation with Fitzgerald before the 25 October Reply Letter was sent.[846] Mattiske gave evidence that he asked if "everyone had reviewed" the 25 October Reply Letter. Unprompted, Mattiske then chose to add to his answer and explain what he meant by "everyone", which he said included the Joe White executives, the other Viterra executives and legal counsel. He continued by stating that he asked Fitzgerald if "he was comfortable with what was put in the letter as a result of *those people* having reviewed it" (emphasis added). He also gave evidence he asked Fitzgerald whether he was satisfied with its factual accuracy and Fitzgerald said he was.

1403 Mattiske was then asked if he enquired of Fitzgerald whether Fitzgerald sought an assurance from "the [Joe White] executives" about the factual accuracy. Mattiske answered affirmatively, before gratuitously stating that he was confident Fitzgerald "had asked the [Joe White] executives" to review the 25 October Reply Letter. When pressed on this issue, Mattiske then said Fitzgerald referred to Hughes checking the letter,[847] but could not recall any other Joe White executive being referred to. Mattiske gave evidence that he also relied on Rees and Norman, as well as Mallesons, to have checked the letter.

1404 Later in his evidence, Mattiske said he relied on the data collected by the people drafting the letter, including Fitzgerald, with the belief that the majority of the information came from Hughes. Consistent with the talking points,[848] he said it was his idea to state that Glencore was not aware of any complaints. However, Mattiske acknowledged he did not know whether Joe White's customers had been made aware

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846 See par 1405 below.
847 Mattiske did not directly discuss any draft with Hughes or any other Joe White executive.
848 See par 1351 above.

of any of the matters the subject of the 25 October Reply Letter.[849]

1405 The final version of the letter was sent to Purser on 25 October 2013 ("the 25 October Reply Letter")[850] and read:

> Dear Philippa
>
> I refer to your letter dated 22 October 2013 and our subsequent discussions on 23 October 2013 and 24 October 2013. As discussed, Glencore was surprised by your letter and had no knowledge of [Joe White] engaging in the practices referred to. Glencore has since made inquiries of [Joe White] management and can advise as follows:
>
> 1. **Issuing [C]ertificates of [A]nalysis to customers which represent that malt supplied to the customers met with particular specifications where the malt supplied did not meet those specifications**
>
>   We understand that you are concerned that the plant is not sufficient to meet the specifications set out in customer contracts. This concern is unfounded. We have confirmed that the plants are adequate to deliver malt that meets customer specifications and have been audited and approved by customers as required.
>
>   [Joe White] issues [C]ertificates of [A]nalysis in compliance with its ISO accredited quality system which is a documented procedure. It is well understood within the industry that significant variations exist between laboratories and also arise when the same sample is repeatedly tested within the same laboratory.
>
> 2. **Supplying malt to customers which has not been produced from the specific barley varieties required by those customers**
>
>   There have been instances where barley other than that specified in a particular contract has been used. However, the malt delivered has, as far as we are aware, always met the technical needs of the customer. We are not aware of any complaints or claims from customers about this.
>
> 3. **Supplying of malt to customers which had been produced from a malting process that involves the addition of gibberellic acid (GA3), where those customers require that GA3 not be used in the production of malt supplied to them**
>
>   There has been non-compliance with customer requirements around GA3. However, we are not aware of any complaints or claims in relation to this and [Joe White] management has confirmed that they are able to produce the specification of malt required to meet customer

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849 Based on the contents of the 25 October Reply Letter, Mattiske said he believed the customers were "testing the barley" and were happy with the products they were getting.

850 The 25 October Reply Letter was on Viterra letterhead, and signed by Mattiske as country manager of Australia and New Zealand Glencore Grain, Viterra Ltd. Mattiske gave evidence the letter was sent in his capacity as an executive of Glencore. Whether this was "Glencore Grain" or Glencore was of little moment, as the letter itself spoke on behalf of "Glencore" and Viterra Ltd.

> demands without adding GA3 although modified production conditions may be required.
>
> [Joe White] manages each customer's expectations carefully and as far as we are aware no customer has ever rejected malt due to the issues raised in your letter.[851]

1406 When Eden read the 25 October Reply Letter, he thought the response was very casual. He said he took comfort from the reference to Joe White's "ISO accredited quality system",[852] but he thought there was insufficient detail overall to put his mind at rest. He said the 25 October Reply Letter gave him no understanding of the extent of the problem as there were so many unknowns.

1407 Equally, Viers did not consider the 25 October Reply Letter was a complete answer to the questions raised. In particular, Viers said Glencore seemed to be suggesting the issues of incorrect barley varieties were limited, and did not say the wrongful use of gibberellic acid was widespread, but he remained concerned about whether there would be ongoing issues.

1408 Viers emailed Cargill's in-house lawyers referring to an expectation that at least some of the practices would continue to take place and might not be able to be remedied in the short-term without significant concessions by the customers. He further stated that his biggest concern was around the barley variety issue, which he suggested could put Cargill in a very difficult situation and in immediate default on day 1. Viers expressed the need to understand the extent of the issues and to work well with Joe White management to define an approach, which he suggested would be complex and take time. After noting Cargill did not have access to Joe White management at that time, he suggested a further letter be sent to Glencore "demanding immediate access to the issues" for the purpose of mitigating Cargill's loss.

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851 For completeness, Viers gave evidence that after Cargill took control of Joe White he did not become aware of any complaints from Joe White's customers about the supply of malt before 1 November 2013 because Joe White had used the incorrect barley variety or prohibited gibberellic acid. However, he also gave evidence that he was not sure how the customers would have known about such things in relation to barley varieties. No doubt, the same observation could have been made with respect to gibberellic acid, but the issue did not arise during his cross-examination.

852 Viers gave evidence that he also took some comfort when the existence of ISO accreditation was brought to his attention in July 2013.

1409 As aspects of the Operational Practices were becoming known at Cargill, a document was being prepared in advance of an upcoming Cargill, Inc board meeting in November 2013. On 25 October 2013, Eden sent an email to Conway and the executive assistant of 2 other senior executives stating he had updated the document being prepared for the board.[853]

1410 The proposed board paper provided some history of the board approval process. It noted that the purchase price of $420 million was the equivalent of US$374 million, being below the amount approved by the board on 9 July 2013 of US$400 million. An estimate was given that the total funds required to complete was nearly US$450 million, noting that this was an increase from Cargill's projections as at 4 August 2013 due to currency fluctuations.

1411 The document also gave some history of the integration, noting the project team had launched it on 1 October 2013. It was stated that the integration team was on track for a smooth transition for Cargill's takeover of the Joe White Business on 1 November 2013. The last paragraph of the document, which was added by Eden and approved by Conway, read as follows:

> Of significance, we have reason to *believe certain practices of [Joe White] plant and lab operations are not aligned with [the Cargill Code]*. While our *knowledge of the details are limited*, the potential *costs to remedy may be significant*. We have put Glencore on notice as per the [Acquisition Agreement] conditions. Our *discovery of the details and costs to remedy will happen post close*.
>
> (Emphasis added.)

1412 Conway's evidence was that, as Eden had said so, he believed it was true that the integration was on track for a smooth transition.[854] Conway approved the wording of the document and was happy for it to be provided to the board. Further, contrary to the Viterra Parties' submission, the last sentence of the passage referred to above did not reflect a belief on Cargill's part that it was not entitled to receive, and would not

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853 On its face, the document stated that Eden had prepared it, but Eden said it had been prepared by someone else before he added his comments.

854 Incidentally, Conway did not see the 25 October Reply Letter, and gave evidence that he saw it for the first time when it was shown to him in the witness box. Conway's evidence was that he was told that Glencore's response was not full, but he never reviewed the letter to form a view about this himself.

have received, substantive answers from the Viterra Parties to its queries in late October 2013. Such a submission ran contrary to Cargill's openly stated position at the time.[855] Rather, the statement in the last sentence reflected the fact that once Cargill had control of Joe White it would be in a much better position to find out the details and the remedial costs.

1413 On another matter, there was no suggestion in this document that Cargill was contemplating the possibility of terminating the Acquisition Agreement or delaying its Completion in light of the recent disclosures. Eden acknowledged under cross-examination that, at this time, he was contemplating the transaction would be completed before any further action would be taken regarding the problems that had recently been identified.

1414 At the same time, others at Cargill were working to seek to determine Cargill, Inc's rights under the Acquisition Agreement. In an email dated 24 October 2013,[856] Okoroegbe asked Clark to provide legal advice in the event that Cargill, Inc decided to retain a portion of the purchase price. In the same email, he stated, "[o]f course, the intent is to close on this deal". Clark responded with some preliminary advice, including noting that should Cargill, Inc elect to act unilaterally, "it hands Glencore options, including termination". In response, Okoroegbe wrote, "Thanks, Marcus. Termination isn't something we want at all." However, he continued by stating Glencore's response might influence the decision to pursue that option.

1415 Clark gave evidence that he understood Okoroegbe's comments concerning termination to be reacting to Clark's email, and that Okoroegbe was conveying that Cargill did not want Glencore to have a termination right, rather than some broader statement as to Cargill's position on termination. However, Clark acknowledged the earlier statement of Cargill's intention to close the deal was very clear. Clark also gave evidence that he advised Cargill it had no right to withhold funds.

1416 Purser's reaction to the 25 October Reply Letter was that it had not fully answered the

855 See, for example, par 1450 below.

856 Precisely when this email was sent was unclear. Clark's response was dated 23 October 2013, at 7.01pm.

questions asked. She also thought that the written response was not Glencore's position as had been espoused by Mattiske in their telephone call before the letter was sent. She discussed the 25 October Reply Letter with Viers and Cargill's lawyers.

1417 After receiving the 25 October Reply Letter, representatives of Cargill, including Viers, Savona, Okoroegbe and Arndt, sought advice from Allens. Cargill was advised that Allens did not have sufficient information to be able to advise whether Cargill had a right to termination. Further, Clark thought the answers in the 25 October Reply Letter were considerably less detailed than he had expected and he considered it was necessary to press Viterra for further information on the 3 issues raised.

1418 In further discussions with Viers and Savona, Clark advised that, if Cargill wanted to raise the topic of a retention fund, it needed the agreement of Viterra. In addition, Clark said if Cargill was to provide estimates, those estimates would have needed to be sound.

1419 Viers had made an attempt to estimate an appropriate retention fund.[857] On 28 October 2013, Viers recorded some calculations in an email to Eden and Jewison. That email indicated Viers had quantified the potential losses as ranging between $70.95 million and $82.95 million. In a section of the email dealing with curtailed use of gibberellic acid where customers did not permit it, Viers estimated an additional cost of $5 per tonne to produce malt without using gibberellic acid. Further, Viers estimated $13.7 million would need to be spent over 24 months to address an expectation that 50 percent of production would be out of specification, of which half would "[receive] customer variance", and 137,000 tonnes would not be "directly usable at $50 [per tonne]". In addition, Viers provided for $33 million in capital expenditure to increase capacity "sufficient to eliminate the 25% nonconformance's (sic) referenced immediately above".

1420 After sending this email, Viers spoke with Eden. Eden reviewed Viers' calculations in light of the fact that Cargill did not have full information, and made some downward

857 See par 1272 above for when this process commenced.

adjustments.

1421 Viers revised his calculations accordingly, and the estimate of the range of losses was reduced to between $41 million and $53 million. His estimate concerning the additional cost for producing malt without gibberellic acid when required remained at $5 per tonne. While maintaining $13.7 million would be required over 24 months, Viers reduced the estimated capital expenditure to $21 million. This information was provided to Clark during the afternoon of 28 October 2013 in an email from Viers which stated Cargill did not have visibility of the magnitude of the issues. At the time it was contemplated a letter would be sent by Allens giving the Viterra Parties an estimate of potential losses.

1422 As a result of Eden being unimpressed with the casual response to the Cargill 22 October Letter, he held a discussion about the options for a firm reply to Glencore. In an email to Van Lierde sent on 28 October 2013, he stated that a further letter would be sent as Glencore's response had been insufficient to allay Cargill's fears of the costs on Joe White's customers and the processing of the 3 issues raised. He stated Cargill's goal was to raise awareness of the potential scope of these issues both in terms of customer and operating implications. He also indicated an intention to ask that all Warranties be honoured when the Joe White Business was turned over to Cargill. Eden suggested Cargill would submit a range of what Cargill thought it would mean in terms of the value of Joe White and observed the range would be large as a result of Cargill's significant knowledge disadvantage. Further, Eden said Cargill wanted to protect its economic interests and believed the "reserve approach" was the best option to do this. He expressed an expectation that Glencore would push back, which would be likely to give rise to further discussions before Completion. Eden suggested that time was of the essence to get such discussions going to minimise and mitigate Cargill's exposure.

1423 Late on 28 October 2013, Allens sent written advice to Viers and Savona concerning the inclusion of indicative loss estimates in any letter to Glencore. The advice recorded that Cargill was concerned Glencore may not appreciate the severity of the issues that

had been raised. After advising that presenting estimates as indicative would not compromise Cargill's ability to claim a higher amount, Clark stated that if Cargill wanted to propose a portion of the purchase price be reserved, then any amount proposed would need to be justified.

1424 Viers spoke to Clark and told him of Cargill's (particularly Purser's) concerns regarding setting out detailed calculations of loss in a letter when Cargill did not have all the facts. In other words, Viers was reluctant to specifically quantify an amount because he did not have the information he needed to understand what the impact would be. Ultimately the decision was made by Cargill not to refer to any loss estimate in further communications with Viterra.

1425 Shortly after 8pm on 28 October 2013, Allens emailed 2 revised draft letters to Viers and Savona. The second version did not include Viers' calculations as a result of Viers' discussion with Allens. Viers forwarded the email, including to Eden and Van Lierde. Van Lierde responded by stating he was okay with the version that did not include Viers' calculations. He added that he would also delete the section of the draft which required that Joe White's customers be informed of any failure to meet their contractual requirements of which they were not aware. When it was put to Van Lierde that his suggestion to remove this section of the draft letter demonstrated he adopted some flexibility in relation to Cargill's guiding principles under the Cargill Code, he firmly rejected the proposition. He gave evidence he made the suggestion because he believed Cargill could not be held responsible for the way Joe White was running the Joe White Business, and it was not for Cargill to intervene or be giving directions about what Joe White should tell its customers.

1426 The Viterra Parties submitted that by choosing not to provide them with Viers' estimates Cargill had decided to deny the Viterra Parties the benefit of Cargill's best guess as to the potential loss that might have arisen because of the issues raised. Further, Viers' estimates were contrasted with those of Mattiske, coupled with the contention that Mattiske formed the view that any potential loss would not be material without the benefit of Viers' estimates. While the Viterra Parties did not learn of Viers'

calculations or estimates, there were sound reasons for Cargill choosing not to provide information. Cargill's knowledge was limited and its ability to obtain further information at that time was restricted by Glencore. Accordingly, it was prudent not to provide estimates that might turn out to be completely wrong once the facts were known. This was the advice Cargill received at the time.

1427 It was apparent from Savona's notes that at some stage on 28 October 2013 she had a discussion with Viers. In red ink, Savona recorded "non-compliance + committed varieties not commercially [available] - contract until 2014". After referring to plant operating expenses, her note continued "cannot remedy this issue for probably 1 year - which is [product][858] of contract". Also in red ink, Savona noted that if the use of gibberellic acid was stopped immediately at Cargill's disadvantage, it would cost $2 to $3 million per year.

1428 In black ink, on the second of the 2 pages where these notes were made, Savona recorded the goal of ensuring Cargill close and that Cargill purchase at a fair value. Also in black ink, Savona noted that Cargill needed comfort on day 1 that Cargill was not committing offences. It was unclear on the face of the note whether the notes in black ink were made as a result of discussions with Viers or otherwise. Viers gave evidence that he did not recall telling Savona it was Cargill's goal to ensure Completion at fair value, and could not recall his state of mind at that precise point in time.

1429 On 28 October 2013, Stewart emailed McIntyre the Customer Review Spreadsheet, containing the extensive information about the ability of Joe White to supply its customers as required. This was an updated version of the Customer Review Spreadsheet emailed on 21 October 2013.[859] Mattiske had not seen the Customer Review Spreadsheet before being shown it in the witness box. He agreed it would have been very, very interesting and helpful to have seen the information in late

858 The letters "prd" were what was written and there was no evidence as to what they referred to.

859 See par 1211 above. None of the information in the Customer Review Spreadsheet had been amended, though some changes to the shading of the columns had occurred.

October 2013.

1430 During the Cargill Parties' opening, the Customer Review Spreadsheet was tendered and referred to as a very instructive document. When McIntyre and Stewart were in the witness box, the accuracy or otherwise of the Customer Review Spreadsheet was not raised with them. In short, any concern about the reliability of the information it contained was not raised with any witness. Further, Mattiske was cross-examined extensively on the contents of the Customer Review Spreadsheet on the basis that it was accurate. When a particular question put to Mattiske was objected to on the grounds that it was unclear whether Mattiske was being asked to verify the document. The Viterra Parties' senior counsel further stated that the document spoke for itself. That position was accepted by the Cargill Parties and the question was withdrawn. Despite all of this, the Viterra Parties submitted the Customer Review Spreadsheet was not a reliable representation of the true state of affairs of Joe White.

1431 The Viterra Parties referred to Stewart's evidence, that not all the information came from electronic databases and it was "a little bit tricky" to get the information concerning barley varieties, in an attempt to cast doubt on the correctness of the Customer Review Spreadsheet. However, Stewart also gave evidence that the information pertaining to each customer with respect to barley varieties was readily available. Further, his evidence was that it was McIntyre who generated the spreadsheet "probably from - she had access to customer contracts". Furthermore, his evidence was that McIntyre was "probably plucking the variety information and entering it in the [Customer Review Spreadsheet] because it was a little bit hard to get hold of". Stewart then completed his answer by stating that the Customer Review Spreadsheet became a good repository for the information about barley varieties.

1432 There are 2 observations to be made about Stewart's evidence. *First,* it was McIntyre who was putting together the information, and accordingly Stewart's evidence was plainly speculative with respect to how that was done. There was no reason to assume that McIntyre acted anything other than diligently in compiling the information.[860]

860 See, for example, par 257 above.

Secondly, Stewart's conclusion was not that the information was unreliable, but rather it was a good repository of the information contained concerning barley varieties.

1433 The Viterra Parties also referred to customer contracts in an effort to create doubt about the ability of the court to rely upon the relevant information. The position with respect to 8 large customers was analysed. It was demonstrated there were discrepancies with respect to each of them when comparing the details in the Customer Review Spreadsheet with the contractual documents relied upon in the particulars to the Statement of Claim. In relation to 2 customers, there were less barley varieties approved according to the contractual documents referred to, and in relation to the remainder there were more that were apparently approved or "neutral". At the conclusion of this exercise, the Viterra Parties submitted that the Customer Review Spreadsheet was significantly inaccurate for half of the customers identified. This proposition was also not raised with either McIntyre or Stewart, or any other witness.

1434 The Viterra Parties were correct in identifying differences between the contractual documents and the Customer Review Spreadsheet. However, the difficulty the Viterra Parties faced in making this submission was that McIntyre's uncontroverted evidence was that on occasions customer specifications were the subject of less formal agreements or arrangements beyond the strict contractual position.[861] In these circumstances, it would be wrong to conclude the Customer Review Spreadsheet was unreliable simply because it did not accord entirely with the contractual terms of all of the customers.[862]

1435 Further, when adducing evidence in chief from Stewart, the Viterra Parties asked questions directed to when Cargill employees obtained access to the Customer Review Spreadsheet, or some other document containing or summarising the information contained in that spreadsheet.[863] In stating that this access was given, his evidence did not suggest that in providing the information to Cargill any of the Joe White executives

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861 See pars 256-259 above.

862 Such a finding does not exclude the possibility that the Customer Review Spreadsheet had some errors in it. However, the evidence demonstrated the document was generally reliable and accurately conveyed the substantive position in relation to Joe White's customers in October 2013.

863 See fn 742 above.

indicated there were inaccuracies in the detail.

1436 Furthermore, and critically, not only was the Customer Review Spreadsheet the subject of evidence by Stewart which suggested the details were accurate, or at least substantially accurate, but the document was provided by Stewart in October 2013 to each of the Joe White executives, who either expressly or implicitly approved its contents.[864] In summary, the evidence overwhelmingly indicated that the Customer Review Spreadsheet was considered to be a reliable business record of Joe White in October 2013.

1437 Finally, McIntyre gave evidence that, on 28 October 2013, she was asked by email to provide a list of all customers and "what varieties *we have to* use for them" (emphasis added).[865] McIntyre emailed the details of the customers and barley varieties the same day. The varieties McIntyre identified that Joe White *had to use* mirrored exactly the varieties listed in the Customer Review Spreadsheet. It was never suggested to McIntyre during her evidence that the email she sent on 28 October 2013 identifying the relevant barley varieties was inaccurate. Moreover, the Viterra Parties' submissions on this point failed to address this evidence.

1438 Also on 28 October 2013, Stewart directed Joe White employees to cease using laminex[866] and lactic acid[867] immediately. Stewart gave evidence at trial that he was aware that lactic acid had been used in respect of a customer without that customer's knowledge. In the same email, Stewart instructed Joe White employees that from 1 November 2013, they were to "ensure that shipments are packed using malt from an approved barley variety".

1439 Shortly after, the Joe White production manager responded to Stewart, his email

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864 See par 1218 above.

865 There is an obvious ambiguity in this wording; it is unclear whether the "have to" related to the contractual or other agreed requirements, or whether it related to what Joe White had to use based on what was available. The existence of the Customer Review Spreadsheet and the related evidence suggested it was a reference to what Joe White was obliged to supply, but as the matter was not raised at all with McIntyre it is not possible to express a view with any certainty as to what she understood it to mean.

866 Laminex is a brewing enzyme used in the production of malt to break down betaglucan.

867 Lactic acid is the acid that brewers use to reduce the pH in mash tuns. Both laminex and lactic acid are different additives to gibberellic acid.

stating he had removed laminex from all batches. The email also addressed the problems being experienced with barley varieties. He referred to Asia Pacific Breweries, noting that he had no approved barley varieties available, and asked Stewart whether he should remove the gibberellic acid given the barley variety was not approved. The email continued:

> What is to happen to the Commander [barley variety] that I am producing? Should I remove the [gibberellic acid] from them as either way it is not an approved variety?
>
> I believe there is only a few hundred tonnes of Gairdner available and no Sloop and I have over 1000mt of shipments scheduled for 1/11 to 8/11. If this malt is not able to be shipped my silos are in danger of filling.

1440 When taken to this email, Stewart gave evidence that it did not demonstrate to him that, if Joe White were to comply with customer specifications it was in real trouble because it did not have existing supply chain arrangements in place for important varieties for important customers. Stewart's position at trial was that he had little or no knowledge of what barley varieties Joe White's plants had access to as the operations department was in charge of that. Whatever Stewart's position was, on the face of the email serious availability problems were plainly identified with respect to certain barley varieties.

1441 On the same day, David Cooke, production manager at Joe White's Sydney plant, forwarded Stewart's email to Prazak. In contrast to the message conveyed in the 25 October Reply Letter on this issue, he stated that Joe White was "in trouble if we have to stick to approved varieties. Hindmarsh?".[868]

1442 In light of the very limited information provided in the 25 October Reply Letter, Cargill resolved to send a further letter to Glencore. Consistent with her earlier approach, on 29 October 2013 Purser telephoned Mattiske to foreshadow the upcoming letter.

1443 Purser told Mattiske that Cargill was going to send a further letter as Cargill did not agree that the matters raised were standard industry practice. Mattiske's evidence

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868 As to Hindmarsh, see par 126 above.

was that Purser went through the practices in quite a lot of detail explaining why she disagreed that the practices were standard industry practice. She also said the letter would address the issues relating to barley varieties. Purser then elaborated on matters concerning each of these topics,[869] together with addressing breach of customer contracts.

1444 Under cross-examination, it was put to Mattiske that upon Purser telling him that it was not standard industry practice to alter Certificates of Analysis, he must have placed some weight upon it given Cargill was a significant player in the malting industry. Mattiske responded by stating that the proposition was fair. He acknowledged that he knew at the time that Cargill was a very major player in the industry. Mattiske then gave some evidence that was far from convincing. When he was asked whether he then raised that issue with anyone at Joe White, he said *he* did. He then said that upon raising it *he* was told that Cargill had a different testing procedure which was less accurate and more prone to error, and that Cargill was delivering malt that was substandard.

1445 When he was pressed with respect to these answers, Mattiske said he "believe[d] *we* would have spoken to Hughes". Mattiske then said he did not recall whether he spoke to Hughes, but that he believed it would have been done by Fitzgerald, Norman or Rees. When pressed further as to the question Hughes was asked, Mattiske said he did not recall the exact question and it was not a question that he directly asked. Even further, Mattiske then gave evidence that he did not personally receive the response as he relied on his executive team to follow up the response. He then gave evidence that the response received through his executive team was that Cargill had a different procedure. It was then put to Mattiske that there was a difference between a response that referred to Cargill's methodology and a response relevant to the question of whether altering Certificates of Analysis to report a result that differed from the laboratory testing was standard industry practice. Mattiske simply replied, "I'm not

869 Mattiske's evidence was that Purser referred to specific barley varieties, including Hindmarsh and "things like that that were non-malt varieties". It was unclear to what other varieties this evidence was referring.

a technical expert in laboratories at all, but I take your point". Mattiske then appeared to recant. When the Cargill Parties' senior counsel sought to confirm this evidence, Mattiske said:

> I honestly have no knowledge of that. All I know is that [Joe White] said that the practices were standard industry practice and that their alteration in the way they did it was perfectly allowable under testing standards. That's all I know.

This appeared to be a reference to a conversation that happened days earlier.[870]

1446 In short, Mattiske's initial evidence that, *after* speaking to Purser and being told of Cargill's position, *he* asked the direct question and that *he* was given a direct answer on whether or not Joe White's conduct with respect to Certificates of Analysis was standard industry practice cannot be accepted.

1447 Purser also said in the telephone conversation that Cargill would certainly not permit gibberellic acid to be used where Joe White customers had specifically requested it not be used. According to Mattiske's evidence, he said to Purser that, to his knowledge, there was only 1 customer with a 70,000 tonne contract that was using gibberellic acid and the rest was fine.[871] Further, he said that the Joe White executives had told Glencore they would stop the practice of using gibberellic acid contrary to customers' contracts, which would just increase the germination time "a little bit" from 4 days to 5. Mattiske further said Glencore would be willing to assist with respect to short term issues of accumulating the correct barley varieties, but to that time Glencore had not been able to substantiate the details. In that part of the discussion, Mattiske raised Admiral and Vlamingh barley varieties as possible solutions.

1448 Mattiske also told Purser that Glencore was there to help Cargill resolve these issues. He said to Purser that he did not think the issues were very large by themselves, so they could be fixed.

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870 See par 1251 above.

871 It may be that this was said in a later conversation (see par 1462 below) where this was raised as part of the discussions with Joe White executives, and was also the subject of a later discussion with Purser: see par 1505 below.

1449 In response to a question from Mattiske about whether Completion would go ahead, Purser said she did not want to make this a legal issue. She said she did not want to go to court but wanted a commercial resolution, and that, in order to achieve that end, she needed more information.

1450 According to Mattiske's evidence, he said to Purser he did not know anything about these practices. Further, he said he repeated that Glencore was not in a position to conduct a full investigation. Whilst Purser did not recall this being said, she did not dispute it. Purser said Glencore needed to make provision for a claim, but Purser did not recall that point being addressed further on the telephone. According to Mattiske, Purser went on to say that Cargill could not assess its loss until after Completion and that someone from overseas would be making the call. His evidence was that Purser also said Cargill wanted Glencore to give Cargill more feedback and more information about the practices. Purser further stated that she did not see anything that would hold up Completion and that, although she was not in charge, she expected Cargill would complete. During the conversation, Mattiske confirmed that he had been told by Joe White's executives "that Certificates of Analysis [were] allowable under the testing parameters of what Joe White had".

1451 On 29 October 2013, Cargill Australia responded by letter to the 25 October Reply Letter ("the Cargill 29 October Letter"). The Cargill 29 October Letter was emailed by Savona on behalf of Cargill Australia to Mattiske as country manager at Glencore Grain.[872] It stated:

> Dear David
>
> I refer to [the 25 October Reply Letter].
>
> We are concerned that Viterra Ltd … has not addressed adequately the matters raised in [the Cargill 22 October Letter] with the result that the impact or potential impact of those matters on [the Joe White Business] remains uncertain. In particular:
>
> 1. We questioned whether [Joe White] has and/or had a practice of issuing certificates of analysis to customers (that may or may not have

[872] The letter was copied to Fitzgerald in his capacity as the company secretary of Viterra Malt, Viterra Operations and Viterra Ltd, together with Pappas and Lindner. It was signed by Savona as Purser was travelling at the time.

been provided to others) which represent that the malts supplied to customers met with particular specifications where the malt supplied did not meet those specifications. Our question was focused not only on differences in analysis outcomes that may result from tests undertaken at different times but *whether the certificates themselves did not reflect accurately the outcomes of the test* on which each certificate reports. If this practice has occurred:

- *What is the frequency* of such occurrence and what percentage of [Joe White]'s contracts is affected? Also detail how many customers may have received inaccurate certificates and the total annual volume those customers represent.

- Have *affected customers been informed* and have they *consented in writing* to such activity?

- Have the certificates of analysis or any inaccurate data found on such certificates of analysis been provided to any further parties, including by [Joe White], its agents or its customers?

2. You concede that there have been instances where barley, other than that specified in a particular contract, has been used. You state that the malt delivered has, however, always met the "technical needs" of the customer and that you are not aware of any complaints or claims from customers about this practice. However, *in the absence of disclosure to the customer, a lack of complaints would seem not to be an answer*. Further, it is not evident from your response *how widespread* this practice is or has been. Have *affected customers been informed* of and consented to this practice? Please quantify *the number of customers* that may have been impacted and outline their total volume and the remaining term of the relevant agreement(s).

3. Related to paragraph 2, we are concerned that the barley varieties required by some of [Joe White]'s customers may not be presently available on commercial terms. Should this be the case, we understand that [Joe White] is *not in a position to supply malt in compliance with those affected customer contracts. Is this the case?* If so, what percentage (by volume and by total value) of [Joe White]'s contracts are affected?

4. You concede that there has been "non-compliance with customer requirements around [gibberellic acid]" but [Joe White] is able to produce the specification of malt required to meet customer demands save that modified production conditions may be required. Again, you state that you are not aware of any customer complaints or claims in relation to this practice. *Your letter does not address how widespread this practice is or has been and the percentage of [Joe White]'s contracts that are affected*. With respect to the absence of any consumer complaints or claims, is it the case that *full disclosure* has been made *to affected customers and agreed by them?* Last, your letter does not address the volume of product in inventory which is not compliant or the costs arising from any necessary modifications to production conditions to produce the required contract compliant malt.

We would be grateful if you would let us have your response concerning these questions as a matter of urgency.

You will appreciate that we are particularly *concerned about the impact* these practices may have on our ability to conduct [Joe White]'s business operations immediately after completion in compliance with [Joe White]'s customer contracts and all applicable laws. As such, please ensure that *adequate measures are put into place before completion* to ensure that:

- to the extent that affected customers are aware of the practices and have previously agreed (expressly or impliedly) to accept malt which does not comply with those customers' formal contractual requirements, those customers' express written agreement to these variations is obtained;

- all product shipped to customers and all inventory on hand is compliant with the specifications of customer contracts (as varied by written agreement, if applicable), including in relation to the use of [gibberellic acid], varieties of barley required by particular customers, and the accuracy of certificates of analysis; and

- [Joe White]'s business is conducted in accordance with all applicable laws.

Please inform us prior to completion of the measures you take to secure these ends.

Significant loss and damage may result from these practices and the remedial measures required to correct and otherwise address them. Given our limited access to information, we are not able to quantify the magnitude of this loss and damage, save to say that it *may be in the order of tens of millions of dollars*. Without being in any way exhaustive, material loss and damage may result from:

- immediate and long term loss of sales for inability to secure compliant barley varieties;

- losses and expenses associated with curtailment of the use of [gibberellic acid];

- expense and capital expenditure to remedy malt produced out of specification; and

- third party claims related to the identified activities.

Bearing in mind that [C]ompletion is currently scheduled for 31 October 2013, conscious that these practices have now been revealed, and the potential for losses to accrue, we propose that a mutually agreed reserve should be made out of the purchase price …

In the meantime, please provide us with *full access to [Joe White's] records and current employees* so that we can continue to plan for the future operation of the [Joe White Business] in full compliance with customer requirements and all applicable laws.

> As you appreciate, to the extent necessary, we continue to reserve all of our rights in relation to these matters.
>
> (Emphasis added.)

1452 Consistent with the position adopted in the Cargill 22 October Letter, the Cargill 29 October Letter did not refer to any desire on the part of Cargill to terminate the Acquisition Agreement.

1453 When Mattiske read the Cargill 29 October Letter, he formed the view that it was likely Cargill would make a claim, but he did not think the financial impact on Cargill of the matters the subject of the letter would be significant. Mattiske's evidence was that he believed this based on his understanding that Joe White was entering into contracts around market rate. Mattiske gave evidence that even if customer contracts had to be unfulfilled, he did not think that would give rise to any significant loss.

1454 The Cargill 29 October Letter was circulated within Glencore and Viterra. It soon came to King's attention, who promptly forwarded it to Walt. Walt responded to King, stating he was on the phone to Mattiske. When King enquired as to the outcome of that telephone conversation, Walt emailed King stating the view was to close on the sale, and to deal with a potential warranty claim thereafter. King's response was to the point, and expressed some doubt:

> Agreed but question is whether we can push to close given this?

King gave evidence that "given this" was a reference to the revelations concerning the practices referred to in the Cargill 29 October Letter. He said the enquiry was an honest question having regard to what had been raised.[873] It was obviously also a prudent question.

1455 The last email in this chain was from Walt, who indicated there was no suggestion that Cargill did not want to close. He also said there were other issues that were being worked on, without elaboration. King had no recollection of speaking directly with Walt about the matters referred to in the email chain.

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873 King was not involved in preparing a response to the Cargill 29 October Letter.

1456 Mattiske immediately forwarded the Cargill 29 October Letter to de Gelder, Mahoney and Mostert marked "Confidential". The email referred to a meeting to be held shortly with Mallesons. The email continued:

> We can discuss this evening, they have mentioned potential claims on losses, due to corrective action that may need to occur, but no mention of delaying Settlement.

1457 Around lunchtime on 29 October 2013, Mattiske received an email from Fitzgerald, addressed to Lindner. The email asked Lindner for a meeting to be arranged at 1.00pm South Australian time. Fitzgerald stated that Hughes and Wicks would be in attendance to answer any questions. Fitzgerald also noted that Wicks would be sending through information needed on barley varieties before the meeting.

1458 Mattiske gave evidence that he attended this meeting by telephone. He said he was focused on the likely financial effect over the next few months of ceasing the practices Cargill had raised and the potential financial liability. During the meeting, the manner in which to respond to the Cargill 29 October Letter was discussed. Mattiske gave further evidence that he believed the likely financial effect of ceasing the alleged practices was discussed by reference to some specific contracts.

1459 Most of Mattiske's evidence on this meeting in his witness statement was in response to some of the allegations in the Statement of Claim about what had occurred at the meeting. Mattiske, in substance, stated he could not recall the various matters being discussed or expressed a view as to the unlikelihood of them being discussed. Those allegations purported to reflect, in part, the substance of Lindner's contemporaneous notes of the meeting.[874] Subject to any ambiguity in their contents, Lindner's notes are the most reliable account of what was said at the meeting.[875]

1460 As to what he did recall, Mattiske gave evidence of a discussion to the effect that Joe

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874 The particulars to these allegations also referred to handwritten notes taken by Fitzgerald and Rees, but these notes never became the subject of evidence. Accordingly, it is only necessary to refer to Mattiske's evidence to the extent it contained his recollection of what was said or it was responsive to what was in evidence.

875 See par 1277 above.

White was ceasing to use gibberellic acid and that it would reduce Joe White's production capacity. He recalled that it was stated that "our" internal calculations showed this would be in the order of 14,000 tonnes of capacity per year. Mattiske said he had been told by Hughes that a new variety, Admiral,[876] would become available in the next season and that would solve the problem.

1461 Mattiske also recalled it being stated that someone had asked Stewart to go away and check the number of times that the incorrect barley variety had been delivered. Beyond Mattiske stating that he was very focused at this stage on quantum issues, nothing further was addressed on this point in Mattiske's witness statement.

1462 Lindner's notes, which recorded that the meeting was attended by Hughes, Wicks, Fitzgerald, Norman, Rees[877] and Mattiske, and went from 1.30pm to 2.19pm, read as follows:

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① BARLEY: Lion [Nathan]

✷

- 8,500t - ~~impact on line business~~ (after January until 1 April)
- [Asia Pacific Breweries]/Heineken group – *22, 000t of malt outstanding*[878] – *only have enough Barley to supply 21,000t* (Now until 1 April) (~11kt WA + SA)

TOTAL SHORT: 29,500t of barley short to meet [specifications]

Heineken: Only 3 varieties allowed - Stirling, Gardiner, Flute (?)[879]

Commander, Bulock (?)← substitutes (?)

The 3 varieties allowed are diminishing. Trials underway for new varieties. *Heineken dogmatic.*

Lion [Nathan]: ~~Lion~~ *Will run out of barley sooner than expected*. But will be same kind of barley. Just newer crop year.

Implication? *Lion [Nathan] will say in breach*.

How many times delivered incorrect varieties? [Stewart] to advise

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876 Admiral was a trial variety from in or around 2012.

877 There was a note Rees joined later.

878 The reference to 22,000 tonnes outstanding appears to be a separate point to the immediately following reference to having 21,000 tonnes of barley available for supply. Subsequent communications indicate Mattiske understood there to be a shortfall of 22,000 tonnes: see par 1467 below, par 2b) of the email. See also pars 1487-1491 below.

879 The reference to "Flute" was plainly an error and should have been a reference to Sloop: see par 2483 below.

No claims re barley ??

What's the breach? Wrong crop yr.

Significance of crop yr – they contract to buy on a crop yr. ∴ could potentially reject it.

New crop barley won't malt as well.

If doesn't malt well, [couldn't] supply.

Who determines how much we buy? We bought right amount for them, but ~~shld~~ have used it for other [contracts].

Barley in Glencore's name.

Tamworth + Sydney – need Gairdner or Commander

Not enough barley in Australia to fill in shortfall.

Unable to supply malt only if required to supply exactly as specified.[880]

~~Short for Lion: January~~

<u>How mitigate</u>:

- *go to customer & try to get approval* to use alternatives varieties to meet same [specification].
- *Heineken: prob. won't react ~~ok~~ well*
  ↳+ Lion
- normally we [wouldn't] be worried as we [would] use ~~of~~ alternatives.
  ~~####~~
- other varieties are better quality. But trials at these [breweries][881] not complete ∴ won't acknowledge it.

- [Contracts] in or out of the money:
- lower price than the current [market].
- ~~## 20t – 50t oct~~
  ~~US~~
- $10 US in the money. ∴ if replace for someone else U$10 loss.
- *went to Heineken, breach*, supply [alternative] at different price (<U$10)
- *Brewers will spin a story re damages.*
- What does the [contract] say re default?

Heineken expires 31/3/13 (sic)

- Heineken:
- Lion [Nathan]:

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880 During closing submissions, Hughes' senior counsel was asked whether this statement was as broad as it appeared. In response, he stated he thought it dealt with issues relating to varieties of barley. He also stated that it was a very sweeping statement and could not argue that the note did not reflect what was stated at this meeting. In the circumstances, even if the comment was confined to varieties, it was an acknowledgement of a substantial incapacity to meet customer specifications in relation to major customers.

881 Lindner's evidence was she believed the word was intended to be "brewers".

② [Gibberellic acid]

Loss 14,000t 530,000 = 2.6%. But [gibberellic acid] impact will [reduce] other time as better quality barley introduced – possibly 12 months

- Unable to fulfil existing committed volumes? NO. Not fully sold immediate impact minimal

- Lose 14,000t of capacity/yr →
- Have discontinued use.
- Stock with [gibberellic acid] will be provided to customer's (sic) who ~~accept it~~ allow use of [gibberellic acid]. (<5000t)

→ # 70,000t/75,000t have had [gibberellic acid] when [shouldn't] for Heineken + [Asia Pacific Breweries]

→ [Heineken] + [Asia Pacific Breweries] prob wouldn't sign up if included [Asia Pacific Breweries]. Last yr of supply anyway. *[Heineken] want to renegotiate.*

③ Certificates:

part of the

- ISO manual – apparently different to approved[882]
- manual audited
- between labs – known inconsistent analysis
- [standard deviation] – demonstrates usual variation.
- [amount] of variation can >[883] range of [specifications]
- if within range = acceptable variation – correct lack original blend
- issue of certs + analysis = common practice

- Use Cargill blend analysis (rather than malt analysis)
- Some don't stipulate it, → no issue. Provided customers accept it. need for analysis [Lindner: if not stipulated, just don't provide][884]

FOLLOW UP

- How many times Incorrect varieties delivered
- Default mechanisms [in] Heineken + [Asia Pacific Breweries]

- *customers not aware getting something other than under [contract].*

(Emphasis added.)

1463 Neither the notes, nor the evidence given at trial, enables the court to form any view

882 In closing submissions, Hughes suggested the Viterra Certificate of Analysis Procedure was "part of the ISO manual" and that the manual was audited. However, when invited to provide evidence to support the suggestion, none was forthcoming.

883 Lindner was unsure if this symbol indicated "greater than" or "leads to".

884 Lindner's evidence was that she believed the words in parenthesis were a note to herself.

about which person or persons made observations that gave rise to the notes made by Lindner.

1464 Lindner only had a vague recollection of this meeting. However, she did recall that during the course of the discussion, someone stated that Joe White provided Certificates of Analysis even when it was not required under a contract. Further, when deciphering her notes in the witness box, she positively stated that what she had written down on the first page of her notes (she was not asked about the others) was as a result of what someone had said in the meeting. That said, subject to some exceptions, the remainder of the notes are plainly a record of what was being said.

1465 Regardless of who spoke to which item or items at this meeting, Lindner's notes indicate in substance that what Mattiske and the others present were told included the following:

(1) There was a shortage of barley for supply to Heineken.

(2) There was a total shortage of 29,500 tonnes of required barley varieties.[885]

(3) The 3 varieties allowed were diminishing and trials were underway for newer varieties, but Heineken would be dogmatic.[886]

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885 Mattiske's evidence was that this was unlikely to have been discussed. He did not purport to have an actual recollection of it not being said, but expressed a belief that if it had been mentioned he would have included the detail in his email to his superiors later that day: see par 1467 below. This evidence, such that it was, can be given little weight in light of Lindner's clear and unambiguous note on the topic. The Viterra Parties submitted the allegation to this effect was inconsistent with Lindner's notes. How it was said to be inconsistent was not identified. Perhaps the submission was intended to focus on "Joe White was short 29,500 tonnes of barley to meet customer specifications *for Lion Nathan*" (emphasis added). Admittedly, there was some ambiguity about whether the observation specifically related to Lion Nathan or more generally. The most natural reading of the note was it did relate to Lion Nathan, but, in any event, the critical fact was a shortage of 29,500 tonnes of required barley. Further, Mattiske gave evidence of discussions, not specific as to time or who was involved, where there was trouble finding the correct barley variety for a particular contract. Later he said he was told the contract in question authorised the use of another variety, Vlamingh, and it was available. He then stated, without any further detail, that there were "a lot of unknown things like that". None of this evidence detracts from the probative value of Lindner's note on this issue, taken approximately a week after Cargill had raised its queries.

886 The actual allegation on this issue was: "Only 3 varieties were allowed by Heineken which were not available to Joe White". In the absence of anything further, the statement "[t]he varieties allowed"

(4) Joe White would run out of the barley variety required by Lion Nathan sooner than expected, and Lion Nathan would be likely to assert that Joe White was in breach of its contract with Lion Nathan.

(5) Stewart would have to make further enquiries to ascertain the number of times incorrect varieties of barley had been delivered.

(6) To that time, no claims had been made with respect to the supply of incorrect barley.

(7) Barley varieties from the new crop would be not likely to malt as well and, if that eventuated, Joe White could not supply the relevant customers.

(8) There was not enough of the required barley varieties in Australia to fill the shortfall of barley, and there would be an inability to supply if Joe White was required to supply exactly as its customers had specified.

(9) To mitigate the circumstances, Joe White could confer with customers to try to get approval for alternative varieties of barley to meet the same specifications and, if that were done, it was likely that Heineken and Lion Nathan would not react well.

(10) Normally, Joe White would not be worried about such circumstances and it would use alternative varieties.

(11) Other varieties were of better quality, but as trials were not complete brewers would not acknowledge the varieties.

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carried with it the implication that other varieties were not allowed. In the context in which this phrase appeared such an implication was fortified. However, reference to those varieties diminishing suggested some were still available. Accordingly, on the evidence this particular allegation has not been established.

(12) If Heineken decided to use another supplier rather than permit substitute varieties, this was likely to result in a loss of around US$10 per tonne.[887]

(13) Another option for Heineken was to offer to supply at a lower price.

(14) It was likely brewers would "spin" a story concerning breach of contract and damages.

(15) Supplying incorrect barley was a default under Joe White customer contracts, but there was an uncertainty as to what the contracts said.

(16) Desisting in the unauthorised use of gibberellic acid would result in the loss of 14,000 tonnes of capacity per year,[888] equating to a loss of 2.6 percent in production, but it was expected that the impact would reduce over time as better quality barley was introduced which could possibly take 12 months.

(17) Joe White was not unable to fulfil existing committed volumes because of the discontinuation of the prohibited use of gibberellic acid, and the immediate impact would be minimal.

(18) About 70,000 to 75,000 tonnes of malt containing gibberellic acid had been supplied to Asia Pacific Breweries (Heineken).

(19) Joe White was said to have discontinued the use of unauthorised gibberellic acid.

1466 Considerable uncertainty attached to Lindner's notes taken under the heading "FOLLOW UP". Lindner was asked no questions about whether or not those notes reflected what was stated in the meeting or whether they were a note to herself. Also no questions were asked about the line separating the first 2 items from the third item

887 Being a total loss of US$220,000 if all 22,000 tonnes were affected. It seems neither the likelihood or otherwise of Joe White obtaining another customer, nor the effect this situation might have on Heineken's overall position (given its contract was up for renewal in April 2014) was discussed.

888 This is what Lindner said her note recorded.

under this heading. Thus, contrary to Cargill's submissions, although the notes make clear the first 2 topics were raised at the meeting, the court cannot be satisfied that it was expressly stated at the meeting that customers were not aware they were getting something other than what was specified under the relevant contract. However, it must be observed that Lindner's note was a statement, not a question.

1467 Returning to Mattiske's emails, based on the times recorded on the emails,[889] there was some uncertainty as to when Mattiske emailed some background on the issues raised in the Cargill 29 October Letter. In any event, in the email to de Gelder, Mahoney and Mostert, Mattiske wrote:

> … the changes to the analysis results appear to be covered under [Joe White's] testing policies *which have been disclosed in the [D]ata [R]oom* including the ISO accreditation and the [Malt Proficiency Scheme]. Any changes made to certificates *appear to be in line with the allowed standard deviations within these schemes*, [Joe White] say this is *fully document* (sic), *we are getting copies* these (sic) records. The other 2 issues around changes to varieties delivered and use of [gibberellic acid] are the issues.
>
> It seems evident that *Cargill are setting themselves up for some sort of claim*. I have separated the issue in the 2 parts
>
> 1. Transactions in the past
>
> 2. Transactions in the future
>
> 1. *Unless Cargill were to notify all customers of the transactions involving delivery of goods not consistent with the contract* we have minimal liability as Customers are very happy with the product received and have given excellent feedback. It is unlikely we would get any claims *unless Cargill decided to throw us under the bus.*
>
> 2. The exposure in the future:
>
> a. *Barley Varieties*, [Joe White has] a domestic exposure with Lion Nathan *… some exposure is evident, but minimal.*
>
> b. *Barley Varieties Export*. There is a sale to [Asia Pacific Breweries] (Sub of Heineken) expecting to receive 22 kmt of Sterling (sic)/Gairdner/Sloop. *There are not sufficient quantities of these varieties in Australia*, [Joe White] were intending to deliver Commander/Bulloke (sic), where (sic) are premium to the contractual varieties *however not specifically approved by [Asia Pacific Breweries] at this stage*, they expect this to occur by January. This particular contact (sic) is a long term contract for 75 kmp per annum, priced annually, it expires at the end

889 Whatever the sequence, Mattiske said this email was sent after receipt of the Cargill 29 October Letter. Mattiske's evidence was that it was sent later in the day on 29 October 2013.

of April. Pricing of Contract is only $10 above the current market price. I am *getting legal to check the default clauses on the contract*.

…

c. Use of [gibberellic acid]. This has now stopped no forward risk. [Gibberellic acid] was used on [Asia Pacific Breweries] Malt on approx. 70,000mt where it was not allowed under the contract. The *short term impact would be to reduce capacity by 14,000mt*, however this would only be over 12 months as the new varieties in the pipeline result in not requiring this as an additive and the ability to renegotiate this contract in April would result in only short term losses.

…

My Estimates (back of the envelope) on *potential liability*:[890]

2a) Nil, or worst case a small discount to delivery (sic) new crop varieties, *even if disclosed to the customer*

2b) $10mt out of the money on 22kmt, We could *possibly bring more barley* in from Victoria, *if it exists*, worst case $60mt IMO,[891] $1.3m

c) [Gibberellic acid] Usage, if capacity was to reduce by 14kmt from total capacity of 530kmt, then *2.6% of 420m would be $11m*, however we would never accept this claim as it is clear this would be only short term so could only be $1m or less.

Of course we will not accept any liability or claim and will fight all representations. A *standard response will be available and sent to you* in draft this evening when ready.

(Emphasis added.)

1468 Mattiske did not communicate directly with Hughes or Stewart about the contents of this email, though he gave evidence that he "believe[d]" he would have obtained the relevant information from Hughes. He then said he could not recall to whom he spoke specifically, but that he would have spoken to people internally, and Rees in particular.

1469 Leaving aside the provenance of the information, a number of observations should be made about the contents of Mattiske's email.

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890 Mattiske gave evidence that he may have discussed the back-of-the-envelope calculations with Mahoney, but he could not recall. In his evidence in chief, Mattiske said that based on these estimates his commercial assessment was that Cargill's total losses would be less than $2.3 million. In closing submissions, the Viterra Parties were asked how it was that Mattiske arrived at the figure of $2.3 million (obviously beyond the addition of $1.3 million and $1 million). There was no evidence to show precisely how the amounts of the components of this sum were arrived at.

891 Presumably, IMO stands for in my opinion.

1470 *First*, Mattiske incorrectly stated that Joe White's testing policies had been disclosed in the Data Room.[892] There was no evidence to suggest that Hughes, or anyone else, had specifically told this to Mattiske or anyone else at Glencore or Viterra. Further, as referred to above,[893] it was apparent that the absence of such testing policies from the Data Room had been fully appreciated by others by this time.

1471 *Secondly*, the suggestion that changes made to Certificates of Analysis appeared to be in line with "allowed standard deviations" was incomplete and inaccurate. The suggestion that the changes were "allowed" was not by reference to any particular contractual term. Further, leaving aside whether industry practices permitted changes for results within 2 standard deviations, if the statement was read as referring to up to 2 standard deviations, it was plainly wrong as the Viterra Certificate of Analysis Procedure allowed for approval of specifications beyond 2 standard deviations. Conversely, if it was to be understood as a reference to standard deviations beyond 2 standard deviations, then the statement was of no substance when it suggested Certificates of Analysis were "in line" with the approved standards given there were no standards for such approvals (beyond approval by 2 managers without any criteria as to how any approval might be forthcoming). Mattiske's evidence was that he was never told that the Viterra Certificate of Analysis Procedure permitted alterations for results beyond 2 standard deviations. Accordingly, when making this statement he presumably only contemplated results within 2 standard deviations as being the "allowed standard deviations".

1472 *Thirdly*, Mattiske's statement that the relevant "schemes" were fully documented, and that copies were being obtained may well have been his understanding at the time. However, at trial, Mattiske gave evidence that he did not in fact obtain a copy of the Viterra Certificate of Analysis Procedure before Completion. Indeed, Mattiske went so far as to say under cross-examination that at no time before Completion was he

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892 The reference to getting copies of relevant records did not make clear whether Mattiske understood such records had been included in the Data Room. Regardless of this, his statement that the testing policies had been disclosed in the Data Room was categorically incorrect.

893 See par 1365 above.

aware of any written policy concerning the manner in which Certificates of Analysis might be produced. This evidence was directly contrary to Mattiske's stated belief in October 2013.[894]

1473 *Fourthly*, the summary given by Mattiske essentially dismissed any concerns about past conduct relating to Certificates of Analysis being issued by Joe White. Whatever Mattiske might have been told, as a matter of fact there was no basis for such an entirely dismissive approach. So much ought to have been clear from what Purser had told him.[895]

1474 *Fifthly*, Mattiske's reference to the possibility of Cargill notifying Joe White's customers of transactions involving goods not consistent with their contracts was an implicit acknowledgement that those customers had not been notified of that fact already. Further, it was an express acknowledgement by Mattiske that he appreciated Joe White was supplying malt inconsistent with the terms of customer contracts at a level that, if Cargill was to disclose this, it would be likely to result in liability other than minimal liability.

1475 *Sixthly*, if there had been full and frank disclosure to Joe White's customers, then, with respect to Joe White's past conduct, there was nothing for Cargill "to throw … under the bus". Further, the use of such language suggested that what was being referred to was something more than trivial. Indeed, Mattiske's evidence was that he used the metaphor to indicate a situation where the parties "end up in court such as this".[896]

1476 At the end of Mattiske's re-examination, he was asked why he thought Cargill could throw Glencore under the bus, to which he responded that "Cargill could have made and have made a big issue out of these issues". When he was asked why he thought that might happen if he had formed the view that there were not any big issues,

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894 In addition to the contents of this email, see, for example, pars 1355, 1376, 1378, 1380 above and 1512, 1526-1532 below.

895 See pars 1372, 1443 above.

896 Interestingly, when Mattiske was asked in cross-examination if, by using this metaphor, he really meant to be referring to Cargill letting customers know what had occurred, Mattiske answered that it was more general than that and asked if he could give some background. In re-examination, he elaborated on the background by stating, amongst other things, that he did not believe the issues in the past were material and that he was focused on the future.

Mattiske's evidence was that he thought legally there was no issue because the customers had accepted the malt. His evidence continued:

> So if Cargill were to make a massive issue out of this legally, because they kept telling me, "We didn't want to take you to court; we want to resolve it commercially; we want to" - you know, all of these sort of things. So by Cargill throwing us under the bus I figured they would want to make a big legal issue out of it.
>
> A big legal issue out of what?---Out of these practices.

1477 This evidence of Mattiske did not in any way explain how he could have thought Cargill could make a big legal issue out of matters that were not material. There was no suggestion by Mattiske in October 2013 that he thought Cargill would act in a manner which was disingenuous or otherwise in a manner that was not reasonable commercially. Accordingly, if Mattiske held the considered view that none of the matters raised were material, such an opinion was plainly qualified by the view that Cargill could throw Glencore "under the bus". At the very least, the use of such language demonstrated that Mattiske appreciated there was a real risk that the matters raised were material.[897]

1478 *Seventhly*, on the question of barley varieties, Mattiske was fully aware that some exposure existed.

1479 *Eighthly*, with respect to Asia Pacific Breweries, Mattiske understood there were not sufficient quantities of the required barley varieties in Australia. Further, Mattiske appreciated that the approval of alternate varieties was yet to occur, and would not occur before Completion.

1480 *Ninthly*, Mattiske was certain that there would be a reduced production capacity as a result of Joe White ceasing to use gibberellic acid. Further, he decided to adopt an optimistic view of the prospects of resolving issues that would necessarily arise from this cessation.

1481 *Tenthly*, the back-of-the-envelope assessment of potential liability demonstrated that

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897 Lindner gave evidence that in late October 2013 she was "certainly suspicious" that after Completion Cargill Australia would make a claim for breach of a Warranty.

Mattiske, at the very least, had not satisfied himself that customers had been told about the Operational Practices. Indeed, on a natural reading of his reference to "even if disclosed to the customer", it appeared highly likely he appreciated that the manner in which Joe White did its business involved at least some customers not knowing about the substitution of non-approved varieties.

1482 *Eleventhly*, Mattiske appreciated that there was a risk that the required barley may not exist (and hence, there could be an ongoing problem).

1483 *Twelfthly*, Mattiske chose to take an optimistic view with respect to the potential exposure concerning unauthorised gibberellic acid use.

1484 *Lastly*, Mattiske's parting comment reflected his overall attitude to press on without making any concessions.

1485 As to the surrounding circumstances Mattiske faced, he said he had numerous important matters to deal with at that time and was "putting out fires". When it was put to him that he must have given top priority to the issues Cargill had raised, he said it was in his top 5. Mattiske said Cargill was but 1 of a very large number of issues he was dealing with and that "we" did not think it was all that material. All in all, Mattiske's position was that he had assessed the issues raised as not material to the sale, and on that basis the parties should proceed to Completion. Mattiske was also concerned that if Cargill delayed the settlement, Glencore would have to prepare to run the Joe White Business for an extended period of time. Mattiske said, with the benefit of hindsight, he might have paid "a lot more attention" to what had arisen; later he further acknowledged that he should have given it "a bit more attention at the time perhaps".

1486 Concluding on the position Mattiske adopted on 29 October 2013, it was apparent he formed the view that it was in Glencore's interests to press on to Completion regardless of the substance or otherwise of the issues that had been raised, particularly

with respect to Joe White's past conduct.[898] The email disclosed that Mattiske formed the view that the risk on completing without resolving the issues, or making all the enquiries necessary to resolve those issues, was a risk worth taking and that, with an aggressive approach to any claims, Glencore's exposure could be kept to a minimum.

1487 Mattiske gave evidence that the email to his superiors set out his understanding as to the potential amount of loss that might be caused by the use of unauthorised barley varieties. He said his understanding at the time was that 22,000 tonnes of the Gairdner variety had to be found. He also understood that, as there was insufficient Gairdner in Australia, Joe White would have to negotiate with Asia Pacific Breweries to use a different variety if the full amount was to be supplied. Mattiske said his understanding was based upon what the Joe White executives had told him, and that he did not have the ability to independently verify the situation.

1488 Mattiske was cross-examined about the potential difficulties that arose because Joe White was using unauthorised barley varieties. He said that, having learned that barley varieties could also be a customer specification provided for contractually, he knew that there would be difficulty going forward with compliance unless the particular varieties of barley as requested by customers were available to Joe White. As a result, he had asked "Joe White's executives" to tell him of the contracts that currently contained varieties specifications and how much barley was required in order to meet those specifications. In response, Mattiske's evidence was that he was told that Lion Nathan's requirements would be satisfied with the delivery of the new crop, "so that wasn't an issue". Mattiske was also told of another contract with Asia Pacific Breweries that needed roughly another 20,000 tonnes of the required barley variety, of which Mattiske believed Glencore could buy at least 7,000 tonnes.

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898 In answering a question under cross-examination as to what questions he asked, after referring to some questions, Mattiske, non-responsively, added that if Cargill wanted to take over custody of the Joe White Business on 1 November 2013, he thought that he knew enough to tell Cargill what it needed to do to run the Joe White Business the way Cargill wanted to run it. On what basis Mattiske formed this view, given his lack of direct involvement in the investigations (save for the limited telephone conversations in which he was involved) and his self-professed ignorance of the Joe White Business before 22 October 2013, was far from clear. The basis upon which Mattiske claimed to have formed this view was not explored.

1489 With respect to each of these matters, Mattiske did not ask about the likely timeframe but said he did not expect it to be a problem because Glencore had a very large procurement team and he understood they were on the doorstep of harvest. Therefore he believed there would be ample supply of barley within a matter of weeks. Mattiske explained that none of this was stated to Cargill in writing because Glencore did not feel that it could correctly substantiate "the statistics". Further, having given this evidence, Mattiske acknowledged that he could not be certain of anything at that point in time, though, in re-examination, Mattiske also said that Glencore thought it could easily provide the solutions. Mattiske was not invited in re-examination to say what these easy solutions were, let alone how they might have been achieved. It was clear on the evidence that some "solutions" would not be available for many months.[899] Further, based on what Mattiske was told, he may have been able to form the view objectively that some of those solutions were likely, or even probable, but nothing he was told could have reasonably allowed him to have formed the view that the solutions to all of the issues raised were certain, or even likely, in the short term.

1490 In response to Mattiske's email, Mahoney emailed that he supposed that a more aggressive approach would be to make clear to Cargill there and then, in writing, that Glencore would not entertain any claims. However, he also said that he did not think it was a poker game Glencore wished to play.

1491 Mattiske sent a further email stating that if Cargill's main concern was the business going forward, then the only real issue was the supply of 22,000 tonnes of Gairdner to Asia Pacific Breweries. Mattiske said that Glencore, as a trading business, would be most likely to be able to find 7000 tonnes that day, but observed it was extremely limited and would result in significant freight costs. Mattiske stated that "we" had not considered providing this information to Cargill at this stage, but that he was happy to disclose the information if it was felt this was the best strategy. Mattiske concluded by stating that the bottom line on the contract with Asia Pacific Breweries was that if Cargill wanted to fully comply with the details of the contract, Cargill

899 See, for example, par 1212 above.

would have to negotiate with Asia Pacific Breweries.

1492 De Gelder then joined the email discussion. He stated that there was no point in disclosing the Gairdner issue. Mattiske gave evidence that he was not sure whether or not this statement was an instruction.

1493 In his witness statement, Mattiske stated that in participating in drafting the response to the Cargill 29 October Letter he tried to respond accurately and in good faith. Mattiske's correspondence with his superiors suggested otherwise. Mattiske's decision-making process as to whether or not to disclose something based upon "the best strategy" for Glencore did not reflect someone acting entirely in good faith. Further, it was apparent that his superiors were also willing to adopt a strategic approach so as to ensure the Completion of the Acquisition proceeded as scheduled. Furthermore, in circumstances where Mattiske knew full well that Joe White had consciously and materially breached customer contracts, at the very least with respect to gibberellic acid and probably in relation to barley varieties, it was difficult to see how a stated intention to not accept any liability, and to fight all representations regardless reflected the state of mind of a person acting in good faith.[900]

1494 With respect to Mattiske's attitude, he gave evidence that if he had known about the Operational Practices before the Acquisition Agreement had been executed, he would have taken certain steps. Although Mattiske did not identify the specific steps, he said he would have ensured that an investigation would have been undertaken to determine whether, and to what extent, the Operational Practices were actually occurring. Further, Mattiske's evidence was that, insofar as the Operational Practices that were occurring (and should not have been), the practices would have immediately ceased. Next, Mattiske said he would have obtained legal advice on what further steps ought to have been taken, including in particular on how to disclose information to Cargill. Finally, Mattiske said he would have recommended to his

900 Mattiske's evidence included a statement that he did not want to say anything in writing to Cargill that he was not sure of because he knew Cargill would have had direct knowledge of the relevant issues within a few days.

superiors that an acquisition agreement ought not be executed until the issues were resolved.[901]

1495 When asked during cross-examination if he had known of the Operational Practices before Glencore provided the Information Memorandum to prospective purchasers, whether the Operational Practices would have been disclosed in the Information Memorandum, Mattiske said he would have needed to investigate whether the Operational Practices were material or not.[902] Further, Mattiske said he believed in late October 2013 that the practices that had been discovered with respect to the conduct of the Joe White Business were not material. He said the reason they were investigated was because Cargill was quite concerned about them. Later in his evidence he said that he did not stop the process to conduct an investigation in late October 2013 because it was only a week away from Completion and he did not think the issue was all that material. Mattiske also said that with the benefit of hindsight, stopping the process and investigating the issue might have been an option.

1496 Precisely how Mattiske determined whether or not something was material in this context was not fully explored. Suffice to say, the evidence disclosed that Mattiske appreciated at least some of the issues raised were not insignificant and may have given rise to later claims by Cargill.[903] Nonetheless, both Mattiske and his superiors chose to proceed to Completion on the basis that any fallout could be dealt with after Completion. This reflected a state of mind that Glencore was willing to take the risk that it could be exposed to a claim for damages and could lose the ability to resolve the matter commercially as initially suggested by Purser and subsequently reiterated.[904] Further, notwithstanding Mattiske's particularly robust approach (which was emulated by his superiors), it must have been appreciated that it was a substantial risk to take in circumstances where, on Mattiske's own evidence, he did

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901 For a more detailed discussion concerning Mattiske's evidence regarding what he said he would have done, see issues 131, 139 below.

902 In relation to Mattiske's evidence about what he understood the Operational Practices to be, see issue 131 below.

903 This represented the objective assessment of the contemporaneous evidence, rather than Mattiske's general assertions otherwise: see also Mattiske's evidence at par 1370 above.

904 See pars 1234, 1449, 1476 above. See also pars 1506-1517 below.

not have a proper understanding of the Joe White Business. There was no suggestion that those in Switzerland had any greater understanding. On the contrary, the evidence disclosed that their understanding of the Joe White Business was even more superficial than that of Mattiske.

1497 On 29 and 30 October 2013, Clark had a number of discussions with Lindner. During these discussions, Lindner enquired as to whether Cargill would be closing. Clark replied that he did not know. He said there was obviously an issue concerning malt quality, but the solicitors needed to plan on the assumption that Completion would be occurring.

1498 Also on 29 October 2013, Cargill was assessing the steps it should take in relation to the Operational Practices on Completion. An email chain between Viers, Okoroegbe, Eden and others between 28 and 29 October 2013 demonstrated that Cargill was considering closely the best course to take.

1499 Viers observed that Cargill would get its first look at the magnitude of the issues on the Friday (being the day of Completion) and suggested certain customers would need to be spoken to "asap". He said he was concerned not to magnify the situation or create additional risk. He also spoke in terms of "Joe White folks" becoming "Cargill folks" and that the Joe White employees would be the subject of questioning about how long the Operational Practices had been going on, and who authorised them. He sought some direction about what to say and what not to say.

1500 In response, Okoroegbe suggested that "you may want to find out customer's (sic) expectations first vs discussing past practices". He said he would wait to find out what Viers wanted to share with customers before giving any advice. Eden then wrote:

> Do we have to be so quick to be ready to advise customers on day 1. Would it not be [a] practical solution to do our investigation of the events and come up with a plan. I think we do not have to rush to the customer until we fully understand the extent of the issues and can come up with strategies, plans, and contingencies to manage in a proper way.

> I am not saying we won't stop what we can immediately, but could we not get alignment around when is the proper time to discuss with the customers?

1501 Eden gave evidence that, at the time he wrote this email, he wanted to understand the magnitude of the impact, which customers were affected, how long it had been going on, and at which plants. He said once this information was available, Cargill would have had a better idea of how to explain the situation to customers. Eden was also grappling with the appropriate time to raise past practices with the customers.

1502 The email chain concluded with Viers suggesting Cargill ought not be responsible for shipments in transit that had already been sent by Joe White under Glencore, and it needed to be clear Cargill was "not responsible to take further action on same".

1503 In addition, on 29 October 2013, Mattiske called Purser. Purser said Mattiske gave her a heads up, but her recollection of what was actually said was vague.

1504 In contrast, Mattiske gave specific evidence of telling Purser a number of things. These included that the Cargill 29 October Letter was asking for quite a lot of information on 30 October 2013, when the parties were settling the following day. Mattiske said there was no way Glencore could possibly respond to Cargill's questions in the detail that Cargill had asked for in that space of time.

1505 Mattiske said that Glencore was still acting in good faith and wanted to help Cargill complete the deal and run the Joe White Business from legal day 1. Further, Mattiske said the Joe White executives had told Glencore that the use of gibberellic acid related to 1 specific contract with Asia Pacific Breweries for 70,000 tonnes of malt. Mattiske said that if Joe White stopped using gibberellic acid on that contract, which Joe White had been asked to do, it would increase the germination time from 4 to 5 days, but there were new varieties coming out that would reduce the need for the use of gibberellic acid.

1506 Mattiske touched on further details about barley varieties before asking Purser whether Cargill was still going to complete. Purser stated that Cargill was planning to do so. She further stated that Cargill wanted to resolve the issues commercially.

According to Mattiske, the issue of provision in Glencore's accounts was raised again.[905] Mattiske gave evidence that he was an accountant by trade and knew provision could not be raised without any justification, and that Purser could not say how much was being claimed at that time.

1507 There was obviously considerable overlap between Mattiske's account of this telephone conversation and the exchange that took place between them when Purser called him before sending the Cargill 29 October Letter.[906] It was possible Mattiske had conflated some parts of the conversations and also duplicated some matters in his mind. This was perfectly understandable given the lapse of time. In any event, the only issue Purser took substantial exception to in relation to Mattiske's account of this conversation was Mattiske's evidence about the contract with Asia Pacific Breweries for 70,000 tonnes of malt. She said if she had been told that it would have stood out in her memory and it would have been something about which she would have taken a note.

1508 It was clear from Mattiske's email of the same date[907] that Mattiske had been informed of the matters he said he stated to Purser. Further, there was no apparent reason why he would not have informed Purser of this if he was aware of it. Unlike some other subjects that were discussed with his superiors and about which it was decided not to disclose to Cargill, there was no suggestion this piece of information should have been withheld. Although there was no contemporaneous record of Mattiske's conversation with Purser, Mattiske explained that these matters were not put in a subsequent letter to Cargill because Glencore did not feel "the statistics" could be correctly substantiated in the time available.

1509 In circumstances where Purser's recollection of this particular conversation was weak, on balance I find that Mattiske's account of this part of the conversation ought to be accepted.

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905 The term provision was a reference to the "mutually agreed reserve" suggested in the Cargill 29 October Letter.

906 See pars 1442-1450 above.

907 See par 1467 above. See also par 1462 above.

1510 Just before 4:00pm, Fitzgerald sent an email to Stewart, copied to Norman, which asked Stewart to come to Viterra after he landed in Adelaide. Fitzgerald stated that they needed to discuss how the specifications "come to [Stewart]" and to run through other documentation from customers. Fitzgerald apologised for the urgency but said the process needed to be sorted out as soon as possible. He asked Stewart to call him when he arrived.

1511 Stewart gave evidence that he could not recall this email, but he certainly recalled getting a telephone call from Fitzgerald to this effect. Stewart said he was sitting in Melbourne Airport about to fly to Hobart when he received the call from Fitzgerald directing him to return to Adelaide. Stewart said he could not recall the specifics of the conversation but did remember being slightly annoyed because he really wanted to go to Hobart for a meeting he had organised. When asked whether he recalled any discussion about specifications, Stewart gave evidence that there may well have been such a discussion. He said he recalled feeling the meeting was not overly important and speculated that it might have been a rehashing of previous discussions, but then stated that he could not really recall the content of the discussion. In short, beyond the details set out in the email sent around 4:00pm, there was no meaningful evidence of the discussion that took place either on the telephone or when Stewart arrived back in Adelaide.

1512 A draft response to the Cargill 29 October Letter was prepared by Lindner and circulated to Fitzgerald and Mattiske later that afternoon. Lindner asked Fitzgerald to review it and provide comment. It read:

> I refer to [the Cargill 22 October Letter] and [the 25 October Reply Letter]. As noted in my letter to [Purser], Glencore had no knowledge of [Joe White] engaging in the practices referred to by [Purser] in her letter. As such, we have had limited time to explore the matters raised by [Purser] with [Joe White] management. Having said that, we have made further inquiries and can advise as follows:

1. **Issuing certificates of analysis to customers which represent that malt supplied to the customers met with particular specifications where the malt supplied did not meet those specifications**

   Certificates of [A]nalysis have been issued in compliance with [Joe White]'s *ISO accredited quality system and [Joe White]'s documented procedures*.

2. **Supplying malt to customers which has not been produced from the specific barley varieties required by those customers**

   It is common knowledge within the industry that there is *a short term shortage* of certain barley varieties. [Joe White] management are currently considering how to manage this shortage.

3. **Supplying of malt to customers which had been produced from a malting process that involves the addition of gibberellic acid (GA3), where those customers require that [gibberellic acid] not be used in the production of malt supplied to them**

   [Joe White] management have taken steps to ensure that *going forward no [gibberellic acid] is added* to malt where customers require that it not be used in production.

I disagree that [Joe White] and Cargill will suffer significant loss and damages (sic) from the above practices and the remedial measures required to correct and otherwise address them.

In relation to your suggestion that a mutually agreed reserve should be made out of the purchase price payable under the Acquisition Agreement, we do not agree to this. The Acquisition Agreement does not provide for this. In the event Cargill becomes entitled to make a claim, the Acquisition Agreement contains provisions detailing the procedure to be followed.

In relation to your request for *full access to [Joe White]'s records and current employees, we believe that we have and continue to provide Cargill with an appropriate level of access*. In any event, from 31 October Cargill will have full and unfettered access to all records and employees of [Joe White].

(Emphasis added.)

1513 Fitzgerald forwarded the draft letter to Hughes asking for his comments, but specifically informed Hughes that he was not requesting any changes.[908] Hughes replied 7 minutes later stating that "[n]one of the content regarding points 1, 2 and 3 is inaccurate". Fitzgerald then communicated this to Lindner and, through Lindner, Mattiske, saying that Hughes had agreed with the contents via email. The draft was then forwarded by Mattiske to Walt. Mattiske's evidence was that he believed that Mostert also reviewed the draft. Mattiske also said that the response was prepared in

908 Fitzgerald also sent the draft Lindner had prepared to Norman and Rees, stating the draft looked fine to him and he was checking the Acquisition Agreement before he confirmed this.

the same way as the first response. Mattiske asserted that the response was checked "by all parties", by which he explained included the Joe White executives, the Viterra executives and his superiors in Switzerland. As to which of the Joe White executives were involved, Mattiske said he believed Hughes, Stewart, Youil, Wicks and Argent had reviewed the response and had indicated they were comfortable with it. This evidence cannot be accepted. Mattiske had no direct knowledge of these matters as the response was being coordinated by Fitzgerald. Further, in emailing Lindner to say "we" were fine with the draft letter, Fitzgerald noted that Hughes had agreed with the contents. He did not refer to any of the other executives in this regard.

1514 On 30 October 2013, Mattiske called Purser again. Purser said she had no explicit memory of the conversation, though she accepted it was plausible that it took place. Further, she gave somewhat confused evidence that if Mattiske had said anything that was not in the letter that was sent later that day then she would have taken notes. The difficulty with this evidence was that, at the time Mattiske was stating the Viterra Parties' position to her, she did not know what was to be contained in the yet-to-be-sent letter. Under cross-examination, she accepted that not having the letter in front of her meant Mattiske not saying something additional to its contents could not be the reason for there not being a note. That said, she also gave evidence that if Mattiske had told her anything substantive, in accordance with her practice she would have taken notes.

1515 In her evidence in chief, Purser was taken to various statements it was anticipated would be the subject of evidence from Mattiske as to what he told her on 30 October 2013. With respect to some of this anticipated evidence, Purser stated simply she could not recall, whereas with other matters she stated not only that she could not recall it being said but also expressed her belief that it was not said. On the question of Completion, her evidence was that she did recall Mattiske raising the issue by asking her whether it was going ahead, and by her responding that as far as she was aware it would.

1516 Both during cross-examination and in their closing submissions, the Viterra Parties

contended that it followed from this evidence from Purser that Mattiske's version of the conversation should be preferred. Naturally, regardless of the extent of Purser's recollection, the court must be satisfied as to the veracity of Mattiske's evidence on this topic.[909]

1517 Much of what Mattiske deposed as to what he said on this occasion was not really controversial. His evidence was that he said that the Cargill 29 October Letter was asking quite a lot of information in circumstances where Completion was imminent, and that there was no way Glencore could possibly respond in the detail that Cargill was asking for in such a short space of time. He repeated that Glencore was acting in good faith and wanted to help Cargill complete the deal and to run the Joe White Business from legal day 1. Consistent with Purser's evidence, Mattiske said he asked her whether Cargill was going to complete and Purser said she saw no issues that would hold it up. Further, Purser repeated that Cargill wanted to resolve the issue commercially and did not want to take the matter to court.

1518 In a further repetition of what had been discussed previously, Purser stated that Glencore needed to raise a provision in its accounts for the sale. In response, Mattiske said that he did not know how Glencore could raise a provision because he did not know what Cargill was claiming or the amount to be raised. Mattiske's evidence was that Purser also said that she could not tell him how much Cargill was claiming at that time. As to the outstanding issues, Mattiske gave evidence that he said Glencore was there to help Cargill resolve them, that Glencore did not think any of the issues were very large by themselves and that Glencore thought it could fix them.

1519 More controversially, Mattiske gave evidence that he said to Purser he would tell her about some details he had been given, but would not include them in the upcoming letter because Glencore could not substantiate the information. Those details included that there was a specific 70,000-tonnes contract with a customer, Asia Pacific Breweries, in respect of which Joe White was using gibberellic acid that was not

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909 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, 586C-588B (Samuels JA, with whom Meagher JA agreed and Kirby P relevantly agreed).

permitted. He said to his knowledge that was the only contract where gibberellic acid was being used where it was not allowed, and that the Joe White executives had said they could stop using gibberellic acid for this contract which would have the effect of increasing germination time from 4 days to 5 days. Mattiske also said that the Joe White executives had been told to stop using gibberellic acid for this customer. Further on this issue, Mattiske stated that it would not be a long-term issue because a new variety called Admiral would be released within 12 months which would solve the issues with respect to the use of gibberellic acid.

1520 In relation to other varieties, Mattiske's evidence was that he told Purser there were some short-term issues with accumulating the correct barley varieties. Mattiske stated that "we" had found another variety called Vlamingh which was widely available in Western Australia and was deliverable against customer contracts. He said further that "we were doing our best" to try to procure the other required barley varieties for them and offered Glencore's help "to try" to resolve the short-term issues. In his evidence, after referring to trying to resolve the short-term issues, Mattiske continued "knowing that the new crop had been harvested or [was] about to be harvested which would then solve *all* of their varietal issues" (emphasis added). Given Mattiske's propensity to add comments rather than confining himself to answering the question, I am not satisfied that this last part of his answer reflected what he told Purser. Further, the comment did not reflect the true position, as Mattiske appreciated the new crop had yet to be proven and could give rise to discounts.[910]

1521 The fact that Mattiske spoke to Purser on 30 October 2013 was corroborated by an email sent by Mattiske to de Gelder, Mahoney and Mostert on the same day. In that email, Mattiske stated that he "gave 'off the record' assurances that the issues raised by Cargill are not problematic for the business going forward". No doubt reflecting Purser's reaction, Mattiske also stated that Cargill was still somewhat sceptical but confirmed Completion would occur. He further stated Cargill's position to be that it would assess the Joe White Business after Completion regarding a potential claim.

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910 See par 1467 above.

1522 Again, in circumstances where Purser's recollection of this conversation was also weak,[911] subject to the matters set out above, I am satisfied that Mattiske's evidence as to what he said to Purser on 30 October 2013 was in substance what was in fact stated.[912] Further, although not put to her while she was in the witness box, a possible reason why Purser did not take notes of the conversation may have been because Mattiske stated the additional matters he conveyed to Purser that were not contained in the foreshadowed 30 October Reply Letter could not be substantiated. Presumably, in those circumstances, little if any reliance would have been placed upon the additional matters stated "off the record" by Mattiske. Mattiske's contemporaneous email effectively recorded this as Cargill's position.

1523 The Viterra Parties submitted that in this call to Purser, Mattiske provided Cargill with the details that he, Fitzgerald and others involved in the investigation had received which related to the likely effect of the issues raised. In fact, much of the information that had been provided to Fitzgerald was never conveyed to Cargill before Completion.[913]

1524 Later on 30 October 2013, a response was sent to Savona, signed by Mattiske in his role as managing director of Viterra Ltd and on Viterra letterhead ("the 30 October Reply Letter"). Mattiske said the letter was a response on behalf of Viterra Ltd, not Glencore, but also conceded he did not notice the change in title from the 25 October Reply Letter as it was not of importance to him. The final version of the letter was identical to the draft circulated by Lindner on 29 October 2013.[914]

1525 Lindner gave evidence that she believed, both in October 2013 and at the time of giving her evidence, that the 30 October Reply Letter was accurate and not misleading. Further, Mattiske's evidence was that he believed he was giving a true and fair account of what "we" had been told by the relevant Joe White executives. Of course, Mattiske

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911 As it was with respect to the conversation held on 29 October 2013: see par 1509 above.

912 Out of an abundance of caution, in stating the obvious, this finding is necessarily subject to the possibility that Mattiske did not say some of the matters he said he did on 30 October 2013 because he had already conveyed the substance of them to Purser the day before: see pars 1503-1509 above.

913 See esp pars 1270, 1373, 1387-1389 above and annexure C to these reasons.

914 See par 1512 above.

had not been privy to what each of the relevant Joe White executives, being Hughes, Youil, Stewart and Wicks, had said individually about the practices. That said, the fact that Hughes had given his imprimatur to the contents of the 30 October Reply Letter must have given Mattiske a considerable level of comfort.

1526 When Eden read the 30 October Reply Letter, he noted it referred again to the International Organisation for Standardisation accredited quality systems. Eden gave evidence that he also noted the letter referred to short term shortages of some barley varieties, but could not recall that matter having been raised before. Consistent with his response to the 25 October Reply Letter, Eden said after reading the further responses he had no way of knowing the true nature or extent of the issues and what impact they would have on the Joe White Business after Completion. He thought Mattiske was being dismissive of the issues. Eden thought, understandably given the lack of detail in the letters, that Glencore and Viterra had not given any reassurance about the extent of the Operational Practices.

1527 Viers also considered the 30 October Reply Letter did not enable Cargill to understand the true extent of what had been raised on 15 October 2013.[915] As for barley varieties, he said a short term shortage had been suggested without any explanation of the practical impact it may have had on Joe White. He remained concerned.

1528 As to Van Lierde's position, he ultimately formed the view that there may have been some practices at Joe White which would not be tolerated by Cargill, but the responses given to Cargill's queries indicated that they were not ongoing and that there were no concerns from customers. He also said he had no information which would provide a basis to make any decision to stop the transaction. Based on the information available, Van Lierde formed the view, as project sponsor, that Cargill should complete the Acquisition.

1529 Cargill sought advice from Allens in relation to whether Cargill should proceed to

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915 Upon receipt of the 30 October Reply Letter, Viers sent an email to Van Lierde simply stating, "Not a surprise here Frank". Van Lierde's evidence was that he did not know whether he had any expectations at the time about what response Cargill would receive. Viers was not asked any questions about the email.

Completion of the Acquisition in light of the 30 October Reply Letter. Clark advised that Cargill was in no better position than when the issues were first raised, and that he thought the matters were being downplayed. Clark said that his reading of what had been stated with respect to Certificates of Analysis was that they were not being falsified by Joe White, and that any difference between what was certified and the actual malt quality appeared to be within some sort of tolerance that was within the ISO Standards. Further, Clark was unsure whether Certificates of Analysis were only used to certify the quality of malt to the customer or whether they were being handed to government agencies. Also on the use of gibberellic acid, Clark observed that Viterra had said that the practice would cease without an impact on production and hence Allens was in no better situation to advise.

1530 Clark gave evidence that, in order to have been able to advise on the question of Cargill's right to terminate, he would have needed to know if the practices identified had a substantial impact on production such that the Joe White Business could not fulfil customer contracts. He further stated if customers had not acquiesced or approved the practices, if they were widespread and if the customers viewed them seriously and could possibly make claims, these matters would also have been highly determinative of Cargill's rights. Clark would have also wanted to know whether Certificates of Analysis were being provided to government authorities.

1531 Up to this time, Mattiske said he did not ask, or seek a report from, anyone about how many Joe White customers were affected by Joe White's pencilling of Certificates of Analysis. He said that despite Hughes' explanation indicating to him that the practice was more than a one-off,[916] he made no such enquiry, nor did he personally ask whether any document recorded the practice, because he did not think it was necessary and because others were investigating in any case.[917] However, Mattiske

916 Later in Mattiske's evidence, he appeared to contradict this evidence, stating he did not know whether the practice of altering Certificates of Analysis occurred once or twice, or across the board. This later evidence was inconsistent with Mattiske's stated position that he understood the conduct in question was standard industry practice and was generally known. Plainly, he had formed a view at the time that it was more than a one-off.

917 Mattiske said he left the conduct of the investigation entirely in the hands of Fitzgerald, Norman and Rees.

said he did not know if anyone else asked these questions. Mattiske said he believed "Hughes and his executive team" when "they" said: "There is no problem with it. It's completely allowed." Mattiske's approach in this regard was somewhat remarkable when his email sent 29 October 2013,[918] Lindner's draft response and the 30 October Reply Letter all expressly referred to documented procedures.[919]

1532 Perhaps even more surprising than Mattiske's lack of enquiry was his evidence that no one told him in October 2013 that Joe White had a written policy in place concerning the creation and dissemination of Certificates of Analysis. Given the relevant documentation had not been included in the Data Room (or shown to Cargill before Completion), this was a glaring oversight in the investigative and reporting process that was conducted after receipt of the Cargill 22 October Letter, not to mention a material deficiency in the Data Room disclosure.[920]

1533 Further, neither Hughes nor anyone else told Mattiske that, despite Hughes' assurances about standard industry practice and assertions that Joe White's approach to Certificates of Analysis was in accordance with the ISO Standards, the Viterra Certificate of Analysis Procedure was marked "obsolete" and was not disclosed to customers or auditors.[921]

1534 Mattiske did ask a series of questions, which undoubtedly reflected his attitude to the issues he was confronted with at that time.[922] Mattiske said he asked how to fix the issues for the Joe White Business going forward. To that end, he also asked how the problem was going to be resolved, what varieties were needed, what the impact of not using gibberellic acid was on the relevant customers, and other questions directed to Mattiske knowing "enough to tell [Cargill] what [Cargill] needed to do to run the [Joe White] [B]usiness the way [Cargill] wanted to run it".

1535 Returning to the enquiries Mattiske did not make, if Mattiske's evidence that he did

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918 See par 1467 above.
919 See par 1512 above. See also pars 1378, 1380, 1472 above.
920 Cf par 1324 above.
921 See pars 287-292, 1324 above.
922 See par 1486 above.

not know that customers had not been told about the Operational Practices were to be accepted, it would have been extraordinary that he did not ask whether or not Joe White's customers knew about the practices. The fact is that he did not ask. Mattiske gave evidence he was not aware that whether the customers knew or not was an issue and that was the reason he did not ask. He also explained the position on the basis that he did not think any such enquiry was necessary as he thought it was reasonable to put "a lot of faith" in the fact that customers were happy and there was no "smoking gun" from the customer side. He said he put a lot of weight on the evidence that customers had not raised issues with the malt they had received. This evidence cannot be accepted at face value. This is especially so in light of Purser repeatedly informing Mattiske that Cargill's unequivocal position was that none of the matters referred to in the Cargill 22 October Letter were standard industry practice.[923] In any event, it must have been glaringly obvious to Mattiske that if Joe White had been completely open and transparent in its dealings with customers, there could have been no real substance to the issues that had been raised.

1536 With respect to gibberellic acid, it was completely implausible that Mattiske believed the customers had been told of its use when the very issue in question was the unacceptability of using gibberellic acid when a customer had not permitted it. Axiomatically, if a customer was informed of its use and allowed it to continue, then the problem identified by Cargill would have been trivial, if not entirely non-existent. Furthermore, upon learning of this issue Mattiske immediately directed the cessation of this practice.[924] The only rational basis for such a direction was an appreciation that the relevant customers did not know about it, or, at best, an entirely inappropriate clandestine arrangement had been put in place with 1 or more employees of the relevant customers.[925] If the customers had been informed about it, and permitted it to occur, it would have made no commercial sense to immediately cease the practice,

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923 See pars 1234, 1372, 1443-1444, 1449 above. During closing submissions, the Viterra Parties provided 25 separate transcript references to Mattiske's evidence concerning his knowledge of whether or not Joe White's customers knew of the Operational Practices. The fact that Mattiske repeated his evidence on numerous occasions did not make it any more plausible.

924 See pars 1254, 1376, 1378(6), 1390 above.

925 There was no probative evidence to suggest the latter of those 2 alternatives had occurred.

at least without discussing the issue with the relevant customers.

1537 When this point was raised with the Viterra Parties' lead senior counsel in closing submissions, it was properly conceded that there appeared to be an inconsistency in Mattiske's position. It was frankly acknowledged that Mattiske's reaction in this manner suggested he must have appreciated that the practice was something that was wrong. This was undeniably correct.

1538 The position with respect to the use of unauthorised barley varieties was arguably a little less clear. Mattiske swore that he accepted, if customers had been told about the practice of substituting barley varieties when it occurred, that would be the end of any basis for a customer complaint. He further gave evidence that he was not informed the customers were so told, but he did not infer that they had not been told. In re-examination, he explained that he assumed customers had been told and had given their consent because they had accepted delivery of the malt against their contracts. In itself, this explanation was not implausible. Absent other relevant facts, it might be that someone in Mattiske's position, who was not told specifically about the lack customers' knowledge, might infer that the customers knew of the substitution because such an inference would be consistent with Joe White acting lawfully as and when the required barley variety was not available.

1539 However, the surrounding circumstances meant that this evidence of Mattiske also could not be accepted at face value. Those circumstances included, for reasons discussed,[926] Mattiske must have known that a practice of non-disclosure existed in relation to gibberellic acid, and in those circumstances was plainly put on notice that a practice of concealment might also exist in relation to the substitution of barley varieties.[927]

1540 Further, it was difficult to accept that a person with Mattiske's background and experience would not have asked the question about whether customers were informed about incorrect barley varieties being used, if he genuinely had a doubt

926 See pars 1285-1286 above.
927 See also pars 1390-1392 above.

about it, or was genuinely only making a positive (and uninformed) assumption about it, rather than knowing the true position. Most likely, the question was not asked because Mattiske believed the customers had not been told or understood that that was the likely position, and wilfully shut out having the true position confirmed.[928] Furthermore, whilst Mattiske's evidence was that he believed that Joe White customers were aware of the conduct, this was not consistent with his contemporaneous written communications. Most tellingly, in his email sent 29 October 2013 to Switzerland,[929] when discussing "[t]ransactions in the past", Mattiske made no suggestion to his superiors that "transactions involving delivery of goods not consistent with the contract" did not include those transactions involving the substitution of incorrect barley varieties. On the contrary, as already discussed,[930] the language used by Mattiske made plain that he understood Joe White's customers were not being properly informed about the practices. Moreover, as identified above,[931] Mattiske effectively acknowledged that Joe White's customers had not been notified of the replacement barley varieties, or at the very least had not been properly notified.

1541 Lastly, with respect to Certificates of Analysis, there may have been some plausible basis for Mattiske to assume, at least at the outset, that there was some awareness of pencilling by reason that he was told altering Certificates of Analysis in such a manner was standard industry practice. However, assumptions that might have been made because of this information only went so far.

1542 Speaking generally, Mattiske fully appreciated that a standard industry practice might

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928 When it was put to Mattiske that he studiously and wilfully failed to ask obvious questions, he "actively" disputed it. Further, when Mattiske was asked whether he was seriously undertaking an enquiry into the practices or whether he was looking the other way and studiously not asking questions that were obviously available to be asked, Mattiske gave evidence that he was relying on his deputies to report on what they had found. He said he was not personally undertaking any of the investigation himself, other than the 2 meetings he had with the Joe White executives. For completeness, Mattiske's evidence was that while he did not ask for an analysis to be undertaken of the extent and scale of the practices, or their implications in terms of the existing customer base, he did ask how to "fix this" for the Joe White Business going forward, how to resolve this, what varieties were needed, and what the impact of not using gibberellic acid would be.

929 See par 1467 above.

930 See pars 1475-1478 above.

931 See pars 1378(7), 1467, 1530-1535 above.

be wrongful. Further and more specifically, he acknowledged it crossed his mind that the standard industry practice Hughes referred to might have been a wrongful practice.[932] In such circumstances, it was difficult to accept that Mattiske would not have asked a question about whether Joe White customers were notified of the impugned conduct, if he intended that Glencore in good faith would provide full and frank information to the best of Glencore's ability in response to the queries that had been raised by Cargill.

1543 On a more general level, it would have been a perfect manner by which to diffuse much, if not all, of Cargill's concerns if Glencore was able to state in relation to each of the practices raised that Joe White's customers were fully aware of the conduct involved. It beggars belief that this would not have occurred to Mattiske. Indeed, the fact that Mattiske was so keen to emphasise that customers had not complained demonstrated that he was fully appreciative of the significance of the Joe White customers' position to the issues at hand. When it was put to him during cross-examination that if it had been reported back to him that all 3 Operational Practices had been disclosed to customers and that they had consented to them it would have been music to his ears, Mattiske noted it was a hypothetical question.[933] Having made this observation, he said he did not know; and then he said possibly. When he was pressed, he acknowledged it would have been comforting because then he would have told Cargill of his knowledge. Mattiske also acknowledged that in these circumstances, there would be no basis for the customers to complain. He further understood that if the customers had agreed, then that would have been a simple

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932 Later in his evidence, Mattiske said it did not occur to him that the practices he was told were standard industry practice were standard corrupt practices. Later still, he said that it did not occur to him that the excellent relationships Joe White enjoyed with its customers were based on a lie about compliance. None of this evidence, nor the other evidence Mattiske gave, detracted from his unequivocal evidence that it crossed his mind that the "standard industry practice" might be wrongful. Further, given what was involved and the fact that Mattiske was an experienced business person, it would be very surprising if it had not crossed his mind.

933 Obviously, Mattiske appreciated that when the talking points were being prepared and finalised, the reference to discussing laboratory results being altered with customers was confined to possible variances in laboratory test results between those of the customers' and Joe White's: see pars 1345, 1368 above.

consensual variation to the contract.

1544 By reason of these matters, it must have occurred to Mattiske that if he had any doubt, as he said in his evidence he did, about whether customers were being informed, he should have asked the question in light of Cargill's enquiries. Moreover, upon receiving various reports from Fitzgerald, Norman and Rees which did not convey that customers knew about the practices,[934] at the very least it was likely Mattiske had real and serious doubts about the extent of Joe White customers' knowledge but chose not to ask a question in that regard.

1545 As already touched upon,[935] the position was heightened even further after the 25 October Reply Letter in light of Purser's communication with Mattiske on 29 October 2013, when she informed him again that Cargill's position was that altering Certificates of Analysis was not standard industry practice. Yet, Mattiske again chose not to ask the obvious question.[936] In my view, it was highly likely that the reason neither the 25 October Reply Letter nor the 30 October Reply Letter (together, "the Reply Letters") referred to the knowledge of Joe White's customers was because Mattiske either appreciated or strongly suspected that they had not been informed, or properly informed, of the Operational Practices. I so find.

1546 Finally, as to Mattiske's position at this time, Mattiske gave evidence that he did not see any benefit in not providing all relevant information to Cargill, because Cargill was going to own the Joe White Business within a matter of days. Be that as it may,[937] the obvious benefits in not providing Cargill information that might disrupt the settlement were that Glencore would not be left with the burden of running the Joe White Business[938] and would not be out of pocket while having to try and finalise a delayed completion.

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934 Perhaps with a possible minor exception insofar as the draft talking points were approved by others (see pars 1345, 1368 above); but noting that the discussions with customers alluded to were confined to laboratories having analytical errors.

935 See par 1535 above.

936 See pars 1444-1446, 1531-1535 above.

937 Compare pars 1491-1492 above.

938 Something Mattiske was concerned about: see par 1485 above.

1547 Eden's reaction to the 30 October Reply Letter was much the same as it had been to the 25 October Reply Letter; he thought Mattiske was being dismissive of the issues. Eden thought, understandably given the lack of detail in the letters, that Glencore and Viterra had not given any reassurance about the extent of the Operational Practices.

1548 The Viterra Parties submitted that the evidence showed Mattiske's beliefs as to the existence and effect of the practices were consistent with information provided to Cargill by way of both the Reply Letters, together with his discussions with Purser. In particular, it was submitted that, as at 30 October 2013, Mattiske:

(a) believed that Cargill had issues with these practices;

(b) believed that these practices were occurring;

(c) was not sure if there was anything wrong with them at that point in time; and

(d) believed they could all be resolved in any case.

While the first 2 of these suggested beliefs are uncontroversial, the latter 2 alleged beliefs must be rejected, at least in part.

1549 In relation to the third suggested belief, Mattiske unreservedly understood that the use of gibberellic acid when it was prohibited was wrong. Whatever assurances he may have received from Hughes or any of the other Joe White executives, no comfort could have been derived from what was said. The conduct was patently improper and Mattiske, as an experienced business person, realised as much. Undoubtedly, this gave rise to his direction that the conduct had to cease immediately.[939] Further, I am not satisfied that Mattiske believed there was nothing wrong with the practice of using unauthorised barley varieties in the manner that Joe White did. Again, Mattiske's evidence was that he told Hughes the practice had to stop.[940] While I accept that some of the conduct concerning unauthorised barley varieties was plausibly explained by reference to weather conditions and poor seasons, that explanation did not justify the

939 See pars 1536-1537 above.
940 See par 1390 above.

conduct more generally.[941] Furthermore, as Mattiske acknowledged, being told that something was standard industry practice was not some sort of panacea upon which Mattiske could assume nothing improper was occurring.[942] Moreover, Mattiske knew that issues concerning barley varieties were ongoing, which was demonstrated by the fact that he offered to assist Cargill to procure the correct varieties.[943] At the time that Mattiske made his offer, he had not made any proper enquiries to ensure that all the required barley varieties were actually available. Finally, I accept that Mattiske may have had some uncertainty in relation to Certificates of Analysis.[944] However, he must have appreciated there must have been real doubt about what he was being told by the Joe White executives after being informed numerous times by Purser that Cargill's view was that the practice being discussed was not standard industry practice.

1550 The fourth suggested belief ran counter to Mattiske's own email to his superiors on 29 October 2013.[945] That email made clear that Mattiske did not believe all issues could be resolved. On the contrary, he plainly anticipated some of them would not be and that claims by Cargill was likely to follow. Moreover, on his own evidence, Purser effectively told him that Cargill would be making claims.[946] Although Mattiske said some comforting words to Purser on 30 October 2013 about being able to resolve the issues, his evidence was that he could not be certain about anything at that point in time.[947]

1551 Despite the concerns raised in the Cargill 22 October Letter and the Cargill 29 October Letter, Completion proceeded as scheduled on 31 October 2013.

1552 As part of the settlement, a deed of release with respect to the Confidentiality Deed was executed on 31 October 2013 ("the Deed of Release"). The Deed of Release identified Glencore as the "Beneficiary" and Cargill, Inc as the "Recipient". It recited that Cargill, Inc had executed the Confidentiality Deed in favour of Glencore, and that

941 See pars 1538-1540 above.
942 See par 1542 above.
943 See par 1520 above.
944 See par 1541 above.
945 See par 1467 above.
946 See pars 1467, 1517-1518, 1521 above.
947 See par 1489 above.

Glencore had agreed to release Cargill, Inc from any further liability under the Confidentiality Deed.

1553 The Deed of Release contained the following:

> **1 Interpretation**[948]
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> …
>
> **Claim** means any allegation, debt, cause of action, liability, claim, proceeding, suit or demand of any nature howsoever arising and whether present or future, fixed or unascertained, actual or contingent, whether at law, in equity, under statute or otherwise.
>
> …
>
> **Existing Deed** means the deed entitled "Confidentiality Deed" between [Glencore] and [Cargill, Inc] dated 27 May 2013.
>
> …
>
> **2 Release**
>
> On and from Completion and subject to clause 3, [Glencore] releases [Cargill, Inc] from all Claims and obligations under the Existing Deed.
>
> **3 Preservation of obligations and rights**
>
> Nothing in this document affects or otherwise prejudices:
>
> (a) the rights or obligations of any party arising under or in relation to the Acquisition Agreement; or
>
> (b) any accrued rights, obligations, Claims or liabilities arising under or in connection with the Existing Deed before Completion which the parties may have against each other.
>
> **4 Further steps**
>
> [Glencore] and [Cargill, Inc] each agree to do anything reasonably required by the other party (including completing and signing any document) that is necessary to give full effect to this document.

1554 Also on 31 October 2013, Cargill (being Cargill, Inc and Cargill Australia individually) and Viterra (being Viterra Ltd, Viterra Operations and Viterra Malt individually), as well as Viterra Packaging and Processing Pty Ltd executed a letter recording a series of matters that had been agreed.[949]

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948 Headings were for convenience only and were not to affect the interpretation of the Deed of Release: cl 1.2.

949 This letter was included in the evidence as it was material to whether or not Cargill was entitled to recover any loss suffered arising out of the Co-Operative Bulk Agreement. As Cargill no longer presses any claim under that agreement, it is unnecessary to set out those parts of this letter that were referred to in the pleadings.

1555 Right up until the moment Cargill took control, Joe White continued to engage in the Operational Practices, including the Gibberellic Acid Practice. On 31 October 2013, an illuminating exchange occurred between McIntyre and a production technician at Joe White. The technician enquired as to whether McIntyre was in the loop on Buloke being supplied to Asia Pacific Breweries in Singapore,[950] being a customer that prohibited the use of gibberellic acid. He stated that approval of the shipment needed to occur that day because gibberellic acid had been used in producing the malt. After McIntyre indicated that she was aware that was the position, the technician stated:

> [Don't] you think that is absolutely [atrocious]. We are just about to go to everything by the book but even at the very last [minute] *we are still doing what we have always done*.
>
> (Emphasis added.)

McIntyre responded with:

> Of course but what else did you expect. You [didn't] think there was going to be some kind of eleventh hour conscience growth did you?

The technician then suggested that whoever was still "taking the low road" ought to have been sacked, to which McIntyre said, "That would be everyone."

1556 Without descending to all the detail, McIntyre and others were also struggling to decide how to manage operations leading up to Completion. In an earlier exchange on 28 October 2013, McIntyre was responding to queries about what should occur regarding batches that would contain exogenous gibberellic acid for customers who prohibited it. McIntyre was asked whether it was necessary to stop using gibberellic acid because they would not be completed until after 31 October 2013 or whether it was okay. McIntyre simply responded that she did not know. After a further query, McIntyre said she could not send preshipments. She also said she could not send Certificates of Analysis and that there was "no point doing my spreadsheets [because] they are only useful to help us lie".

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950 In relation to supplying malt to Asia Pacific Breweries using Buloke, see pars 1781, 1786, 2482-2485 below. See also par 1307 above and the reference to examples of approved varieties for Heineken having been Gairdner and Stirling and par 1462 above recording the approved variations as having been Stirling, Gairdner and Sloop (mistakenly recorded as Flute).

U. Post-Completion events

1557 Cargill decided that, at least initially, in its communications with Joe White's customers it would not refer to Joe White's past conduct reflecting the Operational Practices. Also, Cargill decided to retain the Joe White brand, Viers informing others at Cargill that that was how the Joe White Business would be known in the market.

1558 The process of integrating Joe White within Cargill's business then began. Viers was the person primarily responsible for integration activities after 31 October 2013. However, it was De Samblanx who sent an email on 1 November 2013 to Hughes, Stewart, Youil and Wicks, copied to Viers, welcoming them to Cargill. He had met with Hughes, Stewart, Youil and Wicks the previous day to explain the Cargill Blending and Certificate of Analysis Procedure. He attached this to his email,[951] and provided a link to the relevant manual. De Samblanx did this because Joe White management were told they needed it to implement Cargill's procedures going forward.

1559 Cargill immediately implemented Cargill's standards in relation to Certificates of Analysis within the Joe White Business. From the close of business on 31 October 2013, pencilling stopped immediately and there were no shipments for which a previously generated Certificate of Analysis was sent to customers. This required Cargill to seek derogations from a high proportion of Joe White's customers. Viers gave evidence that this was the result of not having the correct varieties of barley or the capability to produce malt in accordance with customers' specifications in the right quantities. He described this as a major problem for the Joe White Business. It created both short and long-term problems.

1560 In the short-term, Cargill was required to seek agreement from Joe White's customers to accept different barley varieties or to obtain the correct barley varieties (if possible) from some other source. Alternate sources were other Joe White plants or outside sources. Either way, this led to additional cost.

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951 This was the first time it had been provided to Joe White.

1561 In the long-term, Cargill was required to identify potential suppliers of the contracted barley varieties or to get customer approval to use new and available barley varieties. Viers' evidence was that Cargill was often unable to identify or secure barley that allowed Joe White regularly to meet the customer requirements contractually agreed. Viers said it was unclear at the time whether barley grown in Australia could allow Joe White to meet customer specifications it had already committed to prior to the Acquisition.

1562 In his evidence in chief, Viers attested that the practice of using Hindmarsh barley to make Joe White's malt ceased as soon as Cargill took control. During cross-examination, and quite obviously much to his surprise, this evidence was shown to be incorrect. Viers had forgotten about correspondence he received in May 2014 which demonstrated that Joe White continued to use Hindmarsh, albeit at limited levels. Viers gave evidence that he could not recall what he did when he received an email pointing out that Hindmarsh was being used.[952] Further, earlier emails sent in November and December 2013 showed Hindmarsh was being blended at that time. Viers simply could not explain how this had occurred in circumstances where he had given instructions that Hindmarsh was not to be used and that it should be purged from the system.[953] His unequivocal evidence, which I accept, was that he did not know Hindmarsh was being used at this time in 2013. In re-examination, Stewart gave evidence that "the new Cargill Malt business made the decision" that [Joe White was] allowed to put 5 percent of "off-spec" barley into those blends. No details of any such

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952 Perhaps Viers' lack of recollection can be explained by the fact that an email chain in May 2014 referred to Hindmarsh stored at Tamworth and the fact that it was being blended out "at 5% on contracts are (sic) compliant with". Although Viers could not recall, it would seem the email was referring to contracts that permitted up to 5 percent of Hindmarsh being used. Self-evidently, there would be nothing improper in the use of Hindmarsh if its proposed use had been raised with a customer and the customer had approved: see fn 114 above. The other key emails put to Viers during cross-examination were between a marketing manager and the Tamworth plant manager, which referred to the previous week's discussions and the prospect of using Hindmarsh for customers at the maximum specification levels. The marketing manager also referred to a varietal tolerance permitting use of a maximum of 5 percent Hindmarsh. Two observations should be made. Nothing in the emails supported anything was to be done in breach of contract. Further, and in any event, nothing suggested the conduct in late 2013 had the imprimatur of Cargill or that it was being done with Cargill's knowledge; the other recipients to the emails included Youil, Stewart and Jones but no one from Cargill itself. Further, Jones was taken to these emails and had no recollection of the circumstances.

953 See pars 1566, 1596 below.

decision were elicited from him. When asked whether this conduct continued after November 2013, Stewart's evidence was that he could not recall but that he thought it must have. He clearly did not know.[954]

1563 Stewart's evidence was that he did not think Joe White was given enough time to absorb Cargill's new approach, although it was in accordance with his understanding up to that time.

1564 Also on 1 November 2013, Stewart sent an email to representatives of Sapporo informing it that Joe White was having "quality problems" with its barley crop, and enquiring whether Sapporo would give permission for Joe White to use gibberellic acid on its remaining 2012/2013 crop to address these issues. Stewart said he appreciated this was "an unusual request", and was not made lightly. He also expressed concern that if the suggested approach was not taken there would be a risk regarding malt quality. A representative of Sapporo replied on 5 November 2013, stating that Sapporo had rejected the use of gibberellic acid for malting, because it was classified as a food additive in Japan. The email recorded that "[t]his has been their rule" and that it was "hard to revise". However, the email also referred to Sapporo's malt stock being "so tight" and the possibility of a shortfall if shipments were delayed. The email then sought advice on various scenarios, including the possibility of using gibberellic acid. In evidence, Stewart said all Japanese brewers supplied by Joe White prohibited the use of gibberellic acid.[955] Although he said he could not be certain where the enquiry with Sapporo ended up, when taken to an email addressed to him from Sapporo, he admitted that Sapporo rejected the request.

1565 On the same day, Stewart also sent an email to plant and production managers, copied to a large number of people including Hughes, Wicks, Youil, Sheehy and McIntyre. The email concerned approved barley varieties and attached a spreadsheet providing an analysis of customer requirements. An action list was provided on tasks that were then underway. Stewart stated that each plant would be contacted daily in the short

954 See further fn 1021 below.

955 These brewers included Sapporo, Asahi, Kirin and Orion Breweries.

term regarding efforts to move malt under the new Cargill system.[956]

1566 Stewart's email attached 3 documents, 1 of which was entitled "Actions – Barley and Malt Solutions". The document listed in excess of 20 actions that needed to be taken, all of which attracted the status "Not Started". Essentially, the list sought to address the steps that needed to be taken so that barley varieties were supplied as required by customers, if customer dispensation was not forthcoming. Further, a direction with respect to the Sydney plant required the removal of Hindmarsh barley.

1567 Stewart gave evidence that the introduction of the Cargill way of doing business "without any period for transition" gave rise to a difficulty in producing malt which sufficiently conformed with customer specifications. Problems arose because Joe White did not have enough approved varieties of barley to meet customer specifications, and held stocks in other varieties including Hindmarsh. Further, when Cargill sought to use the approved varieties from the new barley, such barley did not have suitable vigour, which resulted in longer germination times. Furthermore, as a consequence of variable batches of malt requiring greater segregation, Joe White's storage facilities became strained. This inhibited the flexibility of plants to blend shipments suitably for customers. Stewart gave evidence that he took a number of steps to "facilitate the change with customers".[957]

1568 The difficulties referred to above resulted in bottlenecks in production. Stewart gave evidence that for several months there were a number of shipments of malt that were ready to be packed, but the theoretical blend results were out of specification. The resultant filling of Joe White's storage meant production had to be reduced or stopped

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956 The email of 1 November 2013 and its attachment were referred to in the witness statements of McIntyre, Testi and Stewart. The Viterra Parties did not ask any questions of these witnesses about these 2 documents. However, when Scaife was cross-examined she was asked a series of questions about them despite the fact she did not commence at Joe White until a year later, in late 2014, and that she had never seen the email before. Then, by reference to documents in 2015, it was put to Scaife that a misunderstanding existed at Joe White in relation to what Heineken's approved varieties included. In essence, not surprisingly, Scaife said she did not know the position in 2013. However, to the extent the Viterra Parties sought to rely on some of Scaife's answers to submit the approved varieties list prepared by Stewart was inaccurate, such an attempt was without merit.

957 By way of example, he referred to an email he sent to Lion Nathan on 1 November 2013 by which he sought approval to use Commander instead of Gairdner.

until the malt could be moved to another plant, shipped or sold as feed.

1569 On 3 November 2013, De Samblanx received a stocktake which showed that various steeping vessels, boxes and kilns at the Perth plant were empty. This was the result of production having been halted. Upon receiving this, De Samblanx enquired as to whether the report on the work in progress was correct. He received a response from Youil, confirming the accuracy of the report and stating it was part of the alignment to Cargill policy. Youil stated Joe White needed to position correct barley and customer profiles to match and take care of the existing stock. De Samblanx forwarded the email exchange to Viers noting that capacity was already lost because of the Certificate of Analysis rules, and stated that what was attached was about Perth. De Samblanx's evidence was that he was acknowledging that Joe White was already losing capacity due to the implementation of the Cargill Blending and Certificate of Analysis Procedure.

1570 In order to assist with the integration, on 6 November 2013 De Samblanx emailed an example of a standard Cargill Certificate of Analysis to Hughes, Youil, Stewart and Wicks. He also attached a single page document entitled "Certificate of Analysis (COA) Policy".[958]

1571 In early November 2013, De Samblanx returned to Belgium. After this time, his involvement in the operations of Joe White was minimal.

1572 Also on 3 November 2013, Stewart sent an email with the subject "[Certificates of Analysis] Out of [Specifications]" and asked for a review of recent regular out-of-specification items for the customers for whom the respective recipients had packed. Stewart asked that a list be developed of affected customers, the issue for each

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958 This document provided a definition of a Certificate of Analysis, together with the requirements that needed to be met. In particular, it stated results recorded in the Certificate of Analysis must be obtained from a representative sample of the product being shipped unless Cargill mutually agreed otherwise with the customer. Further, it stated that if some alternate agreement had been reached, additional language needed to be included to ensure the customer understood the results provided were not from testing the specific lot. Furthermore, it was stated that out-of-specification malt was not to be shipped unless the customer agreed before shipment. If those circumstances arose, the Certificate of Analysis was required to record the out-of-specification results. Finally, it stated that each "Plant Food Safety/Quality/Regulatory Compliance Leader" was responsible for verification compliance by all employees involved in the testing and the creation of Certificates of Analysis.

customer and an action to address it. Stewart gave an example by referring to the Perth plant, which he said had regular issues with grain size for Heineken customers and suggested changes that would need to be made.

1573 On 4 November 2013, the Tamworth plant manager replied by sending an email to Stewart, copied to others including Wicks, McIntyre, Youil and Sheehy. The email referred to various parameters of Lion Nathan, SAB Miller and Nestlé that were out of specification and suggested how that situation might be remedied.

1574 On 12 November 2013, Viers forwarded a status update from Stewart to Eden and Van Lierde, copying in De Samblanx. Viers recorded that all plants were fully operational, with the exception of Cavan in Adelaide, which was running at 80 percent. Viers stated capacity was "curtailed due to being out of position on approved varieties". In referring to the primary customer issues as set out by Stewart concerning gibberellic acid and barley varieties,[959] Viers commented that whilst Joe White was still waiting on some additional responses from clients as to whether use of gibberellic acid or unapproved varieties of barley would be approved, "the customer flexibility has been surprisingly good".[960] After listing the "primary impact to date", including shuffling business between plants (creating out-of-line freight), purchasing small lots of barley at a premium, selling 300 tonnes of malt as feed malt at a loss, and altering processing conditions (in some cases resulting in longer germination and reduced

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959 Without being exhaustive, Stewart's email included the following: (1) With respect to Asia Pacific Breweries and Sapporo, both of whom had been supplied malt with the use of unauthorised gibberellic acid, after setting out various details Stewart stated Joe White would need to produce 5 day germination malt to make up for not using gibberellic acid. He suggested this time period would be reduced as new varieties came in through the year. (2) For customers being supplied the incorrect barley variety, Stewart stated it would be 11,000 metric tonnes from 1 November 2013 to 31 March 2014 for Asia Pacific Breweries, which could be reduced by moving to a new crop a little earlier "subject to barley quality" and mentioned other possible options that could reduce the tonnage substantially. Stewart stated 15,000 metric tonnes referable to Nestlé would be reduced to zero as it "look[ed] like" Joe White had received permission to ship 100 percent Buloke and Joe White would move to a new crop early. With respect to San Miguel, there were 4,600 metric tonnes of non-approved variety that had accumulated and Joe White was currently trying to seek approval. As to Lion Nathan, 9,000 metric tonnes would need to be new crop barley when "technically" Joe White should have been shipping the old crop. Stewart said Joe White was currently planning a "commercial/technical" solution.

960 Perhaps the initial response from customers was because they needed the malt to meet their production schedules or because they did not expect requests for derogations would occur very often. Whatever the reasons for this initial flexibility, it did not last: see for example, pars 1580, 1585, 1601-1606, 1622-1625, 1640, 1656-1661, 1677, 1682, 1706-1713, 1718-1719, 1728, 1739-1741, 1744-1745, 1747, 1785, 1793, 1797-1798 below. For completeness, also see pars 1596-1598, 1662, 1666-1669, 1675 below.

capacity), Viers continued:

> While the list is long there has been substantial mitigation and cost avoidance. Not that (sic) is any less important but a good amount of the cost to date is opportunity loss. I have asked the [Joe White] team to compile a full status update and specific costs to date which we will review [tomorrow]. While we are evaluating the [economics] of each of these decisions we have not consolidated at this point.
>
> The [Joe White] team feels optimistic that we can get in position on varieties for new crop and that the vast majority of the [gibberellic acid] and variety issues will subside (albeit with some reduced capacity due to process condition changes …) While the theoretical blend will help we have not yet contended with the [Certificate of Analysis] issue and potential for out-of-spec production. There will also be customer audits where in the past items like aging for example were not completely transparent and may result in additional changes/capex to meet [customer requirements].

1575 On 18 November 2013, Viers sent an email to Youil, Wicks and Dickie with the subject "RE: guys have I captured all the issues and in a generally complete way. Please confirm". Viers referred to malt inventory that was made from unapproved varieties or from non-malting barley. He stated the existence of this barley would require malt to be sold to alternate outlets, including feeder channels if customer concessions were not obtained. Viers stated that excess inventory had blocked the system and in some cases had necessitated production being stopped. He provided an early estimate of lost production of 8500 "tonnes" to date. Viers continued:

> [G]iven that we are fully sold this may require we ship product from alternative origins inside and outside of [Australia] which is less attractive economically. This production is lost for good and we still absorb the fixed cost and lost margin.

Viers also referred to the unlikelihood of all customers agreeing to concessions.

1576 Further, his email referred to malt that had already been treated with gibberellic acid, which was not approved by certain customers. Again, he noted that concessions were required or an alternative disposition, such as selling as feed.

1577 Finally, the email addressed the fact that Joe White had old and new crop barley contracts which allowed suppliers, at their discretion, to provide non-approved varieties or non-malting barley. Viers referred to a plan then being developed to address this, but noted Joe White may have been required to take possession of the

non-approved or non-malting barley, and trade out of it or pay an "up charge" in certain cases to convert the contract to a viable barley, or both. Viers stated that Joe White remained at risk of being unable to acquire the correct varieties and thus, Joe White faced both economic and supply assurance issues.

1578 On the same day, Dickie sent a response confirming the information was accurate, and clarifying the reference to "non-malting barley" was a reference to Hindmarsh and not to a feed-grade barley.

1579 On 20 November 2013, Dickie sent an email in further response to Viers, copied to Hughes, Wicks, Youil and Jones, with the enlarged subject "[G]uys have I captured all the issues and in a generally complete way[?] Please confirm – additional issue raised." The email referred to a discussion that morning with Viers and stated Dickie wanted to raise a further issue which he identified as the topic of "MIN" grade malting barley on the new crop Glencore barley purchase contracts. That email stated:

> At the time of buying new crop barley from Glencore, *[Joe White] was asked to add 'MIN' grades*, at a price discount, to barley purchase contracts. There were no quality specifications attached to the 'MIN' grade at the time of contracting as you do not know what the actual MIN grade barley quality will be until harvest, if and when it is implemented by the storage & handler. Now that the quality of the harvest is becoming clear, *Glencore is advising they intend to deliver* what has been segregated as 'MIN' grade, which is at a *barley quality [specification] lower than we would accept*. Glencore is arguing that *[Joe White] have accepted this in the past, and that this is a basis for us to accept 'MIN' grade barley this harvest* on their barley sales contracts to us, combined with the fact that the MIN option is on our barley purchase contracts with Glencore, at their request. [Joe White] do not have MIN grades acceptable on any other barley purchase contracts from any other suppliers, other than Glencore.
>
> (Emphasis added.)

Dickie indicated that negotiations were ongoing in seeking to resolve the matter.[961]

1580 Whatever the cause or causes, there can be no doubt that within 3 weeks of Completion, there were very significant problems being experienced by Joe White in seeking to meet customer requirements. Hughes himself acknowledged this in an email to Eden, copied to Viers, on 22 November 2013. That email referred to a weekly

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961 It cannot go without comment that this position adopted by Glencore was in stark contrast to the assurances that had been given before Completion by Mattiske: see pars 1234, 1320, 1448, 1505, 1517-1518, 1520 above.

meeting that had just been completed during which a review was conducted of Joe White's malt delivery commitments as compared to its ability to pack and meet those commitments. Hughes stated he walked out of the meeting slightly more optimistic than when he walked in, but said there were still several risk points he wanted to bring Eden "up to speed on". The email continued:

> The delayed shipments from the first couple of weeks have compounded and created a situation where we are behind in meeting our shipment schedule and this is further compounded by our ability to consistently meet quality. Essentially this means that we are *barely meeting our existing commitments* and anything we miss is delayed, as we will already have a full shipping schedule we are *unlikely to catch these up in the short term*. As we often represent a large proportion of the malt supply for many of our customers *this has significant flow on effects for the breweries*. To alleviate this we have done the following:
>
> - Asked Boon Rawd to *reduce their current malt demand* for the next few months (the Thai market is a little slow at the moment).
>
> - We have also sent samples of our Kwinanna varietal mix in [Western Australia] to [San Miguel] which we have *offered to supply at a discounted rate* which allows us to not only move the malt rather than sell as feed but also make stock available we will otherwise be short on.
>
> - [Wicks] is also meeting with the greater Cargill malt commercial team to negotiate supply from other regions where possible (*but some customers have rejected this*).
>
> The above are critical in enabling us to meet our go forward commitments. Should these be rejected I am then concerned there are some shipment volumes we will be unable to meet, with the attached *customer fallout and costs that this would result in*.
>
> The two drivers for this situation are our short varietal stocks (combined with falling quality at the end of the season) and *our requirement to be fully compliant on specifications (with derogations being slow in receipt with some customers rejecting the concept entirely)*.
>
> I will know more next week and update you accordingly but I thought it important to give you some advance warning regarding the *critical stage* we are at.
>
> (Emphasis added.)

This email was tendered by the Cargill Parties during their opening. No other party referred to it during the trial in order to impugn the accuracy of its contents.

1581 A further version of the Cargill Blending and Certificate of Analysis Procedure[962] was

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962 The document was marked "Rev 07". See par 302 above.

created on 25 November 2013. De Samblanx gave evidence that the timing of this document was not linked to the Acquisition. Relevantly, the new version included the following passage in relation to out-of-specification shipments:

> The Plant Production Department can reject analyses on the original sample only once.
>
> …
>
> **Re-analyses shipment sample**
>
> Following process has been established for shipment analyses and re-analyses in case of out-of-specs (OOS).
>
> 1. Run the original sample (which has been blended in-spec per the blending procedure[])
>
> 2. If OOS, the parameter(s) in question is [analysed] as a recheck
>
> 3. If still OOS, the sample will be considered flawed. The entire analyses set is discarded and a re-probe sample is [analysed] for full analyses
>
> 4. If OOS, the parameter(s) in question is [analysed] as a recheck
>
> 5. If the re-probe is OOS following the recheck, the customer will have to be contacted for derogation. If not approved the shipment will be unloaded or redirected to a different customer.
>
> At any point along this flow the customer accepts an OOS parameter, the analyses will stop at that point.

1582 The first sentence of the extract above was not new. De Samblanx gave evidence that the effect of this was that if the department was unhappy with the results for some reason, these results could be rejected and the batch could be tested again. De Samblanx was cross-examined on the effect of the addition to the Cargill Blending and Certificate of Analysis Procedure. He agreed that the above steps were intended to apply when Cargill had already run a theoretical analysis that was in specification, but had also, "probably because the customer require[d] it", run an actual analysis on the batch to be shipped that had returned results that were out of specification. In that case, the parameters that had been returned as out of specification were required to be re-analysed. De Samblanx agreed that the procedure stated that if the re-analysis of the sample still returned out-of-specification results, the sample (not the batch) would be considered flawed and a new sample taken and analysed, starting the process again. When it was put to him that this process, that he recommended,

allowed Cargill "4 shots at getting an actual analysis that works" in an attempt to have actual results consistent with the theoretical blend, De Samblanx replied "under certain conditions".

1583 Emails between Joe White employees and Joe White customers during November 2013 demonstrated the difficulties experienced in converting to the Cargill theoretical blend model of operation. By way of example, an email from McIntyre to Heineken on 19 November 2013 attached 3 theoretical blends "[a]s per the global Cargill procedure", noting that all 3 were out of specification in relation to soluble protein and requesting confirmation as to whether the Asia Pacific Breweries would accept the shipments.[963]

1584 After further prompting by McIntyre, Heineken responded by stating that McIntyre's request was not understood as B-malt had to be delivered on B-malt specifications. Heineken stated they had previously discussed with Stewart the Cargill procedure being adopted rather than doing an analysis for every batch after blending, with the Certificate of Analysis being based on the individual batch analysis results and blending ratio. Heineken noted that Stewart had explained that the Certificate of Analysis was the result of a calculated value rather than the actual measurement. No exception was taken to this alternate approach in Heineken's email, however it was stated that the specifications for B-malt had to be complied with in the Certificate of Analysis.

1585 Stewart, who was copied on the original email and the response, later clarified that McIntyre's request was by reference to the Cargill practice of "requesting derogation on certain parameters if they are slightly out of specification". Stewart stated he was meeting with Dr Albert Doderer ("Doderer"), Heineken's principal scientist, that week and that he had already discussed with Doderer that Heineken in Europe had a

963 The email was copied to Stewart and expressly stated approval was being sought of theoretical blends. When giving evidence about theoretical blends, Stewart asserted there were no overt communications with Joe White's customers regarding the change to using the theoretical blend approach. He said his understanding was the fact was recorded "at a very fine print" at the bottom of Certificates of Analysis. When it was suggested he was speculating about the level of communication with Joe White's customers, Stewart rejected this, stating he was "saying exactly what happened". When Stewart was later taken to this email chain, he immediately acknowledged he was involved in discussion about the change to theoretical blend and said he stood corrected.

long established history of operating in such a manner with Cargill. Stewart stated that Heineken Europe was well aware of the system and asked whether it could also be adopted by Heineken outside of Europe. Stewart's email concluded:

> Essentially if a shipment blend is slightly out of specification we would like to be able to contact you, or a nominated person at each brewery, to ask for derogation to ship.
>
> I know that there has (sic) been many requests of late and I am very appreciative of understanding to date.

Heineken responded by stating that, unless the specific receiving brewery agreed otherwise, the malt was required to be within specification, regardless of whether the method of determining the analysis had changed under Cargill.

1586 Stewart provided a further response, noting that he had discussed the position with Doderer. He said Doderer was in agreement with the essence of Heineken's email set out in the previous paragraph. Stewart stated that Joe White would move to the blend analysis system that Cargill used with Heineken in Europe, together with the checks that had been incorporated into the system. Further, he said that Doderer had advised him that there was a tolerance list for B-malt that Heineken could use as a guide for accepting malt that was slightly out of specification. Stewart also sought the name of the relevant person to contact at each brewery with respect to future derogations.

1587 When taken to this email chain during his evidence, Stewart acknowledged that at that point in time he was advocating the theoretical blend approach. He explained that he did so because he had no direct experience of a brewer receiving a theoretical blend and was happy to participate with the Cargill approach. Stewart acknowledged that Heineken was happy with the theoretical blend approach, but also said there were other brewers that were not so happy.

1588 After 3 weeks at the helm, Viers recorded some observations about the Joe White Business in an email. In substance, he said the conduct reflecting the Operational Practices had been a real eye-opener for him. He acknowledged that he had made an assumption that in the malting industry participants may on occasion tweak a Certificate of Analysis, but did not expect a systematic approach that underpinned

how the Joe White Business and industry was run. He suggested that Malteurop and Graincorp in Australia were engaged in the same practices. He also thought it was pretty obvious that the practices were pervasive.

1589 In addition, he suggested that Cargill was at a disadvantage because its competitors were adding free capacity with the use of gibberellic acid and lowering the operating costs as a result. Further, he suggested there was an irony in Cargill's reputation being hurt because of Cargill's "self-report problems" and the identified need for derogation. In this regard, he said it gave rise to limitations for any possible alliance or joint venture because other players in the industry were not going to operate to Cargill's standard. As to the knowledge of Joe White's customers, Viers stated:

> I suspect the procurement departments are likely aware at some level this is happening and don't take a hard line as it will potentially reduce their suppliers and disadvantage them vs [competitors] from a cost perspective, not to mention the internal headaches for them.

1590 Viers was not taken to this email when giving evidence. Accordingly, it is not possible to know how he formed the views that he had in the 3 weeks he had been in charge of Joe White.[964] In short, Viers may have been doing no more than repeating what he had been told by 1 or more of the Joe White executives.[965]

1591 In response to Viers' email, Eden stated that Cargill needed to stand behind all of Joe White's product, even if the product was not in compliance. Essentially, Eden's position was that if Joe White was providing the same malt under Cargill that had been provided previously, then the customers ought to be happy. Eden then listed 5 other approaches. Having listed them, he said it was necessary to form an integrated plan, rather than have a casual commercial discussion. He suggested Cargill could not hide with its head in the sand because Cargill was putting itself at a competitive

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964 Some of these views may have germinated earlier than 1 November 2013 as a result of the disclosures made in October 2013 about the Operational Practices engaged in by Joe White: see, for example, pars 1112-1142 above.

965 Although the Viterra Parties referred to this email in their closing submissions, no reference was made to it in contending the existence of the Alleged Industry Practices: see par 1860 and issue 13 below. No doubt this was a reflection of the limited probative value it had in relation to that issue: see also par 1700 below.

disadvantage without getting the same freedoms as Joe White's competition.

1592 With 1 exception, it is unnecessary to elaborate on the 5 different approaches Eden identified, nor the evidence Eden gave in relation to them. Suffice to say, nothing suggested by Eden contemplated an approach which was not to be negotiated with and accepted by Joe White's customers.

1593 Viers responded stating that he agreed with Eden's observations, but emphasised his primary point that, in his view, Cargill needed to make it an industry problem as Cargill was incapable of completely solving the issue itself. When cross-examined about this email chain, Eden stated that Viers' suggestion was partially fair. In explaining his answer, Eden said that brewers had specifications tighter than maltsters could meet.

1594 The exception referred to above was Eden's second possible approach, which was to "[p]romote standard deviation approach to be within spec regardless of lot analysis". While Eden accepted there were parts that were similar, he rejected the suggestion put to him in cross-examination that this was a reference to the erstwhile Joe White approach. Eden explained that this point was a reference to work that was then being done in North America on statistical variation and trying to use that as proof that the quality of malt was not impacted by using such a statistical analysis on a lot by lot basis.[966] In seeking to distinguish what he was referring to from the Joe White approach, Eden noted that the plus or minus 2 standard deviation approach was not written on Joe White's Certificates of Analysis.

1595 When it was put to De Samblanx during his cross-examination that Eden may have argued for a policy that allowed the creation of Certificates of Analysis which showed malt to be within specification although it was outside specification according to some statistical parameter, De Samblanx gave evidence that he could never believe there would be a Cargill policy allowing for this type of thing. When he was asked whether Eden had ever suggested to him that Cargill should adopt such an approach,

966 As to which, see par 1612 below.

De Samblanx said he had never heard of it from Eden and that, in any event, it would not be Eden who would be setting such policies. During the course of this cross-examination, De Samblanx understood a question put to him was raising whether or not having some statistical boundary or deviation as part of a reporting policy was an approach Cargill had in fact adopted. His answer was emphatic in rejecting any such suggestion.

1596 On 27 November 2013, Viers sent a further update as to the progress of the integration to Van Lierde and Eden, copying in Hughes. He stated that he anticipated the "tentative" financial impact of implementing the Cargill Blending and Certificate of Analysis Procedure at Joe White as just under $1.5 million,[967] which represented "the cost to basically purge the system of non-compliant malt/barley and reposition". Viers continued:

> Any cost from here would be due to a new problem which we are not facing today. What [the cost estimate] does not include is lost profits due to capacity shutdowns which we will be unlikely to recover through warranties and represents approx. $1 [million]. Significant cost was mitigated by a multitude of customer derogations …Today we are operating at close to 100% of capacity. That said we continue to run on the edge and are susceptible to challenges in meeting customers [specifications], production disruption, as well with our volume short fall certain customers are running very tight. This is in part due to the fall off of the barley quality on the tail of the crop year particularly around the approved varieties which are in short supply. Getting to new crop will provide some much needed relief. We have been able to push out our planning horizon to a couple of weeks from a few days and are working to secure the production shortfall ex the EU. Bottom line we are stable at the moment.

Viers then turned to what he referred to as a number of positives. After making some complimentary observations about Joe White employees, Viers continued:

> In reviewing the customer book it looks like our assumption in the deal model were (sic) right in line on volume and margins even a bit better than we expected.

Viers then referred to a number of processes and projects underway to capture synergies and expressed confidence that Cargill would find additional synergies

967 Some of which Viers said could be off-set because malt and barley in stock at the time of Completion was distressed and not saleable as good product and therefore would have a lower realisable value than had been paid to Glencore.

particularly on the commercial side. After referring to a possible reduction in the purchase price by reason of various incidental matters, Viers concluded:

> I'm not discouraged by anything I see to date we just need to get all to Cargill standard.

1597 In response, Van Lierde wrote "[o]verall it looks significantly better than the various scenario's (sic) that we came up with in the last days before closing". He then asked for Viers' opinion on what could be claimed back from Glencore and whether Cargill was now in a position to make a good assessment of the short and long-term impact. Viers replied with some comments about Cargill's rights under the Acquisition Agreement, and expressed his uncertainty about whether Cargill's claims would meet the threshold of $3.5 million,[968] and continued:

> The situation was not far off from what we anticipated in the last days. The surprise to me was the number of derogations we received from [customers] on [gibberellic acid]/variety/[specification] and sometimes a combo. Nearly every shipment require same. Speaks to how much [customers] want/need the malt.

Viers then addressed various other matters, but was not willing to definitively express his position on capacity impact and implications, stating a fairly detailed study was required. Further, he was reluctant to impose on the Joe White plants at that time, and referred to other priorities.

1598 On 29 November 2013, Stewart emailed Joe White employees including Wicks, and copied to others including Hughes, Sheehy, Viers and Youil. He stated that following a meeting the previous day, with Lion Technical and the West End brewers, Lion Nathan[969] "seem happy to adopt a standard deviation either side of their specification that would not require derogation", whilst West End had agreed to the proposal "at a brewery level". After referring to a number of other customers who were to be approached, Stewart stated that Coopers had confirmed their agreement to a similar arrangement.

1599 Viers responded congratulating Stewart and suggesting that they should continue to

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968 See cl 15.7(a)(ii): see par 1030 above.

969 Viers described Lion Nathan as a very large customer of Joe White.

discuss with Hughes how to "keep momentum" and align with additional customers. Eden also responded:

> [Stewart], thanks for your patience and persistence in moving this forward. Your efforts and approach are going to be used as a model to approach this issue more broadly across our entire business. Trust me, this issue being resolved in the manner you have accomplished is of tremendous value across our entire malt business. It will be a key part of our business plan going forward.
>
> Thank you very much. We have better days ahead.

1600 Eden was not cross-examined about the contents of this email. Viers gave evidence that, from this email, he understood Eden to be suggesting that a standard deviation approach that was used by Joe White could be something that might be able to be used across Cargill's malt business in the format that Stewart had secured it. As part of this email chain, Stewart suggested Joe White should try to push on with other customers.

1601 Meanwhile, customers continued to express dissatisfaction with Joe White's requested derogations. On 4 December 2013, Asia Pacific Breweries[970] responded to a notification from McIntyre that certain parameters were out of specification as follows:

> So, in total with this shipment
>
> Ale malt is out of [specification] on soluble protein and sacch time?
>
> Wheat malt is out of [specification] on total protein and boiled wort colour?
>
> And the pilsner is out on grading?
>
> I need this shipment here before I run out of malt, so please proceed to ship.
>
> But this is far from ideal.

McIntyre responded, acknowledging the situation was far from ideal and expressing her gratitude for the cooperation. She promised that Stewart would liaise with the plant employees on quality and then be in touch.

1602 During cross-examination, Stewart was taken to this email chain. He gave evidence that in December 2013, Joe White was experiencing real difficulties in supplying malt with barley varieties compliant with customer specifications. He said there were

970 This particular shipment was concerned with a craft brewery of Asia Pacific Breweries.

"many, many instances" where that had occurred to his knowledge. He said that McIntyre was the point of contact at Joe White to liaise with customers on seeking to obtain derogations.

1603 Stewart agreed with the suggestion that customers became intolerant of derogation requests. Stewart said brewers were frustrated by the imposition of derogations, especially when they were sought repeatedly. Stewart's discussions with brewers disclosed that brewers did not readily understand what had brought about the change in Joe White's malt. He said considerable difficulty arose in maintaining smooth relationships with Joe White's customers. In some instances, in order to get a request for a derogation accepted, some compensation from Joe White was required. Others accepted "under protest" (because rejection would have adversely affected their production) or as a "one-off".

1604 Various measures were taken to try and ease the situation with Joe White's customers. Notwithstanding, the repeated requests for derogations led some Joe White customers to find alternate malt suppliers. This included Coopers, who built its own malthouse to produce malt for its own brewery requirements.[971] At the time Stewart gave his evidence, Coopers was producing 16,000 tonnes of malt per annum,[972] whereas previously Joe White had supplied all of Coopers' malt requirements.

1605 Also on 4 December 2013, McIntyre sent an email concerning Certificates of Analysis. The email referred to the requirement of having to ask customers for a derogation on any parameter that was out of specification. The email stated that Joe White was asking for a derogation on almost every shipment being packed, not just in relation to the initial blend but "more often than not" by way of a request for a second derogation when the remaining results were analysed on the shipment sample. McIntyre then set out an action plan to try and reduce the number of derogations required. McIntyre gave evidence that, in response to the requests for derogations, customers frequently queried what was going on and why Joe White could no longer produce compliant

971 The construction of the malthouse took several years, and the gradual transfer of supply away from Joe White was completed in early 2018.

972 Some of which was sold to other brewers.

malt.

1606 McIntyre also gave evidence of a "traffic light system" being introduced to try and alleviate the need to seek derogations so often. If a result was within specification it would receive a green light. If it was out of specification, but within 2 standard deviations then it was given an amber light. Results beyond two standard deviations were given a red light. The proposal was that derogations would only be required in the event that the parameter received a red light. Some of Joe White's customers accepted this regime, but others did not. The regime was not implemented if the customer did not agree.

1607 On 9 December 2013, Hughes sent through a further integration update to Eden, writing:

> - Both domestic customers[973] have now agreed to [standard] deviation type system for delivery of malt
> - [Oriental Brewery] has also agreed to a variation of this approach, once details finalised update to follow
>
> …
>
> - *Adelaide is most problematic with Buloke quality now almost unusable on its own*. New seasons grain being delivered next week to provide blendable material. [Gibberellic acid] will be important for [its] performance and will be used where customers allow
> - A high proportion of 5 day malt will continue to be required in Adelaide, due to Buloke performance and early malting of new seasons (sic) grain
> - Shipping companies are tolerating our constant rescheduling but it is getting more difficult out of Adelaide, we are working with [Cargill's grain and oilseeds supply chain] to manage this, new seasons (sic) grain performance will be critical
> - *Most customers have worked well with [revised] program but some have been resistant*, particularly Vietnam based customers excluding [Asia Pacific Breweries] who are familiar with Cargill Heineken relationship. Guinness Anchor in Malaysia has also been challenging. Nestlé are also difficult but have agreed to some [standard specification] variations.
>
> (Emphasis added.)

1608 Eden replied on 10 December 2013, copying in amongst others Sagaert, Viers, Jewison and De Samblanx:

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973 Eden gave evidence that these customers were Lion Nathan and possibly Boags.

> Could we not ask/tell we will have to use [gibberellic acid] on the new crop, at least for the first few months?

When Eden wrote this, he had no intention of continuing Joe White's practice of covertly including gibberellic acid contrary to a customer's instructions. He gave evidence that, both with respect to gibberellic acid and alternate barley varieties, any variation in supply to what a customer had ordered was only to be done with the customer's approval and collaboration.

1609 On 11 December 2013, Purser on behalf of Cargill Australia sent a letter to Mattiske "Country Manager ANZ, Glencore Grain" referring to the correspondence between the parties in late October 2013. The letter stated that Cargill had investigated the matters previously raised, and had identified a number of issues.

1610 After setting out a series of problems with respect to customer specifications, barley varieties, gibberellic acid and Joe White's barley supply contracts with Glencore (pursuant to which Glencore asserted an entitlement to supply Joe White non-approved varieties or grades that were said to be not suitable for malting consistent with Joe White's existing customer contractual obligations),[974] the letter identified measures that had been taken to seek to address the issues and mitigate any resulting loss. The letter also stated that there were potentially major financial and business implications for Cargill arising from the matters raised. An invitation was made for Glencore to work with Cargill to further mitigate the issues raised. Cargill expressly reserved all its rights.

1611 As Joe White was struggling to produce malt within specification, Cargill was also investigating shortcomings in its own malt analysis methods more broadly. On 15 December 2013, Matthew Evers ("Evers"),[975] reliability excellence leader of the malt business unit at Cargill, emailed Stewart, copied to Hughes and others. He referred to a conversation with Hughes about some of the work Stewart had been doing.

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974 See par 1579 above.

975 Evers was employed at Cargill for approximately 13 years until September 2014. He started working in the malt business in around October 2011 as a reliability excellence leader, responsible for efficiency and reliability of assets. He is a mechanical engineer. Evers had been involved in mid 2013 in assisting at a Cargill plant in North Dakota which consistently had problems producing malt that met customer specifications.

Before contacting Hughes, Evers had been told that there had been issues in Australia in relation to Joe White meeting customer specifications.

1612 Evers stated in his email that over the past several months, he had been engaged in a project designed to reduce Cargill's out-of-specification shipments. He stated that he had obtained "tons" of data and analysis concerning Cargill's process and analytical capabilities. Evers expressed a desire to find the best way to engage with Cargill's customers about analytical capability, measurement system capability, statistical confidence in data, consumer and producer risk, and so on. He continued:

> To make it blunt … in my opinion (and based on the data we have) the analytical capability of the methods for moisture, color, dp and several other attributes do not have sufficient repeatability and reproducibility to meet our customer expectations …
>
> Going forward, we will be working to figure out the best way to solve this very significant and impactful puzzle; I'm hoping we can get some of your time/insight for this effort!!

1613 Evers' email attached a presentation entitled "Our customers … our process".[976] The presentation was for Cargill, not Joe White.

1614 The presentation provided details of the cost to Cargill, Inc of, amongst other things, production of out-of-specification malt, estimated to be $50,000 to $75,000 a month "due to unloads and reprobes". On a slide entitled "PROCESS AND ANALYTICAL CAPABILITY", the presentation read:

> 1. We are working to improve process capability, however the analytical capability needs to be addressed in parallel.
>
> 2. Values on [Certificates of Analysis] (values reported) seem to drive perception of quality more (or equal to) than actual malt quality.
>
> 3. Analytical capability of the methods *does not allow statistical confidence* within specification.
>
> …

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976 The first slide of the presentation bore Cargill, Inc's logo and at the bottom of the slide read: "© 2011 Cargill, Incorporated. All Rights Reserved. For Internal Use Only." Notwithstanding this earlier date, the presentation included figures up to October 2013.

5. Even though theoretical blend is currently possible in Europe and Argentina, *customers seem to be pushing more for actual analysis*.[977]

…

7. This seems to be an industry wide issue.

(Emphasis added.)

1615 With respect to the third point, Evers said the work he had done to that time had led him to conclude that methods of testing malt lacked absolute precision. He had further observed that the typical specification ranges in the industry were tighter than the analytical methods allowed. He had also become aware of malt quality variability. His evidence was that a batch could be tested 5 times and receive 5 different results.[978]

1616 A slide entitled "Practical consequences: Finding result Out-of-Specification: Csp[979] Example" displayed a graph that measured the probability of an out-of-specification result against "true strength". Evers gave evidence that the graph, and his comments on it included in the presentation, were designed to demonstrate that even if a sample tested for wort colour returned a value of 2.5, there was in fact a 50 percent chance that the actual value was within specifications and a 50 percent chance it was outside specifications. This was due to the limits of testing accuracy in relation to Csp, which did not allow statistical confidence within specification.[980]

1617 A slide entitled "What can we do??" set out several options for Cargill, Inc to possibly take in relation to customers who required analysed results as opposed to theoretical blends.[981] One of the 6 options was recorded as:

> Engage conversation with the customer to allow a +/- 2 standard deviations of the analytical method.
>
> (this would reduce our [out of specification] issue by more than half).

Evers gave evidence that the possibility of inviting customers to allow the test results to be acceptable if within plus or minus 2 standard deviations was just 1 of several

977 Evers gave evidence this comment was based on some limited feedback from some people in the industry.

978 In a later presentation in January 2014, Evers stated that analytical capability had been identified as causing significant negative impacts to Cargill and its customers: see par 1646 below.

979 Evers gave evidence that "Csp" was a measurement of wort colour.

980 See par 1614, point 3 above.

981 It was noted that, in regions where theoretical blend was used "this is a non-issue".

options that were evaluated after discussion with Stewart. Evers said he agreed this was a possible solution, but only on the premise that the customers were "aligned". Further, although it was a possible option, Evers said he never personally presented it as an option. In short, Evers' position was that this option was put forward on the basis that it had been discussed with the "Joe White team and their customers and being accepted within that area".[982] Effectively, Evers continued if this option were ever adopted, what would occur would be no more than inherently widening the specification by an additional 2 standard deviations.

1618 The next slide, entitled "Recommendation", stated:

> Engage with our key customers to have open dialogue, share findings and determine next steps.
>
> (could be one, or a combination of the 7 options - or something different).

1619 After being taken to this presentation at some length, it was forcibly and repeatedly put to Evers during cross-examination that the actual numbers recorded in the Certificate of Analysis forwarded to a customer did not ultimately make much difference because of the inherent difficulties with the testing processes. It was further put that the real issue was how the malt performed in the brewing process, rather than what customers were told about the testing results for the customers' specifications.

1620 Evers repeatedly rejected these propositions, stating that the numbers as reported mattered. Further, he also rejected the suggestion that his presentation was seeking to convey that Cargill should not get hung up on the actual numbers recorded in a Certificate of Analysis. A fair reading of the presentation did not give any basis to doubt Evers' evidence on this point.

1621 On 17 December 2013, Stewart emailed Evers stating his presentation gave a good picture of the problem "we face" with out-of-specification malt. Stewart referred to some initial success with customers, and offered to share some data.

1622 Despite Joe White's concerted efforts to set up arrangements with customers that

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982 No doubt, this was Evers' belief at the time, based on what he had been told. There was no evidence that Evers had had any direct dealings with Joe White's customers in forming this understanding.

would allow for regular derogation, some customers were continuing to push back.

1623 On 18 December 2013, Stewart sent an email to the technical controller of Asia Pacific Breweries inviting him to accept a shipment of malt that was out of specification. Stewart was not sure approval would be forthcoming. He enquired as to whether Asia Pacific Breweries would like to wait to see if Joe White could further improve the malt. After a conversation on this matter, Stewart sent a further email explaining why he thought there would not be any "implications" if the malt were used. Additionally, he informed Asia Pacific Breweries that he could not guarantee Joe White would be able to improve the situation. Lastly, Stewart stated his understanding that Asia Pacific Breweries was able to ask for dispensation for any malt shipment, and suggested this line of enquiry ought to be explored.

1624 On 19 December 2013, the technical controller replied:

> After discussion internally, we have decided *to make an exception* to accept this lot. However, we *expect this to be an isolated incident* and should not set as precedence (sic) for future shipments.
>
> This is the 2nd time this has occurred. We have always had positive experience with quality from [Joe White] and we are concerned to why there is a lapse in control over black malt cleaning. It is worrying to hear that specialists are not confident if their improvement efforts will deliver results.
>
> We *take a serious view towards quality* and will not accept chronic deviations from quality deviations. Rest assured that we are in close contact with Heineken and they are being informed and consulted on our decisions.
>
> (Emphasis added.)

1625 Stewart accepted this was a manifest example of a Joe White customer expressing frustration. Stewart gave evidence that the email demonstrated Asia Pacific Breweries' patience for further derogations or variations was effectively exhausted.

1626 The projected earnings for Joe White were soon below expectations, at least according to Cargill. On 19 December 2013, Jewison emailed Van Lierde and others (copied to, amongst others, Hughes, Viers, Eden and De Samblanx) about earnings projections for Joe White. In response to a question from Van Lierde as to why the projections to 31 October 2014 were as low as they were, Jewison wrote:

> The operating results in the first 12 months of the model are impacted by these items:
>
> - Lower margins due to higher barley costs that are still expected from the prior year dislocation of barley prices. This is an impact of approximately ($3-4 [million]) after tax in the first 12 months. Year 2 in the model reflects the recovery to normal margin levels.
>
> - Depreciation/amortization may be high in the model by $200-300K per month based on the Nov monthly results …
>
> …
>
> Also, in the commitment, some of the closing costs were treated as tax-deductible, but they may not be.

1627 Eden gave evidence that Cargill's forecast for barley earnings in the first year turned out not to be achievable.

1628 Further, Eden acknowledged that the operational budget for depreciation devised almost immediately after Cargill took control was set at $15.2 million, as opposed to the $10.4 million allowed in Cargill's previous deal model. Eden also accepted these 2 items were the biggest financial difference between what he had expected Joe White to attain and what was actually achieved.

1629 Jewison was also asked questions about this email. She said she was comparing the details in the Information Memorandum, with the budget that had actually been put in place. Further, she accepted the projected decrease in performance relating to barley trading, depreciation and tax deductibility had nothing to do with the Operational Practices.

1630 Although Sagaert could not be certain of the date, but probably in November or December 2013, she had a telephone discussion with Viers. Sagaert gave evidence that Viers said he was stupefied by the Operational Practices that had been discovered. Viers told Sagaert that Joe White was clearly falsifying Certificates of Analysis and delivering malt not in line with customer specifications. Sagaert's evidence was that it was during this conversation that she learned of the Operational Practices for the first time.

1631 Sagaert's evidence was that the Operational Practices caused difficulties in 2 key areas,

namely customer relationships and the realisation of synergies Cargill had expected to achieve. As to the latter, Sagaert attended a meeting in November 2013 at which synergies were discussed. This resulted in a report being produced in December 2013. The report stated that the synergies identified had a varying degree of certainty. Further, the cycle of contracting and the Completion Date (said to have been 1 November 2013) were referred to in stating that the synergies identified for the first year were highly opportunistic. It was stated the commercial team would closely monitor trading activity in order to achieve the synergies referred to. The report also contained the assumption that there would be no additional capacity at Joe White; therefore the volume allocation to Joe White would only count the additional margin as a synergy.

1632 Under cross-examination, Sagaert stated that it was very difficult to realise synergies in the first year if you were solving problems all the time. She also acknowledged that the change in the Certificate of Analysis procedures resulted in reduced capacity at the Joe White plants. She rejected the proposition that the report was identifying a failure in the original valuation model to ascribe probabilities or risks to the various synergies. A more detailed report on this issue was subsequently prepared in February 2014. With 2 exceptions (which were set at 70 percent), the probabilities of synergies being realised for the 2014 to 2015, 2015 to 2016 and 2016 to 2017 financial years were rated at 50 percent or less (with some of them rated at zero).

1633 On 8 January 2014, in response to a further reply from Van Lierde, Jewison made clear that the lower projections for barley trading earnings were only for the year to 31 October 2014, and the projections "ramp[ed] up" in the following year.

1634 On 24 January 2014, Viers sent an email to Eden and copied to Van Lierde with a suggested update for the Cargill, Inc board about the Acquisition. The update stated that from Completion the Joe White Business had experienced disruptions in production and additional logistics costs as a result of complying with "the Cargill [Certificate of Analysis] policy". Viers said that while this issue had stabilised, "the [l]ong term implications" were being assessed. Viers noted that closing and

integration cost projections were $3 million below the deal model of $29 million because of lower technology costs and lower stamp duty.

1635 Van Lierde responded that he considered the phrase "the [l]ong term implications are being assessed" was too vague "and could lead to wrong interpretations". He advised Viers to either delete the wording or to include a monetary range with it. He also suggested Viers make reference to how the deal had been received by customers and the commercial outlook as against Cargill, Inc's assumptions entering into the deal.

1636 Van Lierde was cross-examined about Viers' email. He said it was incorrect to suggest that Cargill was expecting disruptions in production and additional logistic costs when the Acquisition Agreement was signed on 4 August 2013.

1637 Ultimately, the update Viers prepared for the Cargill, Inc board did not contain the phrase "the long term implications are being assessed", but did include the following:

> Key commercial assumptions including margin structure and sales volume have been confirmed vs the deal model. Customers and new employees are pleased to see a buyer with a long term view and commitment to the malting business acquire Joe White.

1638 The update, which Viers sent through to Eden on 26 January 2014, also stated that the base business of Joe White was "stable".

1639 Viers gave evidence that at the time he sent the update he believed that Joe White had not lost any customers.

1640 On 28 January 2014, Viers emailed Eden concerning a discussion he had had with Hughes and Wicks. Viers told Eden they had arranged a meeting for the upcoming Friday to discuss the policy with respect to specifications and approaching Joe White customers. Viers stated that Joe White was still not hitting all the customer specifications, which meant it was asking for a derogation on essentially all shipments. Viers noted that Joe White's customers had grown weary and were beginning to wonder what had changed. Viers also said that he believed customers either knew what was going on or were simply suspicious. When Stewart was taken to this email in cross-examination, he said this observation of Viers also reflected his state of mind.

1641 Viers stated that the merits of going to Joe White's customers to explain that nothing had changed, except for Cargill's Certificate of Analysis policy, was to be debated at the proposed meeting. Viers suggested communication could be developed about how Joe White handled tests and sampling variability. Viers said Hughes was comfortable with this and that Wicks wanted to pursue a clear and upfront approach. With respect to the use of unauthorised varieties and gibberellic acid, Viers said this would not be touched as it was strictly a compliance issue.

1642 Eden responded with some quick thoughts. These included that he wanted to get the Joe White approach "in the worst way". Eden gave evidence explaining that by this he meant he wanted to reach an agreement with Joe White's customers to adopt the approach that had been used in the past. Eden said he understood that Joe White's approach had meant that the Joe White Business was running much smoother and he had a desire to get back to that approach as best as Cargill could.

1643 Eden also referred to Evers' work.[983] He suggested that it might be supportive of Joe White's approach, but Eden said he did not know. Eden said he understood from Viers' email that Joe White's customers, or at least many of them,[984] had not been told about the Operational Practices before 1 November 2013.

1644 In response to a request from Viers for information, on 1 February 2014 Evers forwarded a draft presentation entitled "Analytical Variability and Customer Expectations". That presentation again reflected work Evers had done in North America and contained observations, some of which were similar to information Evers had previously presented.

1645 As part of an executive summary, Evers suggested that Cargill Malt seemed to be holding itself to a higher standard than its competitors did, or than its customers appreciated in terms of statistical confidence. When taken to this observation during cross-examination, Eden said he agreed with it in some sense. Eden said he had no

983 See pars 1613-1618 above.

984 Eden gave evidence that he could not be certain about what some customers may or may not have been told.

way of knowing what customers appreciated, and nor did Evers given that he was an engineer who had never worked with the customer.[985]

1646 De Samblanx was taken to Evers' executive summary. He gave evidence that there was a persistent problem, in at least part of the malting industry, that customer specifications assumed a precision that analytical capabilities could not deliver. With respect to Evers' point in the summary that analytical capability had been identified as a cause of significant negative impacts to Cargill and its customers, De Samblanx gave evidence that he did not agree. (De Samblanx understood that this point was referring to some parameters having a variability so high that they could bring the malt out of specification.) As for the observation concerning Cargill holding itself to a higher standard than its competitors or customers appreciated, De Samblanx said he could not agree because he did not know the standards to which Cargill's competitors were holding themselves and could not compare.

1647 Later in the draft presentation, under the heading "PROCESS AND ANALYTICAL CAPABILITY", Evers stated the following:

> - Analytical capability of the methods does not allow statistical confidence within specification for color, moisture, PS[986] and other attributes.
> - Even though theoretical blend is currently possible in Europe and Argentina, some customers seem to be pushing more for actual analysis.
> - …
> - Analytical capability relative to customer expectations seems to be an industry-wide issue.

1648 Under cross-examination, De Samblanx said with respect to the first point concerning colour, moisture and soluble protein, he partially agreed. The extent to which De Samblanx agreed, and the basis for that agreement were not explored.[987] On the

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985 See further par 1818 below.

986 PS stands for soluble protein.

987 The Viterra Parties submitted that it should be found that De Samblanx knew in 2013 that, in the malting industry, analytical capability of testing results did not allow for there to be statistical confidence of being within specification for colour, moisture or soluble protein analysis results. In light

second point, De Samblanx gave evidence that Cargill customers in Europe were not pushing more for actual analysis. As to the last point, De Samblanx said he disagreed with it. He said that Evers had not consulted him with respect to this point.

1649 Under the heading "What can we do?", various solutions were suggested. The first of these was to engage Cargill's customers to get them to adopt the theoretical blend. When taken to this point, De Samblanx rejected the suggestion that this approach made it easier to satisfy customer specifications. The next possible solution referred to introducing a "typical range" in Certificates of Analysis rather than doing a specific analysis. De Samblanx's evidence was that he did not know precisely what Evers had proposed and this was not something Cargill had engaged in. A further matter listed under this heading was to widen customer expectations.

1650 As for another possibility suggested by Evers of engaging customers to allow 2 standard deviations on either side of the specification, De Samblanx gave evidence that, to his knowledge, this was not something Cargill wished to do at the time. Further, to an observation by Evers in the draft presentation that that was what Joe White was doing at the time,[988] De Samblanx took exception, stating it was not the same.

1651 The reason why De Samblanx gave this answer was provided during re-examination. De Samblanx said (correctly) that what Joe White had been doing was correcting within 2 standard deviations all the time at the convenience of Joe White. He said that accepting a raw result plus or minus 2 standard deviations could be considered correct if the customer agreed to it. Further, he indicated the correct manner to report such an approach if it were adopted would be to give the customer the actual result and state it was plus or minus 2 standard deviations so then the reporting was clear.

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of the vague evidence on this topic, there was no proper basis to make such an all-encompassing finding. On the contrary, the fact that De Samblanx only partially agreed with the various propositions put suggested there was an element of statistical confidence. However, it also indicated a level of a lack of confidence; but what that level was remained unidentified. It should be further noted that the "other attributes" were not identified for De Samblanx, and he was uncertain as to its meaning.

988 Evers gave evidence that he did not know whether or not Joe White was engaging its customers to get agreement to a regime where a result within 2 specifications was acceptable.

1652 While dealing with De Samblanx's evidence concerning variation and uncertainty, he readily accepted under cross-examination that a test result might read out of specification but variances that arise from the testing process may mean that it was actually within specification. He also acknowledged that it can never be certain if something was precisely within specification, because there was always a level of uncertainty. However, he suggested the closer the result was to the required specification, the higher the probability the malt complied with the specification.

1653 In giving this evidence, De Samblanx gave a hypothetical example where there was a variance in laboratories giving rise to a 2 standard deviation difference. It was in that context that it was put to him in cross-examination that taking data from the system consisting of the results of the tests was not a reliable way of knowing whether in fact the malt shipped was within the customer's specification, to which he responded, "It's all the time coming back to that 2 standard deviations that you have on all the analysis. So a value is never 100 percent sure whether it's malt or whether it's nuts and bolts."

1654 Evers was also cross-examined on the contents of this draft presentation. It is unnecessary to go through each of the matters put to him, which were said to arise out of the contents of the document; many of which he rejected. Further, it was not entirely clear how Evers' work and experience in a plant in North Dakota could be directly related to Joe White's situation in Australia. Evers' own evidence was that the Kaizen and Six Sigma tools used with respect to the North Dakota plant were great for some applications, but for some business problems they did not apply.[989] He also declined an invitation during cross-examination to express an opinion about the appropriate way to change from the practices Joe White had been using to a theoretical blend model, because there were too many variables preventing him from giving an answer.

1655 Suffice to say, in Evers comparing what he was considering with what Joe White had been doing, Evers said it was contemplated that customers would be aware, or should be aware, of errors in testing and that there would be transparency if his possible

989 Evers stated that Kaizen and Six Sigma were different management approaches.

alternatives were adopted.

1656 Many further examples were given of exchanges between Joe White and its customers in seeking to obtain derogations.

1657 By way of another illustration, in early February 2014, McIntyre emailed Nestlé regarding 2 lots of malt. She advised that the order was all within specification apart from total protein which was just above specification. She asked whether the shipments were acceptable. Nestlé responded that they were not. In rejecting the request Nestlé stated that it had given too many "of this type of releases to [Joe White] and it [reflected] badly on our factory KPIs".[990]

1658 Stewart then responded to Nestlé's position, stating he fully understood its comments regarding the large number of requests that Joe White had made. He further stated that Nestlé's understanding had helped Joe White get through a very difficult period of barley quality. He then queried whether Nestlé would reconsider, given all specifications were within the revised parameters apart from protein, which he said was not a functional malt parameter. This email was followed up by Stewart the following day. In again seeking approval, Stewart stated the malt was typical of the remaining 2012 crop that Joe White had, and therefore Joe White expected to see more of this style of malt for the next month or so. Stewart stated that he was concerned that if this higher protein malt was not suitable then Joe White may have issues with supply in the short term.

1659 Nestlé then responded, stating it was agreeable to accepting the 2 lots. However, it enquired as to when the higher protein barley would be used up and when Nestlé could expect to have supply back to normal.

1660 Many other attempts made by Joe White to obtain such understanding were unsuccessful. It is readily apparent from a review of the many emails relied upon by the Cargill Parties that many of Joe White's customers were dissatisfied, and substantially so, with the inability of Joe White to supply malt within specification and

990 KPIs stands for key performance indicators.

on time. The correspondence also illustrated that Joe White suffered a significant reduction in the amount of malt supplied to some customers.

1661 Adapting Joe White's operations to Cargill's business model was an ongoing process. A "Derogation Customer Review", dated 6 February 2014 and prepared by Stewart as a starting point, set out Joe White's customers, their "Current Situation", their "Customer Attitude/Potential Reaction" and suggested action. It detailed a number of different approaches taken or suggested by Joe White in relation to derogations, and recorded Stewart's views as to whether concessions or derogation approval were likely to be obtained.

1662 More specifically, the review recorded that nothing further needed to be done with respect to Coopers or Lion Nathan as each of them had accepted a standard deviation be applied to their specifications (or at least most of their specifications).[991] Viers gave evidence he had no reason not to believe the contents of the review were accurate, though he said he was not certain whether certain derogations were temporary or long term.

1663 With respect to the other brewers, Stewart's evidence was that by the end of February 2014 he had been able to negotiate tolerance ranges with about a fifth of Joe White's customers. Further, Stewart was of the opinion that Japanese brewers would be the least likely to agree to any arrangement that they were not aware of "to the very last detail". He suggested it would be difficult to get Japanese brewers to accept specification variation. That said, he suggested that Sapporo would be the most willing to agree to some sort of specification variation based on Joe White's strong relationship and the fact that Joe White had limited barley choice. As for Asahi, Stewart said there was little chance of it agreeing to any type of concession. Regarding Kirin, Stewart said this customer might be sympathetic as it was an ex-maltster. However, he said that Japanese culture would dictate the need for full disclosure.

1664 Of the other main customers, Stewart made various observations. He stated that Boon

991 See also pars 1598-1600 above.

Rawd understood "that maltsters 'modify'" Certificates of Analysis and wanted to maintain a tight specification as a result. Stewart recorded that Boon Rawd had flatly refused to allow "a yellow and red region approach" to specifications.

1665 The Viterra Parties submitted that Boon Rawd's understanding as recorded in this document showed that Boon Rawd believed Certificates of Analysis could be amended regardless of what Joe White (under Cargill) was saying in respect of its practices. Notably, although dealing with this very customer in his evidence, Stewart did not state this was Boon Rawd's position. Further, this wording, read in context, did not indicate that Boon Rawd had such a belief.[992]

1666 By way of further background, around the end of February or early in March 2014, Stewart visited Boon Rawd in Bangkok to discuss derogations required from it as a result of Cargill's approach. Stewart gave evidence that he was told by Boon Rawd that it wanted Joe White to revert to the way malt had been supplied to it prior to the Acquisition. In response, Stewart said this would include adjusting Certificates of Analysis results, to which Boon Rawd said it knew maltsters made adjustments to Certificates of Analysis.

1667 A meeting with Boon Rawd was also held by Hughes and Wicks, and was referred to in an email from Wicks to Viers, Hughes, Youil and others. The email noted that Boon Rawd was 1 of Joe White's largest customers. It stated that Joe White had been delaying shipments due to its inability to meet Boon Rawd's specifications with old and new (still dormant) crop Buloke barley. In response to orders for 12 shipments of 450 tonnes, Joe White had been unable to supply any malt in March 2014 and only half the requirements in April 2014. Boon Rawd was concerned it would run out of malt as Joe White was its largest supplier.

1668 The email set out some of the details of the meeting. It noted that the Buloke variety consisted of poorly performing old crop and still dormant new crop, which caused loss of production due to 5 day malt cycles and missed batches. The Cargill

992 See further pars 1739, 1747, 1811 below.

requirement that every parameter had to meet specification or the malt could not be sent was discussed. Wicks recorded that he and Hughes admitted that Joe White in the past would "make judgments based on the error of the test" to adjust [Certificates of Analysis] "to meet their requirements and ensure [Joe White] kept the malt flowing without bothering [Boon Rawd] with derogation requests". It was also pointed out that Boon Rawd did not have quality problems with Joe White's malt under the previous regime, to which Boon Rawd agreed.

1669 The discussion then turned to how Joe White could increase supply to Boon Rawd. As part of the solution, Boon Rawd agreed to a different variety of barley and Joe White using the blend analysis results from the theoretical blend for the Certificates of Analysis.

1670 On 24 February 2014, Youil sent an email to Eden, copied to Viers, Hughes, De Samblanx and another, concerning storage capacity. That email attached the "first high-level assessment of the storage capacity requirements for [Joe White], as a result of the introduction of Cargill's [Certificate of Analysis] policy". Youil stated that the Sydney and Adelaide plants were in most need of storage and a request had been made by him for additional funds to undertake further scoping work towards a long-term solution. The attached report also suggested that the Perth plant needed additional storage capacity. The total estimate of the capital expenditure required was $30 million.

1671 In the report, which was copied to Hughes and others, Youil stated as a fact that the implementation of the more stringent Cargill Blending and Certificate of Analysis Procedure had meant that Joe White was unable to produce and deliver malt that consistently complied with customer specifications.[993] The result of this was that the Joe White Business was losing production "due to curtailment on account of full product storage as well as longer processing times that have been implemented to

[993] Youil's view that Cargill's approach was more stringent was to be compared with the view apparently expressed by a number of the Joe White executives in October 2013: see par 1257 above. Presumably, Youil's reference to a more stringent approach included the inability to alter Sign-Out Reports and Certificates of Analysis, and perhaps also to the inability to use the wrong barley varieties.

improve the probability of being in specification". Youil referred to an area of concern, being malt storage and blending capacity. After reporting that both top-down and bottom-up assessments had occurred, it was stated that the current storage and blending capacity for the 3 export plants (being Sydney, Adelaide and Perth) was not sufficient to consistently manufacture malt or base malts to inventory and blend malt to meet customer specifications. Youil stated that this had been partly driven by the Australian variety make-up as well as the specifications of the Joe White customer portfolio.

1672 Around this time, Sagaert was concerned about the impact the Operational Practices were having on Cargill's image. In response to an email from Viers enquiring as to whether Cargill Argentina and Europe could cover some supply issues for Joe White, Sagaert declined assistance from Argentina for capacity reasons but offered some possible assistance from Europe. However, Sagaert emphasised that Cargill should not use Europe as a fall back for the problems at Joe White unless it was the only way not to jeopardise Cargill's image. Sagaert stated that it was probably Cargill Malt's biggest priority to get things fixed at Joe White. She stated that if this did not occur it could really impact Cargill's "image, future earnings, team engagement etc". She also noted she was copying Eden into the email as it was "a too important topic".

1673 In response to the email, Viers suggested that things were improving at Joe White. Viers indicated that Joe White had an action log of initiatives which had been broken down to short, medium and long-term. These initiatives included planning, execution, barley, capital expenditure, process change and "you name it, if it impacts [specifications], customer, or the ability to operate at capacity [it's] on the list". Viers referred to weekly meetings being held with the full management team, as well as plant and production managers. He recorded that customer shipments, production, barley needs and "any road blocks" were being reviewed, with a separate customer log being maintained to record requests regarding specifications, barley varieties and process approvals. He referred to a weekly scorecard which measured capacity utilisation for each plant, including production losses due to "5 day malt, barley, …

space restrictions etc". Viers continued:

> The number of variety approvals, [specification] changes, [gibberellic acid] exceptions, secured while moving all [customers] to a blend analysis to me is phenomenal and a direct [reflection] of the urgency and ownership by the [Joe White] team. We started day one by shutting most everything down and today we have Perth and Minto at full capacity and all indications are that Port [Adelaide] will get there as well. We probably [have not] done a good job broadcasting the same. [I am] not suggesting these are permanent fixes nor sustainable for the long term but necessary for now.
>
> What is clear to me is that coming out of crisis mode and validated by your email is we need to expand the visibility and gain broader support around these issues.

1674 When cross-examined about Viers' response, Sagaert said she read the email and understood that Viers was acknowledging that Cargill had not done a good job in explaining to Joe White's customers what it was doing and the reasons for it. Viers was not cross-examined about the contents of his email. In any event, in an email sent by Sagaert a little later she referred to her own feedback from some Japanese customers to the effect that communications between Joe White and those customers had been less than satisfactory.[994]

1675 Returning to Stewart's derogation review, it stated that Beer Thai 1991 Public Co Ltd ("Beer Thai") would potentially be open to returning to the way Joe White did things previously because Beer Thai analysed the malt delivered and would be in a position to raise issues if they arose. With respect to Beer Thai's current situation, Stewart observed there had been little supply of malt of late. He said there had been 2 successful derogations, before supply slowed down.

1676 Stewart recorded that recent events had strained Joe White's relationship with Hite Brewery Co Ltd ("Hite").[995] Stewart suggested an environment may have been created where Hite would be agreeable to reverting "to our previous operating model". Stewart recorded that there had been intense negotiations with Hite to seek to get agreement for the use of Buloke, a barley variety that had previously been

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994 The email was sent on 9 May 2014, and concerned Asahi, Sapporo and Orion Breweries. When giving evidence, Sagaert could not recall whether the feedback was directly to her or whether she had received information from someone else at Cargill.

995 See also fn 1586 below.

accepted for premium beer production only. After referring to potential trials of another barley variety and Hite's acceptance of out-of-specification malt, Stewart observed that this had largely been due to the risk of Hite running out of malt.

1677 Stewart described the current negotiations with Heineken as very active. He recorded that Heineken had moved to the theoretical blend approach, based on Cargill's strong relationship with Heineken in Europe. Stewart said there had been several derogation requests for out-of-specification malt with some Heineken breweries being forced to accept it or face running out of malt, which had created negativity towards Joe White. Reference was also made to screenings in black malt that had added to Heineken's frustrations with Joe White.[996]

1678 As to the possible way forward with Heineken, Stewart suggested a different approach. It was contemplated that Joe White would get Heineken's technical controller to help coordinate a more consistent approach across the operating companies. Stewart said that Heineken had an internal "yellow and red system" and it should be Joe White's goal to try to make that more transparent, thereby giving Joe White more freedom to operate.

1679 With respect to San Miguel, reference was made to a good deal of negotiation around barley varieties with Buloke finally being approved "and an eye on Vlamingh". Stewart expressed the view that, as the companies that comprised San Miguel were "bulk customers" with an achievable specification, he believed Joe White could meet their needs.

1680 As for SAB Miller, Stewart said there was no change to the way Joe White had been operating in the past. He said that SAB Miller was very prescriptive, however it was a savvy brewer and willing to consider variation from barley quality. He said good communication was the key to successfully dealing with SAB Miller.

1681 Finally, Stewart stated that Saigon Alcohol Beer and Beverage Joint Stock Corporation

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996 When it was put to Viers during cross-examination that screenings in black malt had nothing to do with the Operational Practices, Viers was unable to answer 1 way or the other.

("SABECO")/Hanoi Beer Alcohol and Beverage Joint Stock Corporation ("HABECO") had been engaged in negotiations with Joe White about malt quality. He said that, regardless of what was sent to them, Joe White would be judged on their own analyses of Joe White's malt; and that there would be a need to compensate SABECO/HABECO if the malt delivered by Joe White was found to be out of specification. Having said that, he said that because their analysis decision was final, they may have been receptive to resuming Joe White's historical practices.

1682 Stewart gave evidence that the implementation of the steps referred to above reduced the number of derogations required, but many derogations still continued to be raised.

1683 The ongoing attempts at business transformation were proving difficult. In an email chain between Viers and Eden in late February 2014, Viers detailed the challenges he was facing. The first email in the chain was concerned with a report on malt storage. Viers concluded the covering email apologising for being a little negative at times, stating it had been a challenge to go to work day after day for months on end only to watch the Cargill team struggle and the results fall short. Eden responded by stating he read and felt the pain. Eden expressed the opinion that Cargill could not rely upon Glencore if it was assumed Cargill was going to have a significant warranty claim. After thanking Viers for his assistance, Eden continued:

> Sometimes it is very hard to provide positive leadership when you are surrounded with adversity. You are not in this alone and should not feel the total burden of the issues. I would like you to continue to find leadership that provides hope. As importantly (sic) is to get to capacity as quickly as possible.

1684 In a further email in the chain, Viers stated:

> I think the reality is we might have expected a certain amount of red lining however what we have found was not tweaking but *a systematic approach much more pervasive then (sic) we could have imagined* (to the extent *the asset and business system were built on it*). What *we did not at all expect was the issues around variety and [gibberellic acid] and the ignoring of specific customer requirements*. The result of the later (sic) is in part a variety profile and availability that is not aligned with [customer] portfolio and their subsequent specifications which will take time to correct.
>
> (Emphasis added.)

1685 At trial, it was not put to Viers that the views he expressed in this email were anything other than his genuinely held views at that time. Further, Viers gave evidence that he was optimistic when he sent the email in stating that the issues would take time to correct. He said the issues he had encountered with respect to the Operational Practices were fundamental to the Joe White Business and he was of the view that a great deal of hard work and goodwill was required of Joe White employees and customers to try and limit the significant and overwhelming consequences the Operational Practices had had within the Joe White Business.

1686 Viers also gave evidence that the majority of his time, together with that of Joe White management, was dedicated to damage control or mitigation on a day-to-day basis. This evidence was also not challenged, Viers agreeing with the proposition put under cross-examination that he was considering how to limit the damage of the problems that flowed from the Operational Practices right from day 1. Viers agreed from the first day Cargill took over he was gaining an understanding of whether or not Cargill was succeeding with its damage control, but added that issues continued to unfold regularly and that he had to address those new issues.

1687 Returning to the email chain, in response to Viers' email, Eden said he was struggling as to why it was so difficult to get Joe White customers to accept the different barley varieties and malt being out of specification. He said he understood it was very difficult to tell a customer that it was not getting what it thought, but the fact was that those customers were happy before they were informed of the undisclosed conduct reflected by the Operational Practices (with the exception of gibberellic acid, which had been largely withdrawn as a practice, unless approved by the relevant Joe White customers). Eden's email continued:

> So in some respects, I have a feeling that we will find a way forward. In other respects, once we bring attention to a change, it will be easy for our customers to push back.
>
> No matter what, if we have to spend more money the payback gets worse and we lose a tonne of credibility. We will not get the corporate support for the next deal as a result. It will impact our ability to grow. Not a happy situation, but we need to deal with the reality of the situation. Much of the pain will be eased if we are able to get a meaningful warranty claim.

1688 In the final email in this chain, Viers said in substance that he understood what Eden was saying and that it kept him awake at night. He informed Eden that he was pushing on the issue of specifications and was meeting all day the following day on that and other potential remedies. Viers said he was not giving up but he did not think Cargill could ignore the other solutions.

1689 On 28 February 2014, Stewart emailed a summary of customers who had accepted the use of gibberellic acid and Laminex as additives. The summary listed 18 customers, of which Asahi, SAB Miller, Heineken (both A and B) (being a reference to Asia Pacific Breweries) and Sapporo were listed as still prohibiting exogenous gibberellic acid.

1690 Back on 19 February 2014, Evers sent an email to Okoroegbe requesting a review of various customer contracts. In his initial email, Evers referred to the work he was doing on customers' specifications and terminology for Certificates of Analysis. He then requested that certain contracts be reviewed so that Cargill's malt business was aware of any potential issues that could arise in changing the way malt specifications were reported. Evers stated the exercise was a business critical issue, with the topic having a significant impact on Cargill's malt business in North America.[997] Later in the email chain, Evers stated that Cargill wanted to understand if legally there was anything in the contracts that prevented Cargill from using the theoretical blend approach (as used in Europe and Argentina).

1691 In fact, the contracts were not reviewed by Cargill, Inc's legal department until early in March 2014. When they were, and further instructions were given on various matters, Cargill, Inc's legal department advised that there was nothing that would expressly prohibit Cargill from changing its testing procedures for the purpose of issuing Certificates of Analysis, although it was noted that several contracts contained clauses that imposed quality or service obligations on the parties. The advice also noted that (as raised by Evers with them previously) even if it were technically permissible under the contracts to switch to a theoretical blend analysis, there could

997 In North America, the majority of Cargill's malt customers required actual analyses to be conducted, rather than allowing the theoretical blend approach to be adopted.

be pushback from customers if Cargill was to change its analysis method.

1692 Evers forwarded this advice to others within Cargill, including De Samblanx, Viers and Eden, stating there was probably nothing legally preventing Cargill from switching to theoretical blend analysis immediately (subject to some practicalities). He said customers would have to be informed. He enquired as to how bold Cargill, Inc wanted to be in North America on this issue. Evers also said it was his feeling that a change to theoretical blend analysis would essentially lead to the out-of-specification issues in North America going away. Evers added that it was probably important to note that, essentially, the malt would not materially change from what was already being shipped.

1693 After numerous further emails on 10 March 2014, Viers forwarded the email chain to others, including Eden and De Samblanx, noting the Joe White Business had more than 95 percent of its volume converted to the theoretical blend approach.

1694 De Samblanx concluded the email chain, reminding those involved in any change to a Certificate of Analysis that Cargill's corporate policy stated:

> When Cargill mutually agreed with a customer's request to include information on a [Certificate of Analysis] when a sample is not tested for the specific lot, then the [Certificate of Analysis] must provide additional language to ensure that the customer understands that the result provided was not tested for the specific lot.

1695 When Evers was cross-examined on the email chain and what was being considered for North America, he accepted that, by seeking to adopt the theoretical blend approach, a maltster is not required to test the final shipment and therefore is not troubled by the inherent variations and discrepancies that might be produced in the final blend. Evers further accepted that using the theoretical blend approach essentially eliminated a source of out-of-specification reporting, thereby excluding the analytical variability that may arise in the final sample.

1696 For clarity, the actual analysis approach by Cargill, Inc in North America could not be sensibly compared with the Viterra Certificate of Analysis Procedure. There was no suggestion that in North America, Cargill, Inc was engaging in altering actual test

results in order that Certificates of Analysis issued reported compliance with specifications contrary to actual test results.

1697 Stewart gave evidence that in around January or February 2014, he travelled to Europe to inspect malting facilities and to meet with Cargill, Inc staff in the Netherlands. He said that during the trip he met with Evers and De Samblanx. According to Stewart, Evers said that Cargill had appreciated before the Acquisition that other maltsters engaged in practices such as adjusting results in Certificates of Analysis. When this was put to Evers under cross-examination, Evers stated unequivocally that he had never said that.

1698 Stewart also gave evidence that De Samblanx told him during this trip that Cargill, Inc had undertaken numerous previous acquisitions of malting companies, and had found that some of them were engaged in practices of using off-spec barley and altering documentation in ways which were incompatible with Cargill, Inc's business practices.[998] This matter was not raised with De Samblanx when he gave his evidence.

1699 Nothing much turned on whether or not Stewart's account of these conversations was accepted.[999] The evidence demonstrated that Cargill had some awareness of pencilling before the relevant events in 2013. Accordingly, to the extent that the evidence of Stewart might be considered to be admissions by Evers and De Samblanx against the interests of Cargill, any such admissions made in substance did not go much further than other uncontroversial evidence already before the court. To be clear, Cargill plainly knew at all relevant times of the existence of pencilling and of some malt suppliers using off-spec barley. However, such knowledge did not equate to knowing Joe White was (or was likely to be) engaged in any such practices, nor did it provide a basis for concluding that Cargill ought to have known of the Operational

998 To be clear, to the extent Stewart's account of discussions many years ago included a statement by De Samblanx of "numerous previous acquisitions", I do not accept De Samblanx would have been referring to any more than 2 or 3 acquisitions. This topic was explored by the Viterra Parties exhaustively during cross-examination, and there was no evidence to suggest a significant number of acquired businesses had been involved in using incorrect barley or had engaged in pencilling: see pars 1091-1095 above.

999 If it were necessary to make a finding, in light of the lapse of time and the lack of any contemporaneous record, coupled with Evers' unequivocal denial, and the relevant matter not being put to De Samblanx, I would not have been satisfied on the balance of probabilities that such matters were said to Stewart.

Practices based on the information that was available to it.

1700 Regardless of what Stewart was told, in 2014 he was certainly not recommending pencilling or other conduct encapsulated by the Operational Practices be part of the operations of the Joe White Business. On 6 March 2014, Stewart sent an email to De Samblanx and others, copied to Hughes and Testi, which attached the Viterra Certificate of Analysis Procedure. The document attached was version 2 revised on 26 September 2012.[1000] The email read:

> Hi Steven,
>
> This procedure reflects the way that [Joe White] operated prior to Cargill. *I would not suggest for one moment* that this procedure could be used within the Cargill environment and I do not want anyone scrutinising the procedure with that intent. I am merely supplying it for your reference.
>
> It is worth noting [Joe White] had quite a formal procedure for [Certificate of Analysis] generation, whereas I would suggest that many of our competitors do not. This should give you an indication of the freedom our competitors operate under.
>
> (Emphasis added.)

1701 De Samblanx gave evidence that he was surprised when he saw the Viterra Certificate of Analysis Procedure. He had not seen the document at any time during the Due Diligence leading up to the Acquisition. Further, his surprise was based not only upon provision for adjustment of figures for results within 2 standard deviations, but also because it provided for adjustments beyond that if 2 general managers agreed.[1001]

1702 In around February 2014, Jewison instructed Argent and Scott Barnett[1002] to prepare monthly updates in respect of Joe White. These were produced until around the middle of 2015.

1000 See par 286 above.

1001 For completeness, De Samblanx gave evidence that he could not recall when he first saw a Viterra document entitled "Malt Analytes Proficiency Testing Schemes Procedure" (being the Malt Proficiency Scheme), including whether or not he saw it during the Due Diligence. However, he gave evidence that this document, which related to laboratory performance, had nothing to do with malt analyses in Certificates of Analysis provided to customers and did not give him any concerns with respect to those matters.

1002 Scott Barnett worked in the Cargill Energy Transport Metals – Asia department.

1703 On 11 March 2014, Youil emailed a spreadsheet to Viers concerning Joe White's plant capacity. The spreadsheet set out a considerable amount of detail in relation to each plant, including the loss of production "due to 5 day Malt Production".[1003] The total loss of production projected on this account for the 5 plants affected was 16,350 tonnes. In a separate sheet dedicated solely to "5 day Losses", columns listed the days required to produce contract volume, the days required assuming 5 days of production and the "days lost due to extended germination".[1004] The total lost production capacity was recorded as 16,600 tonnes.

1704 On 15 March 2014, Jewison circulated a February 2014 Joe White monthly update to various persons, including Eden, Viers, Hughes and Argent. The update was prepared by Jewison and painted a negative picture of the Joe White Business. The presentation (which was based on Joe White's existing budget information and not a Cargill budget) recorded that Joe White's year-to-date results comprised a $6.2 million loss, including operating losses of $4.9 million. Overall, the legacy business (being all Cargill, Inc malt businesses other than Joe White) year-to-date earnings after tax were $20.6 million, which was down 34 percent from the original budget of $31.2 million.[1005]

1705 Later, the presentation listed a number of contributors to Joe White's operating results, including a delay on a shipment to SAB Miller, malt inventory downgrades, transport related issues and barley sold as feed. Jewison gave evidence at trial that she could not recall whether these operating adjustments or any other negative matters reported were related to the Operational Practices. The update gave details of Joe White's operating costs to date. The figures presented represented earnings before tax. The lower than expected margin was accompanied by a comment referring to completion of 2012 barley contracts with high carry and finance costs. When giving evidence, Jewison similarly could not recall whether this had anything to do with the

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1003 See pars 755, 779, 789, 819, 893, 1131, 1505, 1519, 1673 above.

1004 The customers identified as being affected included Asia Pacific Breweries, SAB Miller, Sapporo and Asahi.

1005 A breakdown of these figures was also provided, but corresponding figures for May 2014 are discussed in more detail below: see pars 1756-1758 below.

Operational Practices.[1006]

1706 According to Stewart, by around March 2014, Joe White was able to source and use appropriate varieties of barley and had been able to negotiate changes of the specified barley varieties with some Joe White customers. Stewart's evidence was that a number of operational issues had been resolved, and the malt supplied from the Sydney and Perth plants in particular was being produced within or closer to specification. However, Stewart also said that, despite this progress, Joe White had ongoing difficulties in producing malt of suitable quality, and derogations continued. The quality of malt produced from the Adelaide and Cavan plants remained especially problematic.

1707 Stewart said he also observed a change in the production approach, with more attention given to calculations in the theoretical blend rather than the quality of the malt product. Further, Stewart said that difficulties arose because, under Cargill's direction, Joe White had to seek derogations where the theoretical blend resulted in even minor deviations from contractual specifications.

1708 Problems with customer satisfaction continued. On 4 April 2014, Wicks emailed Joe White production managers and plant managers, copying in others including Stewart, Jones, Youil and Viers. In the email, which had the subject line "'B' Malt Quality Issues", Wicks wrote:

> Please be aware Heineken/[Asia Pacific Breweries] have made it clear that we are now on our last chance with [Asia Pacific Breweries] ie we cannot miss any further shipments. The consequences go beyond immediate brewery claims and will impact future business with our largest customer.

This was a response to a number of emails from Heineken which included statements by Heineken that its brewing issues across the Asian region had become much more concerning than any discount from Joe White could compensate for, and that an immediate response on a resolution was required.

1006 The data and commentary had been drafted by Argent and approved by Jewison.

1709 When taken to this email during cross-examination, Stewart agreed Heineken took its malt specifications very seriously.[1007] He also accepted the problem with Heineken had become quite acute in relation to Joe White complying with specifications. Stewart understood that, by this email, Heineken was giving an ultimatum.[1008]

1710 The problems with Heineken were ongoing. On 31 July 2014, a meeting was held in Singapore, which was attended by Viers and Wicks on behalf of Joe White.[1009]

1711 In an email dated 2 August 2014, Wicks provided a summary of the meeting. He said that he and Viers explained how Joe White had previously disguised some out-of-specification malt by adjusting analyses "for analytic error". Heineken was also told that Joe White lost over 50,000 tonnes of product due to poor quality barley. Reference was made to farmers' hugely popular choice of growing Hindmarsh, which made it more difficult for Joe White to source Heineken's approved varieties in sufficient quantities.

1712 Negotiations ensued to allow use of gibberellic acid, only as an interim measure. That and various other matters were agreed, but not without Heineken expressing its frustration and annoyance about a number of operational matters.

1713 Wicks commented in the email that the meeting had been held in a constructive atmosphere, but he had no doubt Heineken had reservations about Joe White's reliability. He said it would have to be assumed Heineken would have been exploring alternative suppliers.

1714 In around mid-April 2014, the March 2014 monthly update was produced.

1715 On 15 April 2014, Viers sent an email to Eden, De Samblanx, Hughes and others.[1010]

1007 Stewart was also taken to other examples of Joe White customers treating specifications seriously.

1008 To demonstrate the importance of this issue for Joe White, Asia Pacific Breweries included Asia Pacific Breweries Singapore, Asia Pacific Breweries Hanoi, Brasserie de Tahiti, Cambodia Brewery Ltd, Guinness Anchor Berhad, Lao Asia Pacific Breweries Ltd, Myawaddy Trading Ltd, Pt Multi Bintang Indonesia, South Pacific Brewery Ltd, Thai Asia Pacific Brewery Co Ltd and Vietnam Brewery Ltd. The Viterra Parties disputed 3 of these companies formed part of the group, but an email from McIntyre dated 20 August 2012 demonstrated all these companies, and more, were included.

1009 The meeting was preceded by correspondence concerning availability of required barley varieties.

1010 Only Eden was asked about the details of this email. He said he accepted what Viers reported.

The email provided another update on the status of Joe White's operations and attached 2 documents providing the details. Viers stated there had been 2 issues limiting the ability to deliver financial results over the first 5 months, namely "production and logistical". Viers stated that both of them were symptoms of the Certificate of Analysis "cut over", a failing old crop barley, variety misalignment and curtailment of gibberellic acid use.

1716 With respect to production, Viers set out what had been produced when compared with Cargill's expectation. He noted approximately 32,000 tonnes a month had been shipped, and that at the current pace only 385,000 tonnes per annum would be produced, compared with an expectation of 525,000 tonnes per annum. He said there had been a number of limiting factors, including a lack of conforming raw material and "scheduled/unscheduled downtime", a lack of space and the need to run 5 day malt. He said the last of these was probably the most prominent limiting factor. In that regard, Viers reported that a transition back to 4 day malt, after some promising test batches, was beginning.

1717 On the issue of logistics, Viers stated the primary problem was non-conforming barley and malt. The problems included demurrage, shipping barley and malt "out of the line", selling malt and raw barley as feed and dead freight. Viers suggested the costs had totalled several million dollars, but that he believed nearly all issues had been cleaned up and such costs should be behind them.

1718 Viers also reported that Joe White was moving at full speed in terms of long-term solutions, including capital expenditure to build storage and blending capacity. After referring to a number of other issues, Viers provided a somewhat pessimistic summary of the effect of those issues on the Joe White Business:

> It is obvious from the derogation chart as well [as] the fact that we have not met our production commitments that we have tried the patience of our customers. We have a lot of work to do over a long period of time to regain their confidence.

1719 The attached derogation chart contained 5 worksheets. The information included the total number of derogations over the first 22 weeks of production, as well as the

volume of production that had been affected (comparing volume with the total production figures). Suffice to say, both in number and volume, the level of production affected by derogations was substantial. For example, in relation to pale malt, derogations had been sought in relation to approximately 60 percent of total volume.

1720 The other attachment provided production figures for a number of the plants. The effective utilisation of those plants was recorded. Broadly speaking, the spreadsheet indicated a loss of production capacity of approximately 25 percent. As McIntyre explained in her evidence, due to being unable to meet customer specifications, including because it did not have sufficient quantities of the required barley varieties, Joe White often had to postpone or cancel malt shipments. Equally, when customers did not accept requested derogations, this delayed the particular shipment in question as new batches had to be produced. Naturally, while such new batches were being prepared, Joe White's production facilities were affected and its capacity to meet other orders was commensurably reduced. When it was put to McIntyre during cross-examination that she had only given limited examples of such postponing or cancellation of orders because there were not many such instances after March 2014, she rejected the suggestion, affirming there were many instances.[1011]

1721 In around mid-May 2014, the April 2014 monthly update was completed. Amongst other things, this update indicated that Joe White had suffered an operating loss of $7.407 million to the end of April 2014, in contrast to the budgeted gain of $998,004 for earnings after tax.

1722 Various issues were detailed in a presentation entitled "Malt Operations Update Australia Frank Van Lierde – Visit", prepared by Youil and presented to Van Lierde on or around 22 May 2014 ("the Malt Operations Update Presentation"). The Malt Operations Update Presentation was reviewed by Viers before being presented to Van Lierde. The first slide entitled "Situation this Past Year and Overall Impact", stated that the implementation of Certificate of Analysis procedures and a decline in

1011 Scaife gave similar evidence: see par 1798 below.

2012 barley performance "impacted plant utili[s]ation, our customers and shipping lines". Dot points on the slide listed the following:

- [Certificate of Analysis] policy introduced Nov 1st 2013
- Decline in 2012 Barley Performance
- Misaligned Barley Variety vs. Customer Profile
- Early Malting of 2013 Barley
- Inability to use [gibberellic acid] for certain customers.

1723 A slide entitled "Capacity Utili[s]ation Loss – Breakdown" contained a pie chart that attributed a shortfall in utilisation for plants in Perth, Adelaide and Sydney to various different factors, including 48 percent for "5-day malt losses", 22 percent to storage, and 11 percent to barley variety shortages.

1724 The next slide was headed "Root Cause Analysis" and contained an elaborate flowchart. A "brainstorm" was contemplated, by which to identify strategies to reset the Joe White Business, including to deal with the issue that "[m]alt from Adelaide does not meet customer specifications".

1725 Later slides addressed barley varieties and procurement. Viers said at that time Joe White was having a very difficult time securing the right quality barley. The first slide on this topic gave various short term solutions. These involved moving barley from interstate if required to meet customer specifications, and fast tracking new varietal approvals.

1726 The Malt Operations Update Presentation also contained medium and long term strategies to ameliorate the identified drop in utilisation. These were largely directed to increasing barley procurement measures, and rationalising the varieties to enable the supply of customers to be shifted between plants.

1727 The document also detailed a long-term storage strategy, which anticipated building or securing additional malt storage in Sydney, Port Adelaide and Perth. The relevant slide stated that doing so would, amongst other things, "[a]llow sufficient malt storage pending customer derogation approvals".

1728 A further slide entitled "Risks" listed a number of risks to the Joe White Business in the short to medium term, including that "[c]ustomer frustrations with derogation requests may impact shipments or future sales" and deterioration of barley quality.

1729 A lengthy presentation, also dated May 2014, dealt specifically with Cargill's integration of Joe White.[1012] At several points the presentation alluded to difficulties in the integration process, including in implementing Cargill's policies. The integration objectives "meet synergy value capture targets" and "[stabilise] the base business" were recorded in the presentation as "Needs More Time" (as opposed to "On Track"). The progress recorded to date in relation to the latter of these objectives included adopting Certificate of Analysis procedures and progressing with customers on derogation procedures, but the outstanding steps remaining were recorded as:

- Sustain profitable operating performance and meet FY14 and FY15 budget goals
- Execute on multiple initiatives to adapt the various parts of the business to new procedures

1730 The presentation was divided into sections, including: "Barley", presented by Dickie; "Commercial", presented by Wicks; "Technical", presented by Stewart; "Operations", presented by Youil and Forsythe; and "Finance", presented by Argent.

1731 Both global and Australian barley were addressed, it being noted that malt and barley production in Australia largely exceeded malting demand in the major barley regions. With respect to barley and synergies, it was stated that Joe White and Cargill's grain and oilseeds supply chain were aligned and had collaborated to capture greater synergies.[1013] Various aspects of how that had been achieved were listed. The presentation continued:

1012 Viers had little or no recollection of it, but believed it would have been prepared because of Van Lierde's visit and may also have been connected with Cargill's end of fiscal year.

1013 On 8 May 2014, the synergy results for April 2014 were circulated. The covering email stated the synergies value was ramping up and had an upward trend. It was also stated most synergies were the result of collaboration between Joe White and Cargill's grain and oilseeds supply chain. Various synergies were yet to be quantified. As for new volume in Japan, the synergy was forecast at US$1.1 million, of which only US$300,000 had been captured. Further, for additional volumes or margin upgrades, none of the forecast of US$700,000 synergies had been achieved.

> This partnership has already started capturing value and has achieved the targeted increased elevator volumes synergy in the deal model.

Examples of how this value had been captured were set out.

1732 The presentation also identified the key actions and risks. Those included varietal alignment with Joe White's customer profile, which was stated to have the potential to limit merchandising activities.

1733 Under the commercial section, it was recorded that Joe White accounted for 70 percent of export volume of malt out of Australia. After some positive statements about Joe White's ability to compete, it was stated that with the Acquisition Cargill was well positioned to capture the growth in the Asia Pacific. It was also stated that Joe White had built up a good track record of supplying the biggest customers in the largest markets in Asia.[1014]

1734 With respect to Joe White's customers, it was stated that Joe White targeted the premium segment of the Asian market, with 66 percent of its volumes going to high margin customers "who value quality and service over price".

1735 The technical part of the presentation recorded the shortage of "current (2012/2013) crop barley" and referred to the need "to move to new crop before the barley was ready". It was also noted that some barley classes had not performed due to harvest rain in the previous year. Reference was made to the use of gibberellic acid which was required for certain customers to meet quality requirements. In addition, reference was also made to the immediate transition to the Cargill Blending and Certificate of Analysis Procedure.

1736 The following slide detailed "Customer Reaction". It was stated that the drop in production capacity "[g]enerated varying levels of concern amongst our customers who expect reliable quality and service from [Joe White]". It was also recorded that production was at less than capacity and shipments were missed as the Joe White

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1014 For the 2012 financial year, it was recorded that Joe White's sales volumes were as follows: Australia 22 percent, South Korea 18 percent, Thailand 13 percent, Vietnam 12 percent, the Philippines 10 percent, Singapore 7 percent, Japan 5 percent and others 13 percent.

Business had to "rapidly adapt to the new conditions".

1737 The reasons given for shipments to customers being delayed were three-fold, namely poorly performing barley, the inability to use gibberellic acid for some customers and wrong barley varieties on site "or on contract". This was said to have resulted in 5 day germination and delayed production.

1738 With respect to the ability of Joe White to meet customer specifications, it was stated that Joe White was actively working with various approaches to improve its ability to meet those specifications. After referring to the fact that several customers had been approached about their willingness to adopt flexibility, it was stated that this had been successful with some customers, but with others who were "reluctant" the reaction had been negative and even strained those relationships.

1739 On the topic of derogations, it was stated:

> The reaction to such requests has been negative and has strained the relationship with many customers. Some customers are now becoming accustomed to the process.

It was recorded that success had been achieved in dealings with Lion Nathan, Oriental Brewery, Phoenix and SAB Miller. However, it was stated that Sapporo, Guinness Anchor Berhad, several other Heineken operative companies, Coopers and Boon Rawd were reluctant to agree to derogations.

1740 A bar graph then set out the volume of malt affected by requests for derogations compared to the total volume produced on a weekly basis. Of the 28 weeks identified, in most of them the volume affected by derogations was substantial, including more than half the total volume in a number of weeks.

1741 With respect to seeking derogations for the use of gibberellic acid, it was stated there had been success with Heineken, Orion Breweries, and with SAB Miller on a temporary basis. It was stated that Sapporo had refused such derogations and it was unlikely in the long term that Japanese customers, Heineken or SAB Miller would allow such derogations.

1742 In relation to barley varieties, the success and failure rates were recorded with respect to customers agreeing to new varieties of barley. With respect to Sapporo and Heineken, it was stated that the new approved variety did not match quality requirements in the absence of the use of gibberellic acid. Some medium and long term strategies were then set out to deal with the issues referred to above.

1743 Slides in the "Technical" section of the presentation addressed the immediate steps put in place to adapt Joe White to Cargill policies and procedures, and stated that there had been an "immediate transition to Cargill [Certificate of Analysis] procedure – 100% compliance". The presentation stated that the drop in production capacity "[g]enerated varying levels of concern amongst our customers who expect reliable quality and service from [Joe White]".

1744 The next several slides detailed steps put in place by Joe White to address shipment and production delays caused by poorly performing barley, inability to use gibberellic acid, and the wrong barley varieties on site or on contract. They noted that whilst some customers were receptive to flexibility around varieties, others were not. Similarly, requests for derogations in relation to specification parameters resulted in negative reactions that had strained relationships with customers. The presentation recorded that whilst Joe White had had success with some specific customers accepting derogations, others were "reluctant".

1745 A slide entitled "Future Strategy" stated that Joe White staff were intending to undertake a round of face-to-face customer visits, with the goals of "relationship building and expectation setting", "further explain[ing] the reason behind derogation requests", and undertaking discussions around specification flexibility, barley varieties, malt analysis and crop forecasts. As to future operations, it was stated that there was a need to improve Joe White's ability to meet customer specifications, to estimate the cost of non-conformance and to improve customer relations. It was further stated that Joe White was required to improve its ability to operate at capacity, to have the right barley varieties in place and, amongst other things, have a stronger alignment with barley suppliers.

1746 The section entitled "Operations" broadly mirrored the content of the Malt Operations Update Presentation.

1747 On the question of synergies, in mid-May 2014 a spreadsheet was circulated.[1015] The spreadsheet forecast that almost none of the synergies with respect to global, Japanese or other accounts would be achieved in 2014. It contained various comments, including:

> The loss of 48,000t production in Australia prevents any additional sales from the origin.
>
> …
>
> [D]ifficult and low probability for now [to achieve synergies in respect of Carlsberg].
>
> …
>
> [D]ifficult now ([to achieve synergies in respect of Asahi, Orion Breweries and Sapporo]) since current quality issues [at Joe White], but in 23rd of June meeting/new chapter and start discussion regarding synergies.
>
> …
>
> Priority [for HABECO/SABECO/Thai] is using spare European malt to honour Australian contracts jeopardised by lost production.
>
> …
>
> Focus [for Boon Rawd] is on overcoming current delivery problems and resistance to derogation requests.

1748 On 14 May 2014, Sagaert sent an email with respect to the spreadsheet. She stated that Cargill kept on following action points and chasing opportunities, but observed that the current quality and capacity issues limited Cargill's potential in the short run. She said Cargill would keep working on creating the synergy value for 2015 on the premise that "hopefully" Joe White would be operating at normal standards again.

1749 Sagaert gave evidence that, at some point in 2014, discussions regarding synergies previously identified ceased.

1750 Viers and Tan also prepared a further document dated 30 May 2014,[1016] entitled "[Joe White] Acquisition Integration Review", which was submitted to the Cargill

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1015 It was in the same format as the spreadsheet that had been circulated in February 2014, with some of the figures updated: see par 1632 above.

1016 It was circulated on 18 June 2014, Viers noting that it had been sent to Cargill's leadership team strategy and commitment committee.

leadership team in mid-June 2014 ("the Acquisition Integration Review"). The stated purpose was to provide a progress update on the integration of the business after 7 months.

1751 After a brief description of the employees from Cargill and Joe White involved in the integration process, the executive summary read:

> From a financial perspective, the base business operating performance and synergies capture *have fallen short of the first year commitment targets*. The leadership team strongly believes that *this setback is only temporary* and that the *original assumptions* around the long term strategic rationale to align [Cargill] Malt's footprint to the growing Australian market and the GOSC[1017] origination system *remains valid*. The business anticipates that Joe White will achieve its commitment targets on an annual basis in FY14/15.
>
> (Emphasis added.)

1752 Under the heading "Base Business Performance", the document relevantly read:

> Joe White recorded an $8.6M loss in earnings before tax from November 2013 to May 2014 compared to a $3.7M profit in the budget.
>
> The *root cause* of the *underperformance* of the base business in the past 7 months can be attributed to the combined effects of *the introduction of [the Cargill Blending and Certificate of Analysis Procedure], the misalignment of required barley varieties, the curtailment of unapproved processing additives and the poor malting performance of the 2012 barley crop* …
>
> Although no key customers have been lost in last 7 months, *Joe White's customers have voiced considerable frustration and concerns around the supply and quality issues experienced*. While this is being proactively addressed and significant progress has been made in serving customers, the *risk of customer and financial loss remains*.
>
> The business is currently executing a multi-front strategy to adapt to the new business conditions. Customers have been engaged and consulted on greater specification flexibility and approvals of additional barley varieties. A barley strategy is in place to ensure the right barley varieties are available in the right regions. Plant upgrades and process improvement initiatives have been made to eliminate process variations in malt production. And finally, lease plans or capital requests have been initiated to increase malt storage capacities.
>
> (Emphasis added.)

1753 With respect to the "root cause" comprising combined effects of various events, the introduction of the Cargill Blending and Certificate of Analysis Procedure was

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1017 This refers to Cargill's grain and oilseeds supply chain.

something De Samblanx had raised as a potential difficulty in July 2013. Viers gave evidence that the reference to misalignment of required barley varieties related to the fact that the "proper barleys" had not been purchased and secured. The third matter referred to was addressing the previously unauthorised use of gibberellic acid (and perhaps other substances). On the last cause, Sagaert agreed that the poor malting performance of the 2012 barley crop was a contributing root cause, and that fact was no fault of the Sellers.[1018]

1754 Under the heading "Synergies and Integration Budgets", the Acquisition Integration Review stated that the "teams" had analysed and validated the deal model synergy projections and had confirmed that they were achievable (something Viers believed at that time), with $1.8 million in synergies having been realised up to that time. However, it was noted that the predicted commercial and energy cost saving synergies had not been achieved because malt customer contracts were generally long-term, and most of Joe White's contracts were not yet up for renegotiation. Sagaert gave evidence that she disagreed with the last statement, though she did not challenge it at the time it was sent to her. Jewison could not recall all the reasons for the synergies not being achieved.[1019]

1755 The final substantive section of the Acquisition Integration Review was entitled "Lessons Learnt – Where We Could Have Done Better". Relevantly, the document stated:

> Actively manage change for high impact initiatives
>
> - The introduction of the [Certificate of Analysis] procedures led to high levels of stress, frustration and anxiety for many employees as they struggled to adapt to the new business rules.
>
> - The team could have done better in managing these change (sic) with the employees to better set expectations on the impact of this change, to provide regular updates on progress and finally to communicate the "light at the end of the tunnel" messages.
>
> …

1018 Jewison said she did not recall whether this matter was related to the Operational Practices.

1019 Viers was not questioned about this particular statement.

Consider timing of [contract] negotiations when estimating Year 1 synergies

- Many of the malt customer contracts and energy contracts are multi-year in nature and may only come up for renegotiations less than once or twice every year.

- Due to the low probability of re-contracting within the initial 12 months of the integration, it is important to be more conservative about the synergies that can be achieved within the first year.

Negotiate stronger terms around warranty claims

- In an auction process, the information available for due diligence is limited. In the case of [Joe White], information was not provided for customer or (sic) contracts, processing techniques and quality analysis. Despite asking multiple questions differently, other than a clear statement that testing and reporting protocol were documented and validated as part of their ISO certification, the responses from the seller or their advisors were generic or indicated that no responses could be provided.

- In these situations, the associated risks should be highlighted in the investment, and there should be more focus on the warranty claims to ensure that they are robust and cover any business practices that are not compliant with customer contracts, laws, and good manufacturing processes.

1756 In June 2014, the May 2014 monthly update of the performance of Joe White was circulated. The update contained information concerning both Joe White and Cargill Malt's business more generally. An overview was given in relation to both. It was stated that legacy business earnings (again being all malt businesses other than the Joe White Business) were $27.9 million, down 34 percent from a budget of $42.5 million.[1020] With respect to the Joe White Business, it was recorded that the earnings for the 2013 to 2014 financial year to date were at a loss of $2.6 million. It was further stated that actual losses for Joe White for that year were $27.1 million, which included $20.1 million of acquisition-closing and integration costs.

1757 A breakdown of the earnings for each region was provided. In relation to the legacy

1020 It was not clear on the face of this document whether amounts were referred to in Australian dollars or United States dollars. On page 13 of the document it was expressly stated that the figures referred to on that page were in Australian dollars. The amounts referred to on that page were also prefaced with "A$". This would seem to suggest that the other amounts in the document were in United States dollars. However, in Viers' witness statement he referred to some figures not designated as Australian dollars and gave evidence that those amounts referred to Australian dollars. In the circumstances, all figures from this document are referred to on the basis they are in Australian dollars. If that assumption is incorrect, it does not affect the substance of what is set out in these reasons about the contents of this document.

business, the after-tax earnings were recorded at $24.475 million. This included "mark-to-market implementation" losses of $3.4 million excluded in the figures referred to in the previous paragraph. This total was broken down into 3 regions. Europe's earnings after-tax to date were $2.007 million against a budget of $4.92 million (being approximately only 40 percent of budget). North America's earnings after-tax to date were $13.157 million against a budget of $22.170 million (being approximately 60 percent of budget). South America's earnings after-tax to date were $9.311 million compared to a budget of $15.41 million (being approximately 60 percent of budget). In short, none of Cargill Malt's businesses were tracking to budget, or even close to budget.

1758 Also in relation to the legacy business, the budget for the month of May 2014 was $3.322 million. In fact, only $525,000 earnings after-tax had been achieved, representing only around 15 percent of budget.

1759 When Eden was taken through these figures during cross-examination, he accepted without qualification that at this point in time there were adverse circumstances for Cargill Malt's business generally. Eden accepted that Cargill Malt was underperforming. The report also contained Unadjusted Earnings figures for the legacy business, both collectively and by region. These figures also indicated that Cargill Malt was not achieving the expected returns.

1760 As for Joe White, its figures were broken down into various components. In relation to operations, for earnings after tax a loss of $7.372 million was recorded against a budget of $1.164 million profit. Integration costs were slightly ahead of budget in the amount of $20.007 million against a budget of $21.611 million. Finally, synergies were recorded at $225,000, well short of the budget figure of $2.228 million.

1761 Turning to the Joe White Unadjusted Earnings figures, the year-to-date amount was $645,000 against a budget of $12.006 million. However, for the month of May 2014, actual Unadjusted Earnings was recorded as $1.514 million against a budget of $1.428 million. As for synergies, the unsatisfactory position was even more stark. The

actual amount was again recorded as $225,000 but the Unadjusted Earnings budget was $3.183 million. In other words, the synergies achieved were less than 10 percent of what had been forecast.

1762 Also in mid-June 2014, a paper was presented entitled "Cargill Malt Platform Review". This presentation was circulated by Jewison and contained an update with respect to Joe White and the remainder of Cargill Malt.

1763 With respect to Joe White, the situation since Cargill took over the Joe White Business and its overall impact were reported. It was stated that the implementation of Certificate of Analysis procedures from 1 November 2013, together with the decline in 2012 barley performance, impacted upon plant utilisation, Joe White customers and shipping lines. Reference was also made to a misalignment between barley varieties and the profiles of Joe White customers, the early malting of 2013 barley, and the inability to use gibberellic acid for certain customers.

1764 When cross-examined about these matters, Jewison could not recall whether the performance of the 2012 barley had anything to do with the Operational Practices. In explaining her answer, she stated that the information in the document was provided by other people. Plainly other matters referred to were referable to the Operational Practices. The presentation also reported that plant utilisation bottomed in November 2013 and was well on the way into recovery.

1765 Viers gave evidence that Cargill had modelled for an increase in capacity through efficiencies and reducing downtimes for maintenance. With the May 2014 results, it was apparent that the opposite had occurred. Capacity was less than it had been at the time of Completion. Further, the prospect of obtaining further customers for Joe White had to be put on hold while Cargill addressed the difficulties it was facing.

1766 In relation to Cargill Malt more generally, a summary was provided of the current year. It was stated that flat global demand, poor barley quality and extreme weather patterns had led to a difficult operating environment, which had negatively impacted results. Jewison acknowledged that flat global demand and extreme weather patterns

had nothing to do with the Operational Practices, but was unsure about the issue of poor barley quality as she could not recall to what that matter was referring.

1767 With respect to the demands for malt, it was stated that the world beer industry was essentially flat in 2013 and that the performance outcome reflected the challenging global economic environment. Again, Jewison acknowledged that these factors had nothing to do with the Operational Practices. A summary was also provided for the 2014 to 2015 financial year. Reference was made to the continuation of a downward cycle in malt since 2009, as well as excess capacity and slow to no demand growth pressure margins. However, reference was also made to exceptional internal opportunities to increase plant and sales effectiveness, and to Joe White adding value-enhancing global merchandising insights and opportunities. In concluding, it stated that despite the negative business environment, earnings after tax of US$56 million were achievable with exceptional execution of business plan initiatives.

1768 Further integration processes continued to be implemented in the following months. On 21 June 2014, Stewart sent an email to Joe White's plant and production managers, copied to others including Youil, Wicks, Hughes, McIntyre and Jones, with the subject line "Barley Draw Down Planning". The first lines of the email read:

> Hi all,
>
> As you are all aware we are operating under a strict policy of matching the appropriate barley variety to customer requirement. This requires a more detailed level of barley use planning than was historically necessary.

Stewart gave evidence that historically there was certainly less emphasis on matching barley varieties with customer specifications. Stewart said Joe White was experiencing real practical difficulties because arrangements were not in place for established supply chains that were needed to match barley variety specifications. Stewart further explained that, under Cargill, it was necessary to have very exact planning to make sure the correct varieties were available as approved by customers. As a result, there was a need to have a plan throughout the year to make sure that the shipment schedule lined up with the barley stocks available, right down to the very

last shipment of the year, such that the right barley varieties could match the barley specified.

1769 The email went on to request that its recipients prepare a plan for barley use that ensured that the correct varieties were available to meet the needs of customers, "right through to the new crop transition". Stewart noted that Joe White was seeking to expand approved varieties with customers to increase flexibility, but that the plan needed to be prepared to deal with the varieties that were currently approved. After stating that McIntyre could provide the approved barley list if needed, Stewart's email concluded by stating:

> Please look to identify any obvious issues/shortfalls so that we can address through shifting customers, acquiring more of certain barley varieties where possible or take other action as appropriate. Can you please complete by the 11th of July? Thanks.

1770 Cargill's position of imposing a strict policy of matching the customer's required barley variety with the barley used in the malt supplied as reflected in this email was affirmed in Jones' evidence. Jones also confirmed that Cargill's policy resulted in a more detailed level of barley-use planning than that which occurred before the Acquisition.[1021]

[1021] Because of the use of Hindmarsh after the Acquisition (see par 1562 above), the Viterra Parties submitted this evidence of Jones should not be accepted. A possible explanation for the use of Hindmarsh after the Acquisition has already been suggested: see fn 952 above. However, in closing submissions the Viterra Parties sought to rely upon an email chain in November 2013 to demonstrate that Joe White was using Hindmarsh in breach of contract after the Acquisition, and therefore submitted the suggested strict policy of Cargill was not in place. The email chain concerned the supply of an order from Oriental Brewery. One of the emails referred to a further attempt to blend the required malt "this time with Hindmarsh kept to 4.96%". The recipients of the emails in that chain included McIntyre, who was asked no questions about it during cross-examination. She also was the author of the final email in which she enquired as to whether or not it was okay to send the blend through to Oriental Brewery. Another recipient of the chain, who also authored 1 of the emails, was Jones. He was taken to the emails in the course of his cross-examination. He gave evidence that in November 2013 he was trying to meet the shipment required by Oriental Brewery. The email recorded that at that time Oriental Brewery was "desperate" to receive the malt. When it was put to Jones that the email chain demonstrated that Oriental Brewery had subsequently been supplied with a blend that included Hindmarsh, Jones said he was unsure and had no recollection. Further, he noted that, reading the relevant email, it was difficult to say whether or not the further blend was delivered. He accepted the further proposition put to him that it appeared from the emails that they did not suggest there was any difficulty with the concept of blending in some Hindmarsh in the malt to be supplied. At no time was it put to Jones (or McIntyre, being the person responsible for maintaining details of the specifications) that the supply of malt would have been in breach of Oriental Brewery's requirements at that particular

1771 In around July 2014, Scaife was approached by Eden to discuss a proposal that she take up the role of general manager at Joe White. Scaife had not previously been involved in any of Cargill's dealings with Joe White.

1772 Eden informed Scaife that Hughes was leaving the Joe White Business. He also told Scaife that Viers had previously relocated to Australia as Cargill's integration manager, but would shortly be moved back to Cargill's head office in Minneapolis. Eden said he wanted someone to take on the role who knew the grains industry and had an operations and processing background, as well as a strong commercial background.

1773 Eden also told Scaife that after Cargill took over the Joe White Business, the Operational Practices had ceased. Eden also said that the Joe White Business was experiencing difficulty producing malt within its customers' specifications.

1774 Scaife accepted Eden's offer, and it was agreed that she would commence at Joe White in Adelaide on 1 November 2014. In anticipation of commencing her new role, Scaife visited Adelaide for a few days in September 2014, during which she spent time at Joe White as well as arranging for her return.

1775 In early September 2014, Viers returned to Minneapolis. On his departure, he sent an email to various Cargill employees including Purser, Woodburn and Savona, entitled "Winding Down". Relevantly, this email read:

> This will be my last day working here at Joe White. I [w]anted to thank each of you for your support of the integration. By nearly all measures the integration itself was a success …
>
> In addition to the integration *we found ourselves running a mitigation given the practices in place under Viterra ownership. This had a profound impact* on our ability to produce and deliver product on time and in [specification] basis (sic) Cargill

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point in time when they were desperate for malt or that Hindmarsh was being used without the customer's permission. The Viterra Parties relied upon the fact that the required specifications of Oriental Brewery included a long list of approved barley varieties, but none of them included Hindmarsh. Based on this evidence, the Viterra Parties submitted the court should not find that Cargill was concerned after the Acquisition to meet customers' specifications concerning barley varieties. To refrain from making such a finding would be contrary to the evidence of Jones, who was an entirely credible witness, and whose evidence was corroborated by the contemporaneous email of Stewart referred to above, together with Stewart's evidence at trial. In this regard, see also the evidence given by Viers: at par 1562 above.

> standards and our contractual obligations. While in the first 6 month *we lost more than 20% of our capacity*, I'm pleased to say that last month we were near 96% cap utilization although *not without flexibility from our customers and additional cost*.
>
> *A good deal of work remains*. We are investing capex in the form of storage and blending capacity as a strategic fix to a number the production issues. Many of the synergies took a back seat to the near term issues however we can now bring them forward with the proper focus.
>
> *All said the strategic rationale, overall quality and placement of the assets, and the benefits of being aligned with [the grain and oilseeds supply chain] all remain intact*. The value will come, it unfortunately is taking longer to ramp up then (sic) we anticipated.
>
> (Emphasis added.)

1776 Upon his return, Viers gave Scaife a briefing on Joe White. Viers told Scaife that the expected synergies were not being achieved regarding barley purchases because Joe White's stock and book of barley purchase commitments did not match the varieties specified by Joe White's customers. He told Scaife she would need to focus on securing the correct barley as required by Joe White. Further, Viers said that Scaife would need to help Joe White produce malt within specification. He said it was necessary to work with Joe White's customers to improve their perceptions of the malt being supplied to them. Obviously, from Viers' perspective, the operational problems Joe White was experiencing were far from over.

1777 Also in September 2014, Stewart ceased his employment with Joe White and commenced his new role at Coopers.[1022] Stewart gave evidence that he received numerous shipments from Joe White after this time that were reported to be within specification in the Certificates of Analysis, but when tested at Coopers were out of specification or did not properly perform in Coopers' brewery.

1778 Although Scaife was still working in the United States, she started to receive information concerning Joe White. The August 2014 monthly update was sent to her by Jewison. That report indicated that for the month of August 2014 Joe White had suffered losses of US$2.5 million against budgeted profits of US$3.6 million. It was

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1022 Stewart had been offered the "global technical role" for Cargill, but ultimately decided to continue his career with Coopers.

noted that negative variances to budget existed across nearly all areas of the Joe White Business, though integration costs were actually down US$600,000.

1779 With respect to margin, it was adversely affected by the continued impact of revenue synergies not being achieved, changes to the customer mix, additional barley varieties purchased to conform with customers' specified barley and "nil Sydney packing to date".[1023] In addition, margin was down because of higher ocean freight costs. As for volumes, they were also below budget. It was stated this was because of Joe White continuing to refine 5 day malt requirements and because production capacity utilisation was at 93 percent. Another factor identified was a delayed vessel to San Miguel. It was also recorded that there were higher water costs at 3 of Joe White's plants because of maintenance issues and customer approval issues. In relation to synergies, US$2 million had been achieved, against a budget of US$4.1 million. Various other matters were referred to in explaining Joe White's performance.

1780 On 22 September 2014, a report for Joe White prepared by Youil was circulated. The report addressed plant utilisation rates from November 2012 to September 2014. The target capacity of 97 percent was almost achieved for September 2014, which was at 96 percent. However, the last time before September 2014 that those levels had been achieved was July 2013. In November 2013, being the low point, they were at 65 percent. From this low point, broadly speaking, the capacity achieved trended upwards through to September 2014.[1024]

1781 The meeting of Heineken's specifications was said to have been a major contributing factor for reduced utilisation rates. Germination had been extended to 5 days to ensure Heineken's specifications were met. The report referred to the recent grant by

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1023 As to the last of these factors, precisely what was involved was not explored.

1024 During the course of 2014, the Port Adelaide plant was shut down to allow for the installation of steeping tanks, which adversely affected capacity in around April 2014. A second phase of works was foreshadowed to continue at this site until July 2015. Some of these later works were required because of a decision by Glencore not to renew a lease over Viterra's property, which had been used by Joe White to gain access to its Port Adelaide plant. Cargill offered to buy the land, but the offer was declined. This position also caused delay to some of the second phase of the works. Also shortly before Scaife commenced, works had started at the Sydney plant to increase silo storage and create the ability to outload malt by way of a dispatch chute for supply to domestic customers. By this time, Joe White had also entered into a lease with Co-Operative Bulk in order to secure further storage in Perth.

Heineken of limited approval to use gibberellic acid on Commander and Buloke varieties for the 2013 crop, which would result in shorter germination time and improved utilisation rates. There were 2 risks identified: that Heineken would not approve the use of gibberellic acid for 2014 (which would require the continuation of the 5 day malt production); and that the barley quality for the 2014 crop would be such that 5 day germination would be required to meet specifications for other customers, including those allowing the use of gibberellic acid.

1782 Youil's report stated that gas and electricity consumption increased as a result of extending kilning in order to meet customer requirements. Scaife, who was a recipient of this report, gave evidence that with respect to producing malt, gas and electricity consumption are an important component of variable costs as they can have a significant impact on the cost of production, and therefore profitability. Having read the report, Scaife formed the view that improving the economics of the Joe White Business was directly correlated with the ability to move production through at full capacity.

1783 Upon receiving this monthly report, Van Lierde sent an email stating it was a disappointing month again. He enquired as to where additional storage would be built or whether there was any other remedy to get Joe White back on track. In response, Youil agreed the result was disappointing. He stated that the Australian employees were putting in significant effort to put the Joe White Business back on course. He also provided details of the plans going forward.

1784 An annual "commitment report", prepared in around October or November 2014 by Jewison, with Argent's assistance,[1025] set out a "profile" of the Acquisition. One part of the report mirrored the language in the Acquisition Integration Review in relation to the impact of the Cargill Blending and Certificate of Analysis Procedure on Joe White staff, and the need to communicate "the light at the end of the tunnel".[1026] In relation to the performance of the Joe White Business, the report stated that sales

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1025 Argent provided a number of other financial reports throughout October 2014, the detail of which was considered by Scaife in preparation for her start in November 2014.

1026 See par 1755 above.

volume was under expectations by approximately US$3.3 million, largely attributable to the cost of conformance with Cargill operating procedures as opposed to those in place under Viterra. It stated that production volumes had fallen as a result of efforts to correct the Operational Practices, with sales volumes falling as a result. Further, the inability to meet customer specifications resulted in derogations being required for nearly 60 percent of malt sales.

1785 The report also detailed costs incurred as a result of a need to purchase additional barley, often at a premium, to meet customer specifications. Other difficulties referred to were additional freight costs (to recall malt from wharfs and to move malt between plants), distressed malt being dumped or sold as feed, and demurrage arising from missed or rolling shipping bookings because of malt quality issues. Further, synergies were delayed, in some respects because Joe White's customers already had contracts in place. Furthermore, the report recorded customer impatience with the number of requests for derogations and deferring of shipments Joe White was making. Nonetheless, the report also stated that "assumptions of future margins expectations remain sound" and Joe White remained a very good strategic fit for Cargill. Emphasis was also placed on Cargill having become a truly global presence. It was stated that, in September 2014, actual production exceeded budgeted production for the first time since 1 November 2013. However, it was observed that the disruptions to the Joe White Business had come at a cost to the Joe White brand.

1786 Towards the end of October 2014, the malt leadership team provided an update for the whole of Cargill Malt. A presentation was given, attended by various Cargill employees, including Scaife. The update contained a section concerned with actions to be taken in relation to Joe White. That part of the update referred to progress that had been made with Heineken in relation to the use of gibberellic acid (which was limited)[1027] and the approval of Buloke barley. In relation to barley merchandising, it

[1027] The document stated: "Transition Heineken to [gibberellic acid] (completed in August)". Scaife's evidence was that Heineken had only consented to gibberellic acid being added for a defined period in relation to the 2013 crop. Her evidence was that Heineken only agreed to exogenous gibberellic acid being used sparingly and not for the entire contract, with further approvals required. She rejected the suggestion put to her that the issue was alleviated for Heineken in August 2014 by stating "not entirely"

was noted that a new merchandising manager would be appointed which would allow an increase in merchandising activity. A large number of other steps were listed in order to increase merchandising and yield. However, it was noted that southern and eastern Australian barley crops had been negatively impacted by a hot and dry weather pattern. Manufacturing and distribution costs were also addressed.

1787 A section of the update addressed volumes and margins. For Joe White, the original budget of 529,967 tonnes was reduced by only 10,000 tonnes.[1028] The reason for this reduction at this level was not explained.

1788 On 1 November 2014, Scaife commenced at Joe White. It was the first occasion she had worked in the malting industry, and her first role as general manager. Scaife never discussed the Joe White Business with Hughes, and Stewart had also departed by this time.[1029] Scaife initially decided not to replace Stewart after his departure, but rather split his responsibilities between Testi, Sheehy, McIntyre and another employee,[1030] together with obtaining assistance from De Samblanx and another individual from Cargill Malt's global business.

1789 Scaife met with the Joe White executives to get an understanding of their immediate priorities, the direction they thought should be taken and the help they required.

1790 She met with Youil, who told her that Joe White could not consistently make malt within specification. He said that he was feeling optimistic that volumes of malt produced had improved, but stated that Joe White was still having a lot of problems. Youil informed Scaife that Joe White had a number of capital projects to seek to reduce the rate at which it was producing malt out of specification. He said these works were

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and explained why. In essence, the longer term proposal was to supply malt without adding gibberellic acid: see par 1816 below.

1028 This part of the update also appeared to deal with gross margin per "metric ton". However, the only witness asked about this issue was Scaife, who was unable to speak to this aspect of the update.

1029 Scaife gave evidence she had previously spoken with Stewart.

1030 In April 2015, a replacement for Stewart was appointed. Scaife rejected the suggestion put to her in cross-examination that she should have replaced Stewart earlier, saying she relied on the technical assistance of De Samblanx and another Cargill employee, before making more permanent arrangements from around March 2015.

critical to help reduce the rate of non-complying malt.[1031]

1791 When Scaife spoke to Wicks, he told her that every time Joe White produced malt out of specification it was necessary to obtain a derogation. He said he needed more time to visit customers face-to-face to assure them Joe White was taking action to reduce production that was out of specification and also to explain why Joe White did not have the barley varieties specified. Wicks said he wanted to get those customers affected by unauthorised barley use to accept alternative varieties. Scaife gave evidence that a difficulty she faced when she joined Joe White was that Joe White did not have relationships in place with farmers and therefore it was not in the supply chain influencing what was being grown. This had been the position long before her arrival.[1032]

1792 Scaife met with Testi, Sheehy, McIntyre and another member of the technical team together. She stated that dividing up Stewart's responsibilities between them provided them each with an opportunity to take on additional responsibility. She then met with them individually.

1793 McIntyre told Scaife that she needed support in seeking derogation approvals from customers. She said she also needed assistance working with plants with respect to storing malt that had been produced but was required to be stored while waiting for customers to accept derogation requests. As part of her role, being principally responsible for obtaining derogations, McIntyre prepared derogation spreadsheets listing details of each of the derogations sought for out-of-specification malt. Scaife reviewed these on a monthly basis to assess the performance of the Joe White Business.

1794 In December 2014, Scaife assisted Argent with the monthly update for November 2014. At the time it was circulated, Scaife was satisfied that it best reflected Joe White's performance and forecasted performance. The update reported that Joe White

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1031 Before Scaife commenced at Joe White, approval had been obtained for capital expenditure to address storage and supply chain issues. In part at least, these issues arose because of customer requirements for particular barley varieties, which had to be kept segregated throughout the supply chain. In order that Joe White could meet customer specifications, increased storage was required in this regard.

1032 See par 1291 above and the reference to Joe White having lost close contact with the procurement team.

suffered a loss of US$1.8 million for the month. In relation to year-to-date earnings, the Joe White Business had suffered a loss of US$4.1 million to the end of November,[1033] compared with a budget of US$6.4 million in earnings.

1795 Scaife presented this update during a conference call in which she reported that ceasing the previous Operational Practices of Joe White had had a negative impact of US$4.2 million. Scaife said she derived this figure from reviewing each component of loss in the profit and loss accounts. Further, for the 2015 financial year budget of US$11.4 million, she reported a forecast impact of US$7.1 million with respect to ceasing these Operational Practices.

1796 As 2014 flowed into 2015, the Joe White Business continued to experience significant difficulties. One of them occurred in March 2015, with the collapse of a silo at the Cavan plant. The smaller of the 2 production lines became inoperable as a result. It also had some impact on the storage and handling configurations and had implications for the larger production line as well, because the conveying systems were interrelated.

1797 In around March 2015, Scaife prepared 2 slides for Eden. The first of these noted that over 40 percent of Joe White's malt volume was being shipped with derogation, due to barley quality or processing failures, or both. The document stated that some customers were opting to cancel contracts as a result of delayed orders. In addition, Joe White had sold less than 50 percent of its contracted malt, leaving it vulnerable to losses in an environment where margins were being pressured by the state of the market in the European Union.

1798 Scaife gave evidence that delays arose when a Joe White customer was requested to make a derogation for malt out of specification. As the malt could not be loaded until the approval was forthcoming, the malt needed to be stored. If no storage was available, then the flow-on effect was that Joe White was not able to start producing new batches of malt for other customers. Given the number of batches affected by the

1033 Integration costs were an additional US$1 million.

need to seek derogations, the delays were significant.[1034]

1799 The first slide also contained a "plan B". Scaife said she created this because she anticipated that, if Joe White customer volumes and profit margins did not improve, the Cargill Malt leadership team would ask her what steps she was considering to reduce fixed costs to respond to demand being below production capacity. Plan B involved a partial closure of the Cavan plant and a complete closure of Devonport. Scaife further suggested a reduction in costs associated with sales and administration if the Joe White Business were to be downsized.

1800 The second slide detailed difficulties experienced in sourcing approved barley varieties. These issues included Joe White's competitors establishing grower relationships and growing premium varieties close to processing assets. A further issue was that Joe White's competitors determined the quality of barley that they delivered to Joe White and to themselves from their storage handling facilities. Scaife explained that often grains were comingled and Joe White did not necessarily get to prescribe the quality of the barley that was delivered. In response to this, Joe White sought its barley through Cargill's grain flow system to have more control over quality. Cargill also sought out additional third party storage so Joe White could better preserve high quality barley stocks rather than having them comingled.

1801 Minutes of a conference call held on 8 May 2015,[1035] between representatives of Joe

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1034 From the day after Cargill took control of Joe White, McIntyre maintained yearly spreadsheets of derogations. She also prepared derogation charts for the periods 9 November 2013 to 31 December 2014 and 2 January 2015 to 30 December 2016. Export pale malt represented approximately 90 to 95 percent of total overseas malt orders. The information McIntyre collated showed, in relation to exported pale malt only: for the period from 1 November 2013 to 31 December 2014, 405,110 tonnes of malt were shipped to export customers, with 171,700 tonnes either requiring a derogation or having a derogation approved (being on average just over 42 percent of this malt requiring a derogation) (other than for 2 weeks which were relatively high, the percentage of derogations fell towards the end of this period. Also Oriental Brewery gave Joe White a standing arrangement for dispensation with respect to some parameters; for the period from January 2015 to December 2016, 557,271.35 tonnes of malt were shipped to export customers, with 87,441.28 tonnes requiring a derogation (being on average 16 percent of this malt). Again the percentage of derogations fell towards the end of this period, particularly after October 2015. There was also some evidence with respect to the period from January 2016 to October 2017 which it is unnecessary to refer to, save to note that with the exception of the month of July 2016 (which was 10 percent), the percentage of volume the subject of derogations was less than 10 percent.

1035 The meeting was cut short, and a written exchange of questions and answers was recorded to state the respective positions.

White, including Wicks, and "Heineken Asia Pacific", demonstrated some of the ongoing issues Joe White was facing. During the call, Joe White sought approval for the use of gibberellic acid and for the use of further varieties of barley, as part of a plan to reduce shipment derogation requests. The minutes indicated that Heineken would cooperate with Joe White.

1802 Before June 2015, Wicks, as Australian commercial manager, reported directly to Sagaert in her capacity as global commercial manager. Upon Sagaert replacing Eden in June 2015, Wicks reported to the new global commercial manager who, in turn, reported to Sagaert.

1803 Both before and after June 2015, Sagaert had a number of dealings with Heineken in an attempt to keep the relationship on an even keel. In 2015 Heineken had a long-term contract with Cargill which had approximately 12 to 18 months remaining. Sagaert wanted to convince Heineken to keep the existing arrangements in place going forward and to regain some of the business lost by Joe White with 1 of its largest customers. Sagaert gave evidence that she was unsuccessful in securing the full volume of malt sales going forward, with the "biggest part of the volume" not taken.

1804 By way of background, in March 2015, Sagaert met with representatives of Heineken in Dublin. In an email sent to Scaife, copied to Wicks and others, Sagaert described the meeting as positive and constructive. During the meeting, Heineken raised an issue concerning the quality and specification issues with respect to malt from Joe White. Sagaert was told that Heineken was disappointed about the fact that it was not "structurally informed about [Cargill's] plan to get into the [specifications] and the progress [Cargill was] making". Sagaert proposed a plan for Cargill and its customers to communicate in a more formal way.

1805 Wicks responded stating that Heineken did not need a public relations exercise, but real actions and results. Wicks had also recently met with Heineken. He had been informed that Heineken's immediate concern was Joe White's ability to meet contractual obligations for 2015. He said Heineken wanted to discuss 2016, but could

not commit until it was confident Joe White could meet Heineken's specifications and ship on time. Wicks said it was Joe White's challenge to convince Heineken that it could overcome the problems which remained despite Heineken allowing Joe White to use gibberellic acid in 2014. The email continued:

> I explained that the number of shipments requiring derogation had halved since takeover but at about 25% [this] was still not acceptable to us either.
>
> Additional storage, extending [gibberellic acid] derogation will assist us [in] supply in 2015 and longer term. [The] new variety (Flinders) would be a huge step towards non-[gibberellic acid] supply in 2016.
>
> She liked the fact that Cargill had appointed a regional Manager ([Scaife]) to support the business and that technical support ([De Samblanx]) was being provided from Europe.

1806 Wicks suggested Scaife be directly involved in a further meeting that week. In a return email, Scaife said she would be. The email concluded by referring to a meeting that Wicks and Viers had had with Heineken the previous year in which Heineken was assured that Joe White would get on top of the quality issues. Wicks said it was likely that Heineken would be questioning Joe White's slow progress.

1807 After receiving these emails, Scaife decided to assume responsibility herself for dealing with Heineken on behalf of Joe White. Scaife considered that work needed to be done to assure Heineken that Joe White could reliably meet its obligations with respect to specifications and timely delivery.

1808 Some 3 days later, Scaife participated in a call with Heineken. Before the call, Heineken sent an email setting out an agenda which included quality issues, gibberellic-acid derogations and malting audits. A summary list was included with respect to the quality issues, which did not exhaustively set out 6 separate quality issues Heineken had for the first quarter of 2015.

1809 Scaife gave evidence that during the call she was told that if Joe White was a new supplier, Heineken would never consider approving Joe White. She was also told that Heineken did not feel like a valued customer. Heineken said the issues with Joe White created a headache in its organisation it could do without. Scaife was told Heineken

could not continue to procure malt from Joe White under these circumstances and that it had accepted the issues for too long already. In an email reporting what Heineken had said, after listing the matters referred to above Scaife noted that, in relation to the list of complaints, it was "unfortunately longer". After setting out the key aspects of the meeting, Scaife gave a series of directions for steps to be taken before a further planned meeting with Heineken.

1810 Scaife's email was not entirely negative. She indicated that "[d]espite the facts and the stated frustration" both she and Wicks felt the discussion was positive and that there was a fast alignment on the way forward. However, Scaife noted that Joe White was now required to deliver. Under cross-examination, Scaife accepted that she believed it was a constructive conversation and that Heineken had given constructive feedback.

1811 Upon receiving Scaife's email containing these directions, Dickie emailed Scaife and the other recipients stating that Lotte Chilsung Beverage Co Ltd ("Lotte"), Thai Beverages and Boon Rawd "amongst others … also want to know *how and when we will be able to deliver on time and in specification*" (emphasis in original).

1812 It was Scaife's opinion, which she expressed at the time to Joe White's executives, that Joe White had a number of problems with respect to Heineken. She believed that Joe White did not have access to the barley varieties required, that it did not have robust enough supply chain processes to meet the complexity involved in supplying Heineken in accordance with its contractual specifications, and that Joe White's contract management and customer management records for Heineken were incomplete.

1813 Towards the end of March 2015, Heineken sent an email to Wicks itemising a series of issues for Joe White to address. Without descending to the detail, the email identified barley variety issues, quality issues and quality inconsistency. The email stated that the number of lots of malt out of specification was very high and that consistent quality between malt batches had not been achieved.

1814 In late March 2015, a presentation was prepared by Scaife and Wicks for submission

to Heineken. Scaife was responsible for all the information and action items contained in the presentation. The presentation recorded that Joe White had an existing agreement with Heineken for 60,000 tonnes of malt for the period from 1 April 2015 to 31 December 2015. This was compared with a supply contract of 80,000 tonnes for the period from 1 April 2014 to 31 March 2015. It was further suggested that on 17 March 2015, Cargill and Heineken had agreed that the relationship could be "restored" by taking action across derogations, barley varieties, quality and specifications. The 16 page presentation identified the ways in which Cargill said it could improve Joe White's performance. It also proposed the traffic light approach to handling derogations.[1036]

1815 A meeting was held with Heineken on 1 April 2015, at which Scaife gave a presentation. The proposed traffic light approach was rejected by Heineken. In an email later that day, Scaife reported that Heineken considered the reductions in gibberellic acid derogations did not appear to be ambitious enough, but that the plan presented was a good first step and far more than Cargill had provided in the last 18 months. However, Heineken said further refinement and detail was required.

1816 After some exchanges, Scaife prepared a further version of the presentation that had been given on 1 April 2015. Part of the presentation dealt with performance improvement. Of the various measures and aims set out, it was stated that Joe White proposed to deliver malt without added gibberellic acid by 1 April 2016. In the email forwarding the updated presentation, Scaife sought various confirmations. In an email sent in late April 2015, Heineken expressed doubt on some aspects of the plan. One of the 7 subjects addressed in the email was Joe White's control and influence over barley traders and farmers. The email referred to a previous discussion about how Joe White and Cargill could ensure influence over farmers, and to a lesser extent traders, so that the barley supply source for required varieties could be secured. The Heineken representative stated that the issue was important for the approach adopted

1036 See par 1606 above.

for the 2014 crop and beyond.[1037]

1817 Throughout May and June 2015, there was ongoing interaction with Heineken. In the first week of June 2015, Heineken conducted audits of Joe White's Port Adelaide and Cavan plants, with Port Adelaide obtaining approval.

1818 Negotiations continued and various emails were exchanged. In mid-July 2015, Sagaert met with the global procurement director of Heineken over lunch in the Netherlands. Sagaert reported that Heineken was convinced that Cargill should be its global partner to do business in all regions. However, the report also referred to "dark clouds" in North America and Australia with respect to quality and supply assurance. Sagaert said she explained the position of Joe White and the "higher standards in terms of acceptance of variations in [specifications], resulting in asking for derogations and problems in deliveries".[1038] The report suggested that Heineken's position would be that, if the malt was better than before, then there should not be a problem as Heineken would be willing to broaden their specifications in order to receive what it had received before.

1819 When cross-examined on this meeting and her subsequent report, Sagaert acknowledged that Heineken's reaction at this point in time was generally positive, but noted that Heineken ultimately did not agree to broaden its specifications. Sagaert's evidence was that after this time Joe White continued to deliver malt to Heineken but not at 100 percent of the normal daily volume.

1037 The Viterra Parties sought to make much of this, in effect suggesting this was evidence that Cargill had not been concerned about, or at least sufficiently focused on, securing the correct barley varieties. Submissions based on such a premise must be rejected. There was a substantial body of evidence demonstrating Cargill was most concerned about this issue. Further, the reference to the 2014 crop in this email was of no moment given the email was sent in 2015; the reference did not suggest Cargill had had no concern about taking steps to source the correct varieties after the Acquisition. Furthermore, the evidence was that it took time for farmers to accede to requests for different varieties to be grown and harvested: see pars 1126-1127 above. In essence, if Joe White had an inability to procure the correct barley varieties immediately before the Acquisition because of a lack of availability of particular varieties, which it did, the problem could not be fully remedied in the short term because of the practicalities involved: see, for example, par 1212 above and pars 2417-2419 below.

1038 Conway's evidence was that Cargill attempted to operate at the highest standards in relation to all aspects of its business. Eden gave evidence that the Cargill Code set Cargill apart from many others in the business world and that in the malting industry there were "few people [who] would run their business the same way the family of Cargill runs their business".

1820 In mid August 2015, in the lead up to a meeting, the third iteration of the presentation was provided to Heineken, incorporating developments that had occurred. This presentation contained a graph showing the total volume of malt sold to Heineken on a monthly basis, together with the amount and percentage of that volume that was the subject of derogations. The graph showed improvement in percentage terms from April to July 2015, though it also showed a reduction in total volume. A second graph provided a breakdown of the derogation data, which was said to demonstrate the improvement in overall quality because of a significant decline in the number of parameters out of specification. A third graph sought to demonstrate the shift in malt quality and identified seasonal crop related issues as the cause of most of the derogations. Cargill's technical team leader, Marcello Marchetti, gave this presentation to Heineken.

1821 On 10 September 2015, Scaife sent an email to all plant managers and the Joe White leadership team, attaching charts prepared by McIntyre setting out details of derogations for the period from January 2014 to August 2015. Scaife stated that the plant managers' perseverance was paying off and that she was delighted with the trends. Scaife suggested that the performance showed certain improvement in Joe White's reliability as a supplier which would build confidence with its customers and local team. In raw numbers and percentage terms, the number of derogations sought by Joe White had declined steadily since February 2015 (from about 25 percent to 10 percent).

1822 A meeting with Heineken was scheduled to be held in mid November 2015. It did not occur as no Heineken representative dialled into the meeting. Shortly after the meeting was due to be held, Heineken emailed Joe White with a list of the issues outstanding. These were addressed by Joe White. Accordingly, late in 2015, Scaife was able to negotiate for the supply of malt to Heineken for the 2016 calendar year.

1823 The November 2015 commitment report, again prepared by Jewison and Argent, set out the difficulties experienced by the Joe White Business in the second year following the Acquisition. The report recorded that all 3 of the actual cumulative volume results,

actual cumulative margin results, and projected volume results were below target, and stated the following in relation to the financial performance of Joe White:

> Sales volumes were under expectations by (Y1) 55.85kt/US$9.3 [million] and (Y2) 101.4kt/US$13.2 [million]. Year 1 variances were related to Cargill's conformance with customer contractual obligations from Day 1 vs. former [Joe White] practices. Prior [Joe White] practices were fraudulent in that they allowed for the changing of [Certificate of Analysis] documentation and delivery of malt, which did not meet customer specifications. These practices were not uncovered in the due diligence process given limited information that was made available, despite multiple questions. Production volumes, and subsequently sales volumes, fell due to our inability to source customer approved barley varieties, produce malt in specification without the use of additives (which are not approved by many customers) and an inability to blend out of specification malt with other batches. These same challenges continued into Year 2 and volume loss was further compounded by surplus global malt supply and competitive forces favouring exports from other origins (primarily Europe).
>
> Spend to date on additional capital related to storage is US$7.1 [million].[1039]

1824 Sagaert rejected the suggestion under cross-examination that the inability to source the correct barley varieties had nothing to do with any past Operational Practices of Joe White. Further, although the position in Europe was not related to the Operational Practices, she gave evidence that because of the surplus in Europe, if Joe White was not able to supply malt as ordered, then it was easy for Joe White's customers to source malt from elsewhere, compounding the difficulties Joe White was facing.

1825 The report then referred to margins related to shipping, stating it was a negative impact largely for reasons that had been previously explained concerning the Operational Practices. Without going into the detail here, Sagaert repeatedly rejected propositions put to her under cross-examination that the matters reported in this section were not related to the Operational Practices (or in some instances she could not say).

1826 The report dealt with future projected volumes for years 3 to 10, which were expected to be below previous expectations (due in part to a slower than expected market

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1039 The evidence at trial was that up to 2018 $5.155 million had been spent on 10 additional silos at Minto, Sydney; $2.588 million had been spent on 6 additional silos during stage 1 at Port Adelaide; and $3.88 million had been spent on additional silos during stage 2 at Port Adelaide. In relation to Perth, Joe White entered into an agreement with Co-Operative Bulk to access additional storage adjacent to the Perth plant at a cost of $452,000.

recovery). That aspect of the report referred to a silo collapse at the Cavan plant. Sagaert accepted this was entirely unrelated to the Operational Practices. She also accepted that other matters raised in the report were not related to the Operational Practices.

1827 In dealing with supply issues, it was reported that there had been a need to change processes to comply with customer obligations as there had been an inability to produce malt within customer specifications "resulting in substantial loss in volume and increased cost of conformance". It was also stated the supply disruptions across the first 2 years had negatively impacted the ability to supply a number of major customers, and in some cases Cargill had been locked out of supply for the medium-term on the basis of poor quality performance. In responding on Joe White's performance, it was stated that Viterra's operating practices were fraudulent by the delivery of malt that did not meet customers' contractual obligations; and that Cargill's actions to correct the problems resulted in product quality issues, lower production and sales volumes as well as higher barley and production costs.

1828 The report stated that 2 years post-Acquisition the Joe White Business had losses of $9 million, in contrast to its projected earnings of $19 million.

1829 The final page of the report recorded an "overall view", which was accompanied by a frowning face in an orange text box. The overall view stated:

> First-year underperformance stems from corrections needed to a business model to be able to comply with customer requirements. To offset the valuation impact, Cargill filed a breach of warrant (sic) claim with the seller. Despite this setback, the acquisition established a truly global footprint for the malt business, a valuable attribute in the industry.

1830 In late 2015, Scaife completed contract negotiations with Heineken for the supply of malt for 2016. This fact was put to Sagaert during her cross-examination coupled with a proposition that the reduction of sales by Joe White after 2013 was mainly because of the under-performance of new barley varieties and the reduced availability of older varieties. In response, Sagaert said she did not know the contractual position of Heineken in late 2015, but rejected the suggestion that the main reason for the decline

concerned availability of barley varieties, stating that "the true root cause was the [Certificates of Analysis]", which was plainly a reference to the Reporting Practice and, to some extent, the Varieties Practice.[1040]

1831 At the end of 2015, it was decided to close the Cavan plant. Scaife explained that this decision was made as the overall volumes of malt being produced were so low and the associated fixed costs of the business were too high. Further, the silo collapse earlier that year had made the plant less viable. Cavan had had a rated capacity of 94,000 tonnes per annum, which capacity was lost once Cavan was closed.

1832 By 2016, Joe White was also dealing with poorly performing Australian barley crops. A joint Joe White/Cargill presentation delivered to Hite in February 2016 stated that the 2015 crop of barley had suffered from 1 of the 3 worst El Niño events since 1950, and as a result malting-quality volumes of barley were extremely short across Australia. It was recorded that the 2015/2016 harvest selection rate was around 10 percent, whereas the long term average selection rate for malt 1 barley was 30 percent. The presentation stated that there was no malt grade Buloke or Commander barley varieties available in Western Australia at all, whilst the same varieties were limited in New South Wales. It stated that for the 2016 crop, Joe White was looking to increase plantings of various varieties of barley as a result.

1833 These problems were reiterated in a further Joe White/Cargill presentation to San Miguel Brewery in Manila dated 16 February 2016, which stated that the Western Australian malting barley industry had been transitioning away from certain varieties of barley, namely Baudin, Buloke, Gairdner and Vlamingh. Scaife and others met with San Miguel to seek to secure malt supply contracts for 2016 and 2017. Two days later, a similar presentation was given to Nestlé, but it was adapted to address Nestlé's specifications. Like presentations were also given to HABECO and Vietnam Brewery Ltd in March 2016.

1834 A presentation entitled "Barley Varieties for Craft Beer", prepared by Stewart for

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1040 Being the extent to which barley varieties were misstated in Certificates of Analysis.

Coopers in March 2016, discussed the use of different barley varieties in craft beer. In the introductory slide, Stewart wrote that "[m]atching the right malting barley variety to a beer style is of great importance for all market sectors, including craft". Stewart gave evidence that barley varieties for craft brewers were certainly important, but also accepted the variety of barley mattered to brewers who provided a specification as to variety.[1041]

1835 Difficulties regarding the availability of barley varieties were also being communicated within Cargill in 2016. A September 2016 Cargill presentation, entitled "F15-16 Q1 Regional Update Asia Pacific", stated that volumes were "impacted by lack of competitive advantage over Europe and previous quality issues", in particular stating that Heineken had lost confidence in Joe White's ability to supply in-specification malt. On a slide entitled "Historical Malting/Feed Barley break up", a graph appeared showing the amount of malting barley available declined from 2012 to 2014. Underneath the graph the presentation stated, amongst other things:

- Despite increasing crop size we are seeing more new Varieties which are unapproved by Cargill Malt [Joe White] customers at this stage.
- For 2015 forecast 49% of varieties are not approved, and we are assuming a selection rate of 40% malting grade barley quality.

1836 Scaife gave evidence that the level of malting grade barley available placed a further constraint on the supply chain given Joe White's previous practice of not disclosing the type of barley being used had ceased.

1837 Broadly speaking, the November 2016 Joe White commitment report reiterated the issues noted in the 2014 and 2015 reports,[1042] recording the unsatisfactory second and third year performances were by reason of the same challenges faced in the first year

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1041 Eden also gave evidence about customers taking barley varieties seriously. He said customers built their brands of beer around barley varieties and that not to use the correct variety was extremely serious. The Viterra Parties invited the court to reject this evidence as the "underlying premise" had not been established. However, Eden's evidence was consistent with Stewart's evidence on the point. See also par 18 above. For completeness, during re-examination Stewart said that he believed small amounts of other barley varieties, so long as they were in a similar class of fermentability, would typically give no issue to the brewer. It was unclear whether this evidence related to a customer who was fully informed of the situation, or otherwise: see par 170 above.

1042 See pars 1784-1785, 1823-1829 above. The document was prepared with the assistance of Argent, in conjunction with Sagaert and her financial controller.

after the Acquisition. The cumulative Unadjusted Earnings for the 3 years was $15.117 million, in comparison to forecast Unadjusted Earnings of a total of $98.036 million. On the question of realising synergies, it was stated that there were many hurdles to overcome before a strong trusting partnership could be established. It was noted that Joe White integration management actively involved Cargill's grain and oilseeds supply chain from the start to define profit sharing and cost sharing frameworks to realise synergies. However, the synergies actually achieved were less than what had been forecast.[1043] It was also noted that the issues experienced in relation to surplus global malt supply and international competition continued "whilst also battling the headwinds of a poor [Australian] crop".[1044] As in 2015, actual cumulative volume results, actual cumulative margin results, and projected volume results were all below target. Again it was recorded that production volumes fell due to the inability to source customer-approved barley varieties and to produce malt within specification without the use of additives. Reference was also repeated to the inability to blend out-of-specification malt with other batches. The report stated that future projected volumes for years 4 to 10 post-Acquisition were expected to be cumulatively 528,000 tonnes below previous expectations. The report said this was explained, in part, by a slower than expected market recovery following Joe White's quality issues and the increasing influence of Chinese manufacturers in the export market.

1838 The report stated that Joe White's projected margins were expected to remain lower than the original deal model assumptions over the next 5 years for 2 reasons:

(1) Additional competitive pressure from China and other regions and also lost volumes due to quality issues. It was stated that it took time and margin to win volumes back that were lost because of quality issues.

1043 For the 2014 financial year $1.131 million had been forecast, whereas $1.071 million was realised. In the following financial year $2.584 million had been forecast, but $2.293 million had been realised. And for the 2016 financial year, $2.755 million had been forecast, but this time $2.436 million was realised. None of the projections that followed from these years up to year 10 had estimates that matched or exceeded the original forecasts.

1044 Reference to a very poor 2016 crop and a shortage of malting grade barley was also made in Cargill Malt's quality business review dated 16 December 2016.

(2) The market was cyclical and the Australian origin malt was periodically less competitive, primarily due to the spread between Australian and European barley prices.

With respect to the steps that had been taken to maintain or improve operating results, it was stated that there had been investment in barley varietal approval partnering with farmers in order to originate grain that was in the right location and consisted of the correct varieties.

1839 Later in the report, Joe White's performance was explained by the operational changes that had been necessary because of the Operational Practices. An explanation for operating performance included Joe White being unable to produce malt within customer specifications, resulting in substantial loss in volume and increased costs. The supply disruptions were reported to have negatively impacted Joe White's ability to supply a number of major customers for 2 years. It also repeated that Joe White had been locked out of supply for the medium-term because of poor quality performance. Steps were referred to aimed at recovering "Cargill's"[1045] quality reputation and regaining market share. It was stated those changes needed to be made to correct product quality issues not disclosed by Viterra which resulted in lower production and sales volumes, and higher barley origination and production costs. The report also stated that the results were further impacted by weaker crops in Australia, a surplus in global malt supply and competitive forces that favoured exports from other origins. Sagaert gave evidence that it was clear in preparing the report that these matters were the root causes of lower earnings, both looking back and looking forward.

1840 Sagaert gave evidence that the conclusion she reached at the time this report was prepared was that the position was worse than the view that had been formed at the time of the 2015 commitment review; it was observed that there would be a longer term negative impact of the Certificate of Analysis situation. She said the conclusion reached was that it had given rise to greater damage than had been anticipated. Her

[1045] Joe White was referred to as Cargill throughout the report.

evidence was that Joe White was not capable of producing malt within specification, resulting in Joe White being unable to deliver to customers' specifications, which gave rise to lost volume. Sagaert said this resulted in Joe White customers looking for alternative suppliers to avoid having to stop their beer production. She said Joe White customers found malt from competitors, mainly from Europe and sometimes China. Sagaert referred to a price dislocation between Australia and Europe at the time, and said it was "a perfect moment actually to lose a customer" from the customer's perspective.

1841 As in 2015, the "overall view" was represented by a sad face. The underperformance for the first 2 years was said to stem from corrections needed to the business model to address Joe White's customer requirements with which Joe White had not been complying. However, again, the report concluded by stating that the Acquisition established a truly global footprint, which was a valuable attribute in the malting industry.

1842 Sagaert was directly involved in preparing this report. At the time it was produced she had replaced Eden as global managing director of Cargill Malt. The report was prepared with assistance from a financial controller (working for Cargill)[1046] and Argent.

1843 A financial summary prepared in 2018 recorded Joe White's annual financial results from November 2012 to October 2013 (being the first year) through to November 2016 to October 2017. A note in the summary (note 9) recorded a loss of volume had been impacted by commercial changes unrelated to the Acquisition. That note stated Heineken's contracted volume had fallen from 80,000 tonnes to 20,000 tonnes due to a breakdown in discussions concerning price. Further, the summary indicated that the volumes of malt produced from November 2013 to October 2017 were significantly below those achieved before the Acquisition. In addition to identifying the drop in sales reflected in the reduced volumes, in relation to the malt that was actually sold

1046 The precise title of this person was not the subject of evidence. He was described by another witness as the financial planning and analysis lead in consideration of the sale of Cargill's entire global malt business.

the amounts that were delivered in accordance with customer contracts were specified. This information demonstrated approximately 42 percent of malt sold in the first financial year after the Acquisition was supplied pursuant to a derogation (that is, the malt did not comply with the contractual specifications). For the second financial year, the amount supplied pursuant to derogations was 28 percent. In the third and fourth financial years, derogations were required for just under 19 percent of malt supplied.[1047]

1844 In summary, for each financial year ending May 2014, 2015, 2016 and 2017, Joe White suffered losses.[1048] Further, before it was sold by Cargill, Joe White's sales volumes had failed to return to the levels that were being achieved before the Acquisition. Joe White's sales volumes were not forecast to return to such levels until 2022.[1049]

1845 Sometime in 2018, Cargill, Inc decided to engage in a project, known as Project Colombo, with a view to selling all interests in its malt businesses globally. In September 2018, Cargill, Inc disseminated an information memorandum, with the assistance of Crédit Agricole Corporate and Investment Bank, for the sale of the entirety of Cargill Malt, including Joe White. This information memorandum commenced with a disclaimer which disavowed any representation being made as to accuracy, relevance or completeness and required each recipient to rely on its own investigations and analysis. In short, and broadly speaking, this disclaimer was similar to the disclaimer which appeared at the commencement of the Information Memorandum.[1050] Ultimately, the Joe White Business was sold by Cargill on 20 December 2018 as part of the sale of Cargill, Inc's entire global malt business.

1846 On 23 April 2019, Cargill, Inc and Copagest NV entered into a final sale agreement by which it was agreed that Cargill Malt would be sold for US$847 million, subject to various adjustments. Further, the amount of US$188.3 million was to be allocated to

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1047 See also fn 1034 above.

1048 This was the evidence of Van Lierde. However, for completeness, the documents produced by Cargill as part of Project Colombo (see par 1845 below) recorded an amount for earnings before interest and tax of negative $6.8 million in 2016, but an amount of $8.3 million profit for 2017.

1049 The estimate for 2021 was 471,400 tonnes and for 2022 was 516,400 tonnes.

1050 See par 475 above.

the Australian and Pacific region, with a more detailed allocation to be made before 31 March 2019. Subsequently, the date for this allocation was extended to 31 May 2019, 28 June 2019 and then 12 July 2019. On 27 September 2019, Cargill sent a letter to Axereal referring to the agreement with Copagest NV. The "debt free/Cash Free Price" as finalised was set out, which indicated that US$188,382,287 had been allocated for the purchase of Joe White. The sale of the entirety of Cargill Malt was completed on 31 October 2019.

1847 This completes the narrative of the key facts in the case. Some further facts are set out below. The compilation of these facts has involved (more than usual) an ongoing consideration of what to include and what to leave out. Given the large volume of factual matters put before the court, and the extent to which they were the subject of dispute, this has taken a significant period of time.[1051]

1848 Very broadly speaking, the main claim for loss by Cargill Australia was simple. Cargill's case was that if, before the Acquisition Agreement had been executed, it had been told of the Operational Practices it would not have agreed to purchase Joe White and the Joe White Business. Further, if, after the Acquisition Agreement had been executed but before the purchase was completed, Cargill had been told of the true nature and extent of the Operational Practices it would not have completed the purchase and would have terminated the Acquisition Agreement. In short, it was a no transaction case; Cargill Australia claims the difference between the amount it paid for Joe White and the Joe White Business, being $420 million, and the amount Cargill says the Joe White Business was actually worth, which was substantially less.

V. The pleadings

1849 By its fifth further amended statement of claim ("the Statement of Claim"), Cargill Australia made a large number of claims connected, in various ways, to the Acquisition. Speaking very broadly, claims were made in reliance on provisions under Schedule 2 of the *Competition and Consumer Act 2010* (Cth) ("the Australian

1051 See further pars 5345-5349 below.

Consumer Law"),[1052] in tort for deceit and for breach of contract.

1850 By a defence to the Statement of Claim and a further amended counterclaim ("the Defence"), save for formal matters the Viterra Parties substantially joined issue with the Statement of Claim. The Viterra Parties made allegations against the third parties ("the Third Party Claim"), each of whom filed a defence to the Third Party Claim.

1851 Key allegations were contained in paragraph 19 of the Statement of Claim, which was entitled "Non-disclosure of material information". It read as follows:

> Glencore and/or Viterra did not disclose, either in the Information Memorandum or during Due Diligence,[1053] and it was the fact:
>
> (a) that [Joe White] routinely, and without informing customers:
>
> (i) supplied malt to customers that did not comply with contractual requirements and specifications; and
>
> (ii) supplied [C]ertificates of [A]nalysis to customers that misstated the results of analytical testing on the malt, so that certificate reported that the malt complied with contractual requirements and specifications when it did not,
>
> (together, "**Viterra Practices**");[1054]
>
> (b) that the Viterra Practices were partly recorded in and endorsed by policies entitled "Viterra Malt Certificate of Analysis Generation Procedure" and "Malt Blend Parameters Procedure" (together, "**Viterra Policies**");
>
> (c) that [Joe White]'s financial and operational performance for the financial year 2010 to part of financial year 2013 (including that reported in the financial and operational information disclosed in the Information Memorandum and during Due Diligence (collectively or in any combination, "**Financial and Operational Information**")) was substantially underpinned by [Joe White]'s practice of supplying malt to customers pursuant to the Viterra Practices and Viterra Policies that did not comply with the relevant customer contract; and
>
> (d) that, but for the Viterra Practices, [Joe White] could not produce and sell malt:
>
> (i) in the volumes and to the specifications required by customers;
>
> (ii) in the volumes and for the returns reflected in the Financial and

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1052 Pursuant to s 130, Australian Consumer Law means Schedule 2 of the *Competition and Consumer Act* as applied under Subdivision A of Division 2 of Part XI of the *Competition and Consumer Act*.

1053 Due Diligence was defined in the Statement of Claim to mean participation in Phase 2 of the sale process which involved conducting due diligence on Joe White and the Joe White Business: see also par 1022 above.

1054 To be clear, the definition of Viterra Practices employed in paragraph 19(a) of the Statement of Claim comprised the Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice, where such practices were implemented collectively, on a routine basis and without informing customers.

Operational Information,

(collectively, individually or in any combination, the "**Undisclosed Matters**").

Extensive particulars were provided to these allegations, the details of which are not necessary to set out here.

1852 The definitions in paragraph 19 of the Statement of Claim will be adopted for the remainder of the judgment. To be clear, the definition of the Viterra Practices is different from the definition of the Operational Practices.[1055] The Operational Practices (the existence of which, ultimately, there was no dispute) incorporates the Reporting Practice, the Varieties Practice, and the Gibberellic Acid Practice. In substance, the Viterra Practices was a reference to the Operational Practices being implemented in a particular manner, at a particular level of regularity, and being characterised in a particular way.

1853 The defences filed by the Viterra Parties up until the defence filed on 20 August 2018 (more than 2 months after the trial had commenced), save for complaining about the inadequacy of particulars, in substance simply did not admit the allegations contained in paragraph 19 of the Statement of Claim. Further, the Viterra Parties relied upon the disclaimers contained in various documents provided before the Acquisition Agreement was entered into, and also made certain allegations with respect to Cargill's position, including its knowledge, before its execution of the Acquisition Agreement.

1854 Despite a substantial body of evidence, including agreed documents, being before the court from the time of the Cargill Parties' opening in the second half of June 2018, it was not until 13 December 2018 that the Viterra Parties made certain admissions with respect to paragraph 19 of the Statement of Claim.[1056] For the first time, the Viterra Parties then admitted that the Joe White Business had written policies in the form of the Malt Blend Parameters Procedure and the Viterra Certificate of Analysis Procedure. The admissions were confined to *Joe White* having these written policies despite the fact that they were both business records of Viterra. This defence

1055 See par 43 above.

1056 See also fn 56 above.

continued:

> (bc) subject to subparagraph (ca) below, [the Viterra Parties] admit that at all material times until about 31 October 2013 the [Joe White Business] was generally conducted in accordance with the [Malt Blend Parameters Procedure and the Viterra Certificate of Analysis Procedure] as they existed from time to time;
>
> (bd) subject to subparagraph (ca) below, [the Viterra Parties] admit that on occasions prior to 31 October 2013 the [Joe White Business] supplied shipments of malt to customers which were produced in part or whole from barley varieties which had not been approved by the customer in question, but do not admit the number of occasions upon which that occurred;
>
> (be) subject to subparagraph (ca) below, [the Viterra Parties] admit that on occasions prior to 31 October 2013 the [Joe White Business] supplied shipments of malt to customers which were produced using gibberellic acid in circumstances where the customer in question did not permit the use of gibberellic acid, but do not admit the number of occasions upon which that occurred;
>
> (c) otherwise do not admit paragraph 19; and
>
> (ca) say that before 22 October 2013, they did not know of any of the matters set out in subparagraphs (bb), (bc), (bd) and (be) above;
>
> (i) those matters having been entirely within the [Joe White Business]; and
>
> (ii) the [Viterra Parties] only came to know of those matters as a result of:
>
> (A) reading the contents of the [Cargill 22 October Letter] and [the Cargill 29 October Letter]; and
>
> (B) being told of them by one, some or all of the [Third Party Individuals] on or after 22 October 2013; and …

The remainder of the defence at that point in time replicated what had previously been stated with respect to disclaimers and Cargill's position.[1057]

1855 Given the limited nature of the admissions made by the Viterra Parties on the pleadings, it is convenient to also refer to their closing submissions with respect to the Varieties Practice and the Gibberellic Acid Practice.

1856 In relation to the Varieties Practice, the Viterra Parties repeated the substance of what was contained in subparagraph (bd) as set out above, and then stated that the evidence did not demonstrate that the Varieties Practice was routine, systemic, or anything

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1057 For further details of amendments made by the Viterra Parties to their defence, see *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 25)* [2020] VSC 172, [19], [22], [60]-[64], [76].

other than an occasional practice that was employed by Joe White in circumstances where there were shortages of approved varieties. It was further submitted that, as at October 2013, Joe White's practice was to use a customer's desired variety where available, but if it was unavailable, to use a variety with a similar character to ensure the malt met the customer's expectation. It was further contended that the conduct engaged in by Joe White with respect to supplying unauthorised barley was consistent with industry practice.

1857 As for the Gibberellic Acid Practice, the Viterra Parties repeated the substance of what was contained in subparagraph (be) as set out above, and then stated there was no evidence to the effect that the practice of using prohibited gibberellic acid was routine, systemic, or anything other than an occasional practice that was limited to a small number of customers. Similar to the response to barley varieties, the Viterra Parties further contended that the relevant conduct was consistent with industry practice.

1858 In short, there was ultimately no controversy that before Cargill took control of Joe White, Joe White engaged in conduct as contemplated by the terms of the Viterra Certificate of Analysis Procedure and the Malt Blend Parameters Procedure, including pencilling. So much so that the Viterra Parties positively contended in their closing submissions that the majority of participants in the commercial malting industry "engaged in practices in relation to the production of [C]ertificates of [A]nalysis which involved the use of pencilling", and defined them as the "Analysis Industry Practices".

1859 Equally, there was ultimately no dispute that Joe White historically had been using unauthorised barley varieties when supplying malt and using gibberellic acid contrary to some customers' instructions. The extent to which each of these practices had been engaged in, whether such practices aligned with industry practices and, to some extent, whether Joe White customers knew of such practices, was in dispute. That said, the Viterra Parties' case as ultimately put positively asserted the existence of the practices set out above, which were defined by them respectively as the "Barley Variety Industry Practices" and the "Gibberellic Acid Industry Practices", in seeking to defend the allegations made against them.

1860 Notably, in their closing submissions, in seeking to define each of these alleged industry practices they contended existed (collectively "the Alleged Industry Practices"), the Viterra Parties were silent on whether or not such practices were disclosed to customers of malthouses, and whether or not the Alleged Industry Practices involved deliberately concealing the relevant conduct from customers and, for completeness, auditors. However, in the Defence, the Viterra Parties positively alleged the Alleged Industry Practices "were not ordinarily disclosed to customers".[1058]

1861 Subject to what is set out above, it is unnecessary to set out in detail here the specific allegations in the pleadings. By way of a list of issues, the parties helpfully identified for the court, by reference to the pleadings, the issues that required determination. To the extent necessary, further details of the pleadings are addressed in dealing with the issues for determination. However, not all matters that require determination arose out of the pleadings. During the course of the trial, further issues arose. Some of these will be addressed before those the subject of the list of issues.[1059]

W. Ancillary issues for determination

W.1 Whether parts of the Statement of Claim should be struck out because of Cargill's agreement with Hughes

W.1.1 Introduction

1862 The Viterra Parties apply to strike out parts of the Statement of Claim which relate to Hughes' knowledge.[1060]

1863 They do so on either or all of 3 bases:

(1) Rule 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ("the Rules").

1058 See issue 13 below.

1059 See also issue 145 below.

1060 The application was made on day 101 of the trial. The parties were informed the ruling would form part of the final judgment.

(2) Sections 16 and 19 of the *Civil Procedure Act 2010* (Vic).

(3) The court's inherent jurisdiction to address a contempt of court.

1864 Essentially, the Viterra Parties' application rests on a fundamental submission: that Cargill Australia engaged in conduct, in respect of Hughes, which was liable to interfere with the administration of justice, and accordingly amounted to a contempt of court.

1865 If this characterisation of Cargill Australia's conduct were accepted, then the identified parts of the Statement of Claim may be struck out on any of the 3 bases identified.[1061] If the characterisation of Cargill Australia's conduct is not accepted, the application must fail.

1866 Essentially, there are 2 components to Cargill Australia's impugned conduct.

1867 The first is an agreement, entitled "Separation and Release", entered into between Cargill Australia and Hughes on 25 June 2014, around the time Hughes resigned his employment with Cargill Australia ("the Hughes/Cargill Agreement").

1868 The second is a letter sent by Eden to Hughes ("the Hughes Letter") on 9 July 2014, in which Eden, on behalf of Cargill Australia, covenanted on certain conditions not to take directly any action against Hughes in relation to "the practices that were engaged in by the Joe White [Business] prior to [the Acquisition]" ("the Cargill Covenant").[1062]

1869 For the reasons that follow, I do not accept the Viterra Parties' characterisation of Cargill's Australia's conduct. Accordingly, the Viterra Parties' application to strike out parts of the Statement of Claim will be refused.

1061 This was not disputed.

1062 The Hughes Letter stated that the Cargill Covenant did not apply to a situation where Viterra or other parties claimed against Hughes in order to reduce their liability to Cargill. See further pars 1899-1900 below.

W.1.2 Background

W.1.2.1 Hughes' employment and retention

1870 Hughes' employment history with Joe White has already been touched upon.[1063] Hughes also worked, from 1987, for Joe White's predecessor, Adelaide Malting.

1871 Between 1987 and 2007, Hughes held various positions at Adelaide Malting, and then Joe White, including "Technical Manager", "Technical and Plant Manager", "General Manager – Operations" and "Executive Manager – Malt".

1872 From the time Viterra acquired Joe White in September 2009, Hughes was employed by Viterra Ltd as "Executive Manager – Malt".

1873 The contract of service between Viterra Ltd and Hughes, effective from 1 November 2009, set out the terms of Hughes' employment as "Executive Manager – Malt". Two aspects of the Hughes/Viterra Contract are presently relevant:

(1) Hughes' superannuation-inclusive remuneration for the position of "Executive Manager – Malt" with Viterra was set, effective 1 November 2009, at $300,000.[1064]

(2) The Hughes/Viterra Contract could be terminated by Viterra Ltd on the provision of 6 months' notice, although Viterra Ltd could make payment to Hughes in lieu of that notice period.

1874 In November 2011, Hughes was appointed a director of Viterra Malt, Viterra Operations and Viterra Ltd. On 20 December 2011, he was also appointed a director of Joe White. He ceased to hold these positions on 17 December 2012.[1065]

1063 See par 47 above. Although some detail is set out there, it is convenient to refer to the relevant facts here.

1064 By June 2014, however, Hughes' total remuneration had evidently increased. See further pars 1885, 1904 below.

1065 For completeness, Hughes also executed an indemnity agreement with Viterra Inc on 8 August 2012 pursuant to which it was agreed that Viterra Inc would indemnify Hughes in certain circumstances in respect of a liability which Hughes might have incurred as a result of acting as an officer of Viterra Inc or a subsidiary.

1875 Following Glencore's acquisition of Viterra in December 2012, Hughes continued as "Executive Manager – Malt", reporting to Mattiske, then managing director of the Australian division of Glencore Grain.

1876 Shortly after Glencore's acquisition of Viterra, Glencore commenced preparations to sell Joe White.[1066] To that end, Glencore engaged Hughes, amongst others, to assist with the sale of the shares in Joe White and the other assets used in the Joe White Business. Hughes' engagement was formalised in a letter sent to him on 9 May 2013, entitled "RE: RETENTION PROGRAM", signed off by Mattiske as "COUNTRY MANAGER",[1067] on the basis that "we require" Hughes' assistance. That letter relevantly stated that Hughes:

(1) Had been selected to participate in a "retention program for key staff" in relation to the planned divestment of "the Viterra Malt business", and that he would be required to assist in that divestment and to ensure "operations *continue* in a professional and efficient manner" (emphasis added).

(2) Would, subject to the successful sale of "the Viterra Malt business", be paid a "retention incentive" bonus payment by "the Company[1068] [of] no less than [3 months'] and no more than [6 months'] pay, to be determined at the Company's discretion".

Mattiske concluded the letter by thanking Hughes *on behalf of Glencore* for his continued support.

1877 Mattiske's evidence was that he agreed with the Glencore executives, Walt and Mostert, that it was important to ensure Hughes "did not leave Joe White prior to the sale of the business" as this was "standard practice within Glencore". Both the

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1066 See pars 362-363 above.

1067 The header to the letter was "Viterra™" and the footer of the letter referred to Viterra Ltd and its details. On its face, the letter was not clear for which Viterra company or companies Mattiske was signing off as country manager. No questions were asked of him about this during his evidence.

1068 Which company was not specified, but presumably this was a reference to Viterra Ltd.

contents of the letter and the evidence as a whole[1069] disclose that the requirement for Hughes to assist was agreed by both Glencore and Viterra.[1070] As for the retention program, this was stipulated by the letter to be a confidential agreement between Hughes and "Viterra (a subsidiary of Glencore International Plc)".[1071] The confidentiality regime imposed meant Hughes was prohibited from discussing the agreement with any other employee.[1072]

1878 Following the Acquisition, and until his resignation on 24 June 2014, Hughes was employed by Cargill Australia as "Regional General Manager, Asia Pacific"; a period of nearly 8 months. He was reappointed a director of Joe White on 2 November 2013 and held that position until 23 June 2014. The circumstances which brought about Hughes ceasing his employment with Cargill Australia were not fully explored at trial.[1073]

1879 The Viterra Parties contended that the court should infer that Hughes told Cargill Australia what he knew about the matters the subject of the proceeding before his resignation. However, this was not put to the Cargill Parties' witnesses, including those who were directly involved in the conduct of the Joe White Business after the Acquisition. Contrary to this contention, an inference was also available that the Hughes/Cargill Agreement was in the terms that it was because Hughes had not told Cargill of such things. In these circumstances, it would be pure speculation on the part of the court as to whether any such communication had taken place to that point

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1069 Without being exhaustive, King gave evidence that Glencore considered Hughes and Argent should be retained as it would not be possible to run the Joe White Business without the management of the company and it was also important to assist Glencore in the conduct of the sale process. See also par 368 above.

1070 Mattiske's evidence was that Argent was also offered a retention bonus of approximately 6 months' pay at "our discretion" in the event the sale successfully completed.

1071 Again, which Viterra company was being referred to was not specified. Further, in relation to the reference to "Glencore International Plc", see fn 371 above.

1072 If Hughes failed to maintain confidentiality, any entitlement to a "retention incentive" bonus would be lost.

1073 The Viterra Parties noted that the Cargill Parties had not discovered documents providing an explanation as to why Hughes departed. This was of little moment in the context of the real issues in the case.

in time, and therefore it is inappropriate to draw any inference on this issue.[1074]

W.1.3 The Hughes/Cargill Agreement

W.1.3.1 Terms of the Hughes/Cargill Agreement

1880 The Hughes/Cargill Agreement was entered into the day after Hughes resigned from his employment with Cargill Australia. Cargill Australia was referred to as the "Employer". By operation of clause 12, unless the context required otherwise, "the Employer" extended to Cargill Australia's "… subsidiaries, associated entities, related bodies corporate, businesses …". This included Joe White. Accordingly, in this section of the judgment only, when "Cargill Australia" is referred to, such a reference includes Joe White.

1881 For present purposes, there are 3 relevant elements to the Hughes/Cargill Agreement.

1882 *First*, the Hughes/Cargill Agreement documented Hughes' resignation. It recorded that Cargill Australia and Hughes had agreed that Hughes would resign his employment with Cargill Australia effective 24 June 2014. Clause 1 required Hughes to issue Cargill Australia with a written letter of resignation with an "effective date" of 24 June 2014, and Cargill Australia to accept that resignation without requiring Hughes to work out his notice period.[1075]

1883 *Secondly*, in the recitals, Cargill Australia denied any liability to Hughes in relation to his employment by Cargill Australia or the termination of that employment (Recital C). Further, the Hughes/Cargill Agreement released Cargill Australia from any claim(s) that Hughes might have against it in relation to his employment by Cargill Australia or the termination of his employment.[1076] Consistent with the release, the

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1074 See *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 412 [165] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

1075 See also par 1873(2) above.

1076 Clause 3, entitled "Release by Employee", relevantly provided:
[Hughes] absolutely releases and forever discharges [Cargill Australia] from and against all claims, suits, demands, liabilities, actions, damages and costs of whatsoever kind … and howsoever arising in any way relating to or arising out of [Hughes' employment by Cargill Australia or the termination of his employment] which [Hughes] has or may have had in the future against [Cargill Australia] but for [the Hughes/Cargill Agreement], excluding any statutory claim for workers' compensation or superannuation.

Hughes/Cargill Agreement provided, generally, that it would operate as an absolute bar to all claims that might be brought by Hughes in connection with his employment or the termination of his employment.[1077]

1884 *Thirdly*, the Hughes/Cargill Agreement provided for payment to Hughes of an amount in addition to his statutory and contractual entitlements. This additional payment was structured so as to incentivise Hughes' compliance with a series of obligations owed by Hughes to Cargill Australia pursuant to the Hughes/Cargill Agreement.

1885 Speaking broadly,[1078] Cargill Australia was obliged to pay Hughes any accrued but untaken leave entitlements ("the Leave Payment"), together with a further amount of $498,308.64 ("the Further Payment").[1079]

1886 The Further Payment was to be paid to Hughes in 2 equal instalments. The first instalment was to be paid, along with the Leave Payment, within 14 days of Cargill Australia receiving an executed copy of the Hughes/Cargill Agreement. Those 2

1077 Clause 10, entitled "Absolute Bar", relevantly provided:

> Except by way of enforcement of this Agreement, or in respect of any claim for statutory superannuation or workers' compensation, [the Hughes/Cargill Agreement] will operate as an absolute bar to all claims, suits, demands and actions of whatsoever kind threatened or brought or attempted to be brought by or in the name of [Hughes] against [Cargill Australia], arising out of or in connection with [Hughes' employment by Cargill Australia or the termination of his employment].

1078 Clause 2, entitled "Entitlements", relevantly provided:

> (a) Without any admission of liability, [Cargill Australia] will, subject to having received [Hughes'] letter of resignation and subject to [the Hughes/Cargill Agreement]:
>
> (i) pay to [Hughes] the gross amount of $498,308.64, to be taxed as an employment termination payment (**Payment**);
>
> (ii) pay to [Hughes] his accrued but untaken entitlement to annual leave and long service leave (if any) to be taxed according to law; and
>
> (iii) issue a statement to relevant staff confirming that [Hughes] has resigned from his [employment by Cargill Australia].
>
> (b) The Payment will be made in two equal instalments. The first instalment with the benefits referred to in paragraphs 2(a)(ii) and (iii), will be made within fourteen days of [Cargill Australia] receiving an original of [the Hughes/Cargill Agreement]. The second payment will be made 26 weeks after the cessation of [Hughes'] employment but only if [Hughes] has complied with each and every obligation in [the Hughes/Cargill Agreement].
>
> (c) [Hughes] acknowledges and agrees that, subject to receiving the first instalment of the Payment and the benefits referred to in clause 2(a)(ii), he will have received all of his statutory and contractual entitlements in connection with [his employment by Cargill Australia and his termination].
>
> (Emphasis added.)

1079 This represented a total of 18 months of Hughes' base salary at the date of the Hughes/Cargill Agreement. See further par 1904 below.

payments were taken to satisfy all of Hughes' statutory and contractual entitlements arising from his employment by Cargill Australia.

1887 The second instalment of the Further Payment, to which Hughes would otherwise not have been entitled, was to be paid 26 weeks after the cessation of Hughes' employment on the condition that Hughes complied with each and every obligation under the Hughes/Cargill Agreement. From Cargill Australia's perspective, this delay in payment made commercial sense in circumstances where part of that payment of the second instalment was referrable to Hughes providing assistance after the execution of the Hughes/Cargill Agreement.

1888 In addition to the obligation to provide a written letter of resignation, Hughes was required to comply with 4 further obligations. In light of the Viterra Parties' submissions as to the overall effect of the arrangement in question, it is necessary to refer to these in some detail.

1889 The first was the obligation on Hughes to "render assistance" to Cargill Australia ("the Render Assistance Obligation"). This obligation was in the following terms:[1080]

> (a) [Hughes] agrees *to render such assistance to [Cargill Australia] as may be reasonably required*, as requested by [Cargill Australia], *in relation to any dispute* with, or claim against, Viterra or Glencore Xstrata plc *arising from or relating to the Acquisition* (including but not limited to any dispute or claim relating to breach of warranty or to accounts of the [Joe White Business] prepared in relation to the Acquisition). Such assistance may include but is not limited to:
>
> (i) meeting with [Cargill Australia's] lawyers;
>
> (ii) *giving evidence in proceedings* initiated by [Cargill Australia], including providing a witness statement if required;
>
> (iii) reviewing documents; and
>
> (iv) responding to requests made by [Cargill Australia];
>
> (b) [Cargill Australia] will meet any reasonable business expense associated with such assistance, subject to [Hughes] seeking [Cargill Australia's] approval (which will not be unreasonably withheld) before incurring the expense and producing evidence of the expense.

1080 Clause 4.

(c) [Cargill Australia] will agree to a request by [Hughes] that he renders assistance in accordance with clause 4(a) at particular times and/or locations, but only if the request is:

(i) reasonable; and

(ii) made so that [Hughes] does not compromise or conflict with any future employment.

(Emphasis added.)

1890 Further, there were obligations on Hughes to maintain confidentiality in relation to 2 sets of specified matters ("the Confidentiality Obligations").

1891 Clause 5, entitled "EMPLOYEE TO KEEP TERMS CONFIDENTIAL", provided by sub-clause (a) that:

[Hughes] must keep absolutely confidential and not divulge or allow to be divulged to anyone:

(i) the terms of [the Hughes/Cargill Agreement];

(ii) the discussions and circumstances leading to the making of [the Hughes/Cargill Agreement]; or

(iii) information disclosed to [Hughes] by or on behalf of [Cargill Australia] *during any meeting or discussion relating to any dispute with, or claim against, Viterra or Glencore Xstrata plc arising from or relating to the Acquisition.*

(Emphasis added.)

1892 This obligation was qualified. Clause 5(b) provided that clause 5 did not preclude disclosure of the matters identified in clause 5(a):

(i) *as required by law*;

(ii) with the express written authority of [Cargill Australia];

(iii) to enforce [the Hughes/Cargill Agreement]; or

(iv) for the purpose of obtaining confidential accounting or legal advice.

(Emphasis added.)

1893 Clause 6, entitled "CONFIDENTIALITY", obliged Hughes to keep confidential the "protected information of a confidential nature" of "the Employer".[1081] It included

1081 Which included Joe White: see par 1880 above.

that:

> [Hughes] will not, except with the prior written consent of [Cargill Australia] disclose any *information of a confidential nature relating to the business or the affairs of* [*Cargill Australia*] which [Hughes] has learned while employed with [Cargill Australia] to any other person and will not use for [Hughes'] own purposes any such information so acquired.
>
> (Emphasis added.)

1894 Clause 6 provided that the protected "information of a confidential nature" included ordinarily non-public information (including data and records) relating to the business affairs and operations of Cargill Australia.

1895 Furthermore, there was an obligation of non-disparagement ("the Non-Disparagement Obligation"). Clause 7, entitled "NON-DISPARAGEMENT", provided that:

> [Hughes] agrees not to make *any negative,* derogatory, disparaging or defamatory comments whatsoever about [Cargill Australia].
>
> (Emphasis added.)

1896 With respect to the construction and operation of these and other clauses, a severability clause stated that the invalidity or unenforceability of a clause or part of a clause did not invalidate or modify the remainder of the Hughes/Cargill Agreement.[1082]

W.1.3.2 Payments under the Hughes/Cargill Agreement

1897 A document sent by Cargill Australia to Hughes on 21 July 2014, entitled "Terminated Employee Listing" recorded that on 15 July 2014, Hughes was paid, pursuant to the Hughes/Cargill Agreement, a gross amount of $385,602.30, comprising:

(1) $249,154.32, being the first instalment of the Further Payment, and described in that document as a "Golden Handshake".

1082 Clause 13. There were some other general provisions it is unnecessary to discuss. The Hughes/Cargill Agreement is governed by the laws of South Australia.

(2) $136,447.98, being the Leave Payment.[1083]

1898 On 20 February 2015, Hughes was paid $249,154.32, being the second instalment of the Further Payment, which was nearly 2 months after it was due.[1084]

W.1.4 The Cargill Covenant

1899 The Hughes/Cargill Agreement contained no provision effecting Hughes' release from any claim(s) Cargill Australia may have had against him. Hughes' protection against such claims was, instead, addressed in the Hughes Letter, containing the Cargill Covenant.[1085]

1900 The Cargill Covenant was conditional upon:

> (a) [Hughes'] *full and frank assistance* to Cargill in prosecuting [its] claims, which includes providing *accurate instructions and testimony* about matters relating to Cargill's [claim in respect of practices engaged in by Joe White prior to the Acquisition]; and
>
> (b) [Hughes'] compliance with the obligations under the [Hughes/Cargill Agreement].
>
> Should you breach any of the abovementioned obligations, the [Cargill] Covenant ceases with effect immediately.
>
> (Emphasis added.)

1901 The Cargill Covenant did not offer, nor could it offer, any bar against the possibility that the Viterra Parties or others might join Hughes to any future proceeding. Further, no indemnity was proffered with respect to this possibility.

W.1.5 Additional context

1902 It is necessary to provide some further context in relation to the Hughes/Cargill Agreement and the Cargill Covenant.

1083 The Leave Payment comprised amounts of $49,899.12, $34,800.44, and $51,478.42 in respect of Hughes' long service and annual leave entitlements.

1084 Contrary to the Viterra Parties' submissions, it was not readily apparent why this relatively short delay needed to be explained. This proceeding was in its very early stages in both December 2014 and February 2015.

1085 See par 1868 above.

1903 On 24 June 2014, negotiations between Hughes and Cargill Australia over the form of the Hughes/Cargill Agreement had not yet concluded. That day, Cheryl Zampin ("Zampin"), a client human resource manager for Cargill Australia, sent Hughes an email entitled "As discussed".

1904 In the email, Zampin proposed the ultimate amount of the Further Payment, and attached a schedule which explained its composition. The schedule provided that the Further Payment consisted of 6 months' pay in lieu of notice, together with the equivalent of 12 months' pay.

1905 The next day, Hughes replied to Zampin, enquiring as to the status of a " release", that he had previously discussed with Eden. After referring to the difficulty of getting advice at short notice, Hughes suggested a clause should be inserted providing that the second instalment of the Further Payment should not be unreasonably withheld.[1086]

1906 Later that day, Hughes sent Zampin another email. In it, Hughes confirmed that he was content with the formulation of clause 2(b)[1087] and that he would sign and return the Hughes/Cargill Agreement. He continued:

> The only outstanding issue which may be a separate document was regarding Cargill's release of me with regard to any claims/losses with regard to Cargill (sic) purchase of [Joe White] being [sought] from me, as per phone comments by [Eden].

1907 Still later that day, Hughes emailed Zampin enclosing a copy of the Hughes/Cargill Agreement, which he had executed. In that email, he reiterated his understanding that a release in his favour (albeit, incorrectly described as an indemnity) would be provided by Cargill in a separate document:

1086 The Viterra Parties submitted it ought to be inferred from this that the prospect of the payment of the second instalment "was playing strongly on Hughes' mind as an inducement". There was no evidence which might properly support such an inference. The request for such a term for a deferred payment cannot be considered out of the ordinary in a commercial negotiation or demonstrating any particular concern, and no subsequent correspondence suggested that this was a matter of particular significance to Hughes (it not being included in the executed document).

1087 See fn 1078 above.

> Please come back to me regarding the [*Eden*] *indemnity matter*. I have executed [the Hughes/Cargill Agreement] in good faith and expect that *the indemnity offered by Eden yesterday morning* will be a supplementary document, thank you.
>
> (Emphasis added.)

1908 Zampin replied shortly afterwards, stating that she was "following up on the indemnity matter and [hoped] to have something with [Hughes] soon".

1909 On 9 July 2014, Zampin emailed to Hughes a copy of the Hughes Letter.

W.1.6 Origins of this application

1910 The Hughes/Cargill Agreement was put into evidence on 27 June 2018, the seventh day of trial, and the first day of Eden's evidence.

1911 On 6 August 2019, the one-hundredth day of trial, and the second day of oral closing submissions, the court asked the Viterra Parties' senior counsel whether the Viterra Parties wished to make any application concerning any allegations made in the Statement of Claim. This question was put in light of written submissions to the effect that Cargill Australia should not be permitted to "rely on its pleadings, and the related part of its submissions, in relation to those parts of its claim which rely on Hughes' knowledge".[1088]

1912 The following day, the court was told that the Viterra Parties wished to make the present application.[1089] A draft summons was filed that same day.[1090] The present application was heard that afternoon.

1913 The parties' submissions were directed at 2 questions.

(1) Should the present application be entertained?

1088 The submissions referred to the power of the court to prevent Cargill Australia from relying on the relevant parts of its pleading, but was silent as to whether any application was made by the Viterra Parties or whether the Viterra Parties intended to move on this issue in any way.

1089 This was the first notice that the Cargill Parties had of this application.

1090 The draft summons identified those parts of the Statement of Claim that the Viterra Parties sought to have struck out. The following day, at the request of the court, an amended draft summons was filed which further identified those parts of the Third Party Claim which would, if the application was successful, also fall away.

(2) If so, should the present application succeed?

W.1.7 Should the present application be entertained?

W.1.7.1 The Cargill Parties' submissions

1914 The Cargill Parties submitted that the court should not entertain the strike-out application, for 3 reasons.

1915 *First,* they submitted that the matters the subject of this application were not raised at an appropriate time, and as a result inadequate notice was given to the Cargill Parties.

1916 *Secondly,* they submitted that the allegations underpinning the application were not properly put to the Cargill Parties' witnesses. To the extent allegations of impropriety in relation to the Hughes/Cargill Agreement or the Cargill Covenant were raised, they were raised only in the cross-examination of Eden and were not put to any other witness. Further, the allegation of impropriety was put to Eden in relatively narrow terms; namely, that the provision for the second instalment of the Further Payment could be characterised as an:

> [a]greement that [Hughes] would be entitled to the sum of about a quarter of a million dollars if he *acted according to your directions, that is to say Cargill's direction, in relation to these proceedings*.
>
> (Emphasis added.)

1917 Furthermore, Eden did not agree to the proposition put, and stated that he did not recall the Hughes/Cargill Agreement. Moreover, the Cargill Parties relied upon the fact that the additional allegations which underpin the present application were never put to Eden, nor any other witness. For instance, it was not put that, by the Hughes/Cargill Agreement, Cargill sought to: prevent Hughes being available to the other parties or the court; compromise his candour as a witness; or, otherwise interfere with the administration of justice.[1091]

1918 *Thirdly,* they highlighted that the Viterra Parties did not plead the facts or matters the

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[1091] For completeness, Eden gave evidence that he saw nothing in the Hughes/Cargill Agreement, nor the Cargill Covenant, as inconsistent with the Cargill Code.

basis of this application. Rule 13.07(1) of the Rules relevantly requires that a party:[1092]

> … in any pleading subsequent to a statement of claim, plead specifically any fact or matter which –
>
> (a) the party alleges makes any claim … of the opposite party not maintainable; or
>
> (b) if not pleaded specifically, might take the opposite party by surprise;
>
> …

1919 The Cargill Parties submitted that because this application would, if successful, make the Cargill Parties' claims of deceit not maintainable, the facts or matters the basis of this application were required to have been, and were not, specifically pleaded by way of defence.

1920 The Cargill Parties emphasised that rule 13.07 of the Rules reflects a principle of fundamental importance: that a pleading must state with sufficient clarity and particularity the case that must be met.[1093] Because a properly drawn pleading ensures the basic requirement of procedural fairness that the opposite party has the opportunity of answering the case against it,[1094] a pleading will not be sufficient if it does not allow the opposite party the opportunity to know, in advance, and in a timely way, the case it must meet.[1095] This may be particularly so when the proceeding is large and complex, and involves very substantial costs.[1096]

W.1.7.2 The Viterra Parties' submissions

1921 *First,* the Viterra Parties submitted that this application ought to be entertained, notwithstanding that it had been belatedly brought, as the delay could be explained.

1092 See in relation to pleading a defence: *Bright v Sampson & Duncan Enterprises Pty Ltd* (1985) 1 NSWLR 346, 350C (Kirby P), 353C (Samuels JA).

1093 *Banque Commerciale SA (en liquidation) v Akhil Holdings Ltd* (1990) 169 CLR 279, 286.8 (Mason CJ and Gaudron J); see also *Dare v Pulham* (1982) 148 CLR 658, 664.3 (Murphy, Wilson, Brennan, Deane and Dawson JJ).

1094 *Sunland Waterfront (BVI) Ltd v Prudential Investments Pty Ltd* [2013] VSCA 237, [94] (Warren CJ, Osborn JA, and Macaulay AJA).

1095 See, for example, *Charlie Carter Pty Ltd v The Shop, Distributive and Allied Employees' Association of Western Australia* (1987) 13 FCR 413, 417.7 (French J).

1096 *Patrick v Capital Finance Pty Ltd* [2003] FCA 206, [10] (Tamberlin J). In line with these principles, the court made plain to the parties at the commencement of this proceeding that the court would determine the issues in this proceeding solely on the pleadings. If any of the parties wished to depart from the pleaded case, it was made clear that it would be necessary that they make a timely application to do so. This was reiterated to the parties throughout the proceeding: see also *United Petroleum Australia Pty Ltd v Hudson* [2020] VSCA 14, [54] (Whelan, McLeish and Niall JJA).

It was accepted, appropriately, that the application had been unsatisfactorily delayed "in some respects". This delay was candidly attributed to: (1) the Viterra Parties' failure to appreciate the significance of matters relating to the present application until consideration and discussion in the course of preparing written closing submissions; and (2) the necessity of taking detailed instructions from a client based outside Australia before bringing the application.

1922 *Secondly*, it was submitted that it was appropriate that the court entertain the application, because the Viterra Parties' delay could not have caused the Cargill Parties any relevant prejudice, as the Cargill Parties ultimately decided *not* to call Hughes.

1923 *Thirdly*, it was submitted the application raises important issues in relation to the preservation of the administration of justice.

1924 *Fourthly*, the Viterra Parties contended that the allegations underpinning this application were put to Eden to the extent it was reasonably possible to do. The limited cross-examination of Eden in relation to the Hughes/Cargill Agreement was a necessary consequence of Eden's responses in relation to that issue. Specifically, it was said any further cross-examination in relation to the Hughes/Cargill Agreement would have lacked utility once Eden gave evidence that he did not sign the Hughes/Cargill Agreement and could not recall it.

W.1.8 Analysis

1925 It is appropriate that the application be entertained.

1926 Significantly, it involves very grave allegations in relation to the conduct of this case, which are potentially relevant to the administration of justice. It is important that those allegations be fully ventilated, and considered.

1927 Further, although it does not follow that no prejudice would flow to the Cargill Parties simply because they did not call Hughes as a witness, the issue of the nature and extent of any prejudice is, in the present circumstances, more appropriately taken into

account in considering the substantive application.

1928 Furthermore, save for the inconvenience of hearing the present application during time allocated for oral closing submissions, the application will not cause any material delay in this proceeding.

1929 Moreover, in order to ensure that the real issues are the subject of determination, and consistent with previous rulings in this case,[1097] it is appropriate, in the context of a large, long, and complex case such as this, to afford the parties a degree of latitude in respect of inadvertent, rather than strategic, procedural lapses. In respect of candidly acknowledged oversights, both the Cargill Parties and the Viterra Parties have benefited from this approach in the past.

1930 That said, it must also be observed that the Cargill Parties were justified in their criticism of the very late timing of this application. Though the product of oversight, it is nonetheless entirely unsatisfactory that it was made more than a year after Eden's evidence, and during oral closing submissions. It is also especially unsatisfactory that the Cargill Parties were not given notice of the application before the court was informed that the application would be made.

1931 Additionally, I reject the Viterra Parties' submission that Eden's lack of memory of the Hughes/Cargill Agreement provided a basis to refrain from putting to him in cross-examination that he had been allegedly directly involved in interfering with the due administration of justice. His lack of memory did not prevent such a line of questioning; he could have been taken to what the Viterra Parties considered to be the relevant parts of the Hughes/Cargill Agreement in any event. More fundamentally, if such a serious allegation is to be made about the conduct of a witness, the proper conduct of a trial requires such matters to be squarely put so the witness is given the opportunity to respond.[1098]

1097 See *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 22)* [2019] VSC 351, [30]–[31], [58].

1098 See, for example, *Nicholls v The Queen* (2005) 219 CLR 196, 233 [88], 234 [90] (McHugh J), 267-268 [189] (Gummow and Callinan JJ), 296-297 [281]-[282] (Hayne and Heydon JJ); *Browne v Dunn* (1893) 6 R 67, 70.7-71.4 (Lord Herschell, with whom Lords Halsbury and Morris agreed).

W.1.9 Should the present application succeed?

W.1.9.1 Applicable provisions and principles

1932 The critical issue is the characterisation of Cargill Australia's conduct in relation to the Hughes/Cargill Agreement and Cargill Covenant. Specifically, it is necessary to determine whether the impugned conduct was or is liable to interfere with the administration of justice, and so amounts to a contempt of court.

1933 The principles applicable to the 3 bases of the application[1099] were neither substantially developed, nor substantially disputed, by the parties. It is, therefore, sufficient to set out the relevant principles very briefly.

1934 Rule 23.02 of the Rules provides that the court may order that the whole or part of a pleading be struck out or amended where a pleading or any part of a pleading:

> …
>
> (c) may prejudice, embarrass or delay the fair trial of the proceeding; or
>
> (d) is otherwise an abuse of the process of the Court.

1935 The *Civil Procedure Act* sets out a series of overarching obligations,[1100] which applies to, amongst other persons, the parties to a proceeding.[1101]

1936 Section 16 of the *Civil Procedure Act* provides that each person to whom the "overarching obligations" applies:

> … *has a paramount duty to the court to further the administration of justice* in relation to any civil proceeding in which that person is involved …
>
> (Emphasis added.)

1937 Section 19 sets out a particular overarching obligation; namely, the obligation to only take steps "to resolve or determine dispute". It provides:

> For the purpose of avoiding undue delay and expense, a person to whom the overarching obligations apply must not take any step in connection with any claim or response to any claim in a civil proceeding unless the person

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1099 See par 1863 above.
1100 *Civil Procedure Act*, Pt 2.3.
1101 Section 10(1)(a).

> reasonably believes that the step is *necessary to facilitate the resolution or determination of the proceeding.*
>
> (Emphasis added.)

1938 The court is empowered by section 29 to address any contravention of the overarching obligations by making any "order it considers appropriate in the interests of justice", including:

(1) An order that the party which has contravened the overarching obligations not be permitted to take specified steps in the civil proceeding.[1102]

(2) Any order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.[1103]

1939 In addition, the court has an inherent jurisdiction to address, and punish, a contempt of court.[1104] A contempt of court includes conduct interfering with the proper administration of the law.[1105] The essence of a contempt has been described as:[1106]

> action or inaction amounting to an interference with, or obstruction to, or having a tendency to interfere with or obstruct the due administration of justice, using that term in a broad sense.

1940 It is necessary that the relevant conduct have a "real and definite tendency as a matter of practical reality" to interfere with the proper administration of justice.[1107] However, is not necessary that interference *in fact* occur.[1108]

1102 *Civil Procedure Act*, s 29(1)(e).

1103 *Civil Procedure Act*, s 29(1)(f).

1104 The Viterra Parties stated they sought to characterise Cargill Australia's conduct as amounting to a civil contempt rather than a criminal contempt: see, for example, *Witham v Holloway* (1995) 183 CLR 525, 531.6-534.5 (Brennan, Deane, Toohey and Gaudron JJ).

1105 *Lane v Registrar of the Supreme Court of New South Wales* (1981) 148 CLR 245, 257.5 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ), referring with approval to *In Re Dunn* [1906] VLR 493, 497.1 (Cussen J).

1106 Ibid.

1107 *R v Vasiliou* [2012] VSC 216, [15] (Beach J). See also *Farahbakht v Midas Australia Pty Ltd* [2006] NSWSC 1322, [25] (Brereton J); *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 370.6 (Dixon CJ, Fullagar, Kitto and Taylor JJ).

1108 *R v Vasiliou* [2012] VSC 216, [20] (Beach J); *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 29D (Mason P,

1941 Further, it is necessary that the person said to have committed a contempt of court intended to do the conduct which has the tendency to interfere with the proper administration of justice.[1109] It is not necessary that that person also intend to interfere with the proper administration of justice,[1110] although such an intention may be relevant, including by rendering the offence more serious.[1111]

1942 Relevantly, a contempt of court may be committed if conduct amounts to interference with witnesses before trial. It is a contempt to:[1112]

> intimidate, induce or deter witnesses in a manner calculated to deter them from giving evidence or to influence them in the evidence that they are to give, because that may prejudice the course of justice.

1943 Inducement of witnesses in the relevant sense may extend to subtle "blandishments and calls to affection and loyalty, as distinct from … threats, bribes and violence".[1113] In this regard:[1114]

> More witnesses are probably deterred from or influenced against giving truthful evidence by affection for or loyalty to a party than by threat or intimidation. A deterrence from giving truthful evidence in those more subtle ways is just as much an interference with the course of justice as one attributable to the more gross methods ….

W.1.9.2 The Viterra Parties' submissions

1944 The Viterra Parties characterised Cargill Australia's conduct, in relation to the Hughes/Cargill Agreement and the Cargill Covenant as "egregious conduct" and "really very bad behaviour" which, it was submitted, has significant potential to pervert the course of justice and undermine its administration.

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with whom Beazley JA agreed).

1109 *Lane v The Registrar of the Supreme Court of New South Wales* (1981) 148 CLR 245, 258.4 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ).

1110 See, for example, *Farahbakht v Midas Australia Pty Ltd* [2006] NSWSC 1322, [38] (Brereton J); *Attorney-General (NSW) v Dean* (1990) 20 NSWLR 650, 655F (Gleeson CJ, Kirby P and Priestley JA); *Lane v Registrar of the Supreme Court of New South Wales* (1981) 148 CLR 245, 258.6 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ); *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 371.3 (Dixon CJ, Fullagar, Kitto and Taylor JJ). See also *R v Vasiliou* [2012] VSC 216, [19] (Beach J); *R v Slaveski (contempt)* [2011] VSC 643, [19] (Whelan J); cf *R v Taylor* [1999] 3 VR 657, 662 [26] (Gobbo J).

1111 *R v Vasiliou* [2012] VSC 216, [19]; *R v Slaveski (contempt)* [2011] VSC 643, [22]; *Director of Public Prosecutions v Johnson* [2002] VSC 583, [9] (Osborn J); *Registrar of the Supreme Court, Equity Division v McPherson* [1980] 1 NSWLR 688, 700B (Moffit P and Hope JA).

1112 *Farahbakht v Midas Australia Pty Ltd* [2006] NSWSC 1322, [25] (Brereton J).

1113 Ibid, [52].

1114 Ibid.

1945 It was submitted that this was primarily because the Hughes/Cargill Agreement provided for a payment from Cargill Australia to Hughes in the order of $250,000, being the second instalment of the Further Payment, for Hughes co-operating with Cargill Australia to Cargill Australia's satisfaction. It was submitted this payment was "solely to secure his co–operation for the purposes of this proceeding". This was said to be, if not a bribe, then at least something "more than a blandishment" in favour of Hughes, a potential witness.

1946 Further, it was submitted that the impugned payment was accompanied and reinforced by a "litigation threat" contained in the Cargill Covenant. The relevant threat was said to be that if Hughes failed to satisfactorily co-operate with Cargill Australia, it may (in addition to bringing an action against Hughes for breach of the Hughes/Cargill Agreement) bring an action against Hughes of the kind Cargill Australia had covenanted not to bring; that is, an action in relation to the practices engaged in by Joe White prior to the Acquisition.[1115]

1947 Together, the Hughes/Cargill Agreement and the Cargill Covenant were said to operate to deny the court "knowledge of the relevant law or of the true circumstances of the case",[1116] essentially in 2 ways.[1117]

1948 The *first* was said to be by impairing Hughes' candour and honesty. In simple terms, it was argued that: (1) the Hughes/Cargill Agreement and the Cargill Covenant

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1115 This threat was said to arise because the Cargill Covenant's protection against this type of action depended on Hughes' ongoing compliance with the Hughes/Cargill Agreement and his "full and frank" assistance to Cargill Australia in relation to the present proceeding. Thus, a failure to co-operate with Cargill Australia would deprive Hughes of protection against any claim(s) Cargill Australia covenanted not to bring. See pars 1899-1900 above.

1116 See *R v Rogerson* (1992) 174 CLR 268, 280.6 (Brennan and Toohey JJ).

1117 For completeness, the Viterra Parties asked the court to infer that Cargill Australia sought to keep the Viterra Parties from knowing about the Hughes/Cargill Agreement because it was not discovered in the proceeding by Cargill Australia, and Hughes was required to keep its existence strictly confidential. There is no substance to this. *First*, the fact that a document is confidential does not take it outside discovery obligations. Hughes, in fact, discovered the document after the Viterra Parties filed a summons seeking discovery. *Secondly*, the Viterra Parties' submission did not state why it was that Cargill Australia might have breached its discovery obligations by not discovering this document. Without the benefit of any such submissions, it is far from apparent why this document (and related documents) ought to have been discovered by Cargill Australia. This was particularly so when a protocol was in place excusing a party from discovering a document if it had already been discovered by another party.

incentivised Hughes, by the "carrot" of the second instalment of the Further Payment and the "stick" of threatened litigation by Cargill Australia against Hughes, to comply with his obligations under the Hughes/Cargill Agreement; and (2) either of those obligations,[1118] or the manner in which Hughes was incentivised to comply with them,[1119] necessarily impaired Hughes' candour and honesty.

1949 The *second* way in which the Hughes/Cargill Agreement and the Cargill Covenant were said to operate to deny the court knowledge of the true circumstances in this case was by practically reducing, if not eliminating, the prospect of Hughes giving evidence in the proceeding unless called by the Cargill Parties.[1120] By Hughes receiving a substantial payment to co-operate with Cargill Australia pursuant to the Hughes/Cargill Agreement, it was submitted Hughes was placed "decidedly in [Cargill Australia's] camp". The Viterra Parties went so far as to submit that evidence of Hughes would be "irrevocably tainted, indeed spoliated" and that the conduct in question was said to be "analogous to a litigant destroying relevant documents in anticipation of litigation, in that it effectively and permanently alter[ed] the evidence available to the court". It was contended the arrangement would make it unlikely that any other party to the proceeding would call Hughes, because of the risk associated with calling a witness "financially beholden" to another party.

1950 In any event, it was said that the Confidentiality Obligation not to disclose "information of a confidential nature relating to the business or the affairs of" Joe White except with the written permission of Cargill Australia,[1121] foreclosed the possibility of Hughes usefully co-operating with any of the other parties in relation to

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1118 For example, it was submitted that the Non-Disparagement Obligation prevented Hughes from raising "negative" matters in relation to Cargill Australia or Joe White with other parties; and the Confidentiality Obligations prevented Hughes from "disclosing effectively anything about the subject matter of the case" to Cargill Australia's opponents.

1119 For example, it was said that Hughes was, by reason of the Further Payment, "financially beholden" to Cargill Australia. It was further said that the delayed nature of the second instalment of the Further Payment meant that Hughes needed to assist Cargill Australia to Cargill Australia's satisfaction, and presumably in ways that furthered its interests in the proceeding, to receive the Further Payment.

1120 Hughes filed a witness statement, but did not give evidence in his own case. Hughes, along with the other Third Party Individuals, was subpoenaed by Cargill Australia and an outline of evidence was filed. However, Hughes was not called by the Cargill Parties as a witness (noting that the Cargill Parties were not required to make a decision about this until after the Viterra Parties had led their lay evidence in the case: *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 12)* [2018] VSC 454, [30]–[31], [33]).

1121 See pars 1891, 1894 above.

this litigation.

1951 In a submission directed to the alleged overall effect of the Hughes/Cargill Agreement and the Cargill Covenant, it was said that if quarter-of-a-million dollar payments to prospective witnesses were to become "the fashion, and if they were sanctioned in any way" by the court, this would undermine the administration of justice.

W.1.9.3 The Cargill Parties' submissions

1952 By contrast, the Cargill Parties characterised Cargill Australia's conduct in relation to the Hughes/Cargill Agreement and the Cargill Covenant as unexceptional and commercially sound. They submitted the conduct in question could only be understood in light of its context, including that:

(1) Not only had Hughes been intimately involved in the Acquisition, but he was a very senior employee.

(2) Hughes had had a long tenure at Joe White, and its predecessor and successor entities.

(3) Hughes was recognised as being of particular value to Joe White, as evidenced, for example, by the fact that he had previously been incentivised by Glencore to assist with the Acquisition.[1122]

(4) At the time of Hughes' departure, Joe White had only been in Cargill Australia's possession for around 8 months. During this time Cargill Australia had formed the view that the Joe White Business was "fundamentally different" to the business it thought it had purchased, and began to contemplate bringing proceedings against the Viterra Parties.

(5) For Cargill to work out what it was going to do "with the situation it found itself in", it would require Hughes' assistance.

1122 See par 1876 above.

(6) In circumstances where Hughes had been "heavily involved" in the sale and had overseen the Operational Practices before the Acquisition, Cargill would need his involvement to manage various things going forward.

1953 Thus, it was said to be unsurprising that: (1) Hughes would cease employment with Cargill Australia; (2) the cessation of Hughes' employment would be on agreed terms; and (3) Cargill Australia would make provision for ongoing assistance.

1954 Further, the Cargill Parties submitted that the form and content of the Hughes/Cargill Agreement accorded with mainstream commercial practice. Reference was made to industry practice guides and templates for "deeds of separation and release" in respect of departing senior employees. Those guides and templates indicated that in order to ensure finalisation of all potential claims by an employee, such agreements routinely:

(1) Provide for an ex gratia or discretionary payment or other extra benefits in addition to payments to which the departing employee is entitled.

(2) Contain release, confidentiality (including with respect to the terms of the agreement itself), and non-disparagement provisions.

(3) Where the departing employee provides a release in favour of the employer, provide for an additional or greater payment to the departing employee.

(4) For executive employees, the courts have found reasonable periods of notice to be in the order of 6 to 12 months.

1955 Furthermore, the Cargill Parties disputed that the obligations in the Hughes/Cargill Agreement or the Cargill Covenant, or the way in which Hughes was incentivised to observe them, could have the effect of impairing Hughes' candour or honesty. In support of this contention, a number of points were made.

1956 *First*, the second instalment of the Further Payment could not reasonably be understood as simply a payment for Hughes to co-operate with Cargill Australia. Rather, it was consideration for a number of valuable promises flowing from Hughes to Cargill Australia under the Hughes/Cargill Agreement, including, in particular, the release and bar in favour of Cargill Australia.[1123]

1957 *Secondly*, the second instalment of the Further Payment depended only on Hughes' compliance with the obligations under the Hughes/Cargill Agreement. None of those obligations required Hughes to take any step favourable to Cargill Australia in connection with, or to achieve any particular outcome in, this proceeding. In any event, to whatever extent the Further Payment could incentivise Hughes to favour Cargill Australia's interests, it could only realistically do so in the 26 weeks before that instalment fell due, which, in the context of this proceeding, was an insignificant period of time and long before any possible trial.

1958 *Thirdly*, in any event, nothing in the Hughes/Cargill Agreement or Cargill Covenant foreclosed the possibility that Hughes would be joined as a party to this proceeding.[1124] Once that possibility eventuated, Hughes and Cargill Australia's interests in the proceeding necessarily diverged: far from Hughes favouring Cargill Australia's interests, Hughes' interests were served in succeeding in his case by opposing Cargill Australia's case. In the circumstances, where it was directly in Hughes' interests for the Viterra Parties to successfully defend Cargill Australia's claims against it and Hughes was no longer a Cargill Australia employee, there was no real basis to suggest Hughes was in "Cargill's camp".

1959 *Fourthly*, provisions of the Hughes/Cargill Agreement did not necessarily foreclose the possibility of Hughes *also* co-operating with, or assisting, other parties to this proceeding, for example:

(1) Clause 5 applied only to matters disclosed to Hughes by Cargill Australia "during any meeting or discussion *relating to any dispute with*

1123 See generally pars 1883-1896 above.

1124 See, for example, par 1900 above.

… Viterra or Glencore Xstrata plc arising or relating to the Acquisition" (emphasis added). Whilst this might prevent disclosure of privileged post-Acquisition discussions between Cargill Australia and Hughes relating to the present dispute, it did not prevent disclosure of pre-Acquisition matters about which Hughes was aware and which are relevant to the present dispute.

(2) The Non-Disparagement Obligation, properly construed, captured only disparaging and defamatory comments, and did not prevent Hughes from describing to other parties a fact or facts that Hughes believed to be true about Cargill Australia's conduct.

1960 *Fifthly*, the Cargill Covenant cannot be characterised as a "stick" when it is apparent that the Cargill Covenant was actively sought by Hughes.[1125]

1961 *Sixthly*, and in any event, the Cargill Covenant required rather than impaired Hughes' candour and honesty: the protection of the Cargill Covenant depended on Hughes giving "*full and frank* assistance" to Cargill, including "providing *accurate instructions and testimony"* (emphasis added).

W.1.9.4 Analysis

1962 Whilst all of the Cargill Parties' submissions cannot be accepted unreservedly, I am not satisfied that Cargill Australia's conduct in respect of the Hughes/Cargill Agreement and the Cargill Covenant was or is liable to interfere with the administration of justice.[1126]

1963 There are several reasons for this.

1964 *First,* the second instalment of the Further Payment cannot properly be characterised as a payment "solely" for Hughes' co-operation in this proceeding.

1125 See pars 1902-1909 above.

1126 For completeness, it was also not a contravention of the duties and overarching obligations contained in ss 16 and 19 of the *Civil Procedure Act*, nor was conduct capable of enlivening r 23.02 of the Rules.

1965 No obligation to which Hughes was subject under the Hughes/Cargill Agreement amounted to an obligation that Hughes "co-operate" with Cargill Australia in this proceeding.[1127] This includes the Render Assistance Obligation, which the Viterra Parties appeared to treat as a general obligation on Hughes to "co-operate" in this proceeding. At a general level, an obligation to assist is not necessarily equivalent to an obligation to "co-operate". Co-operation requires, and so connotes, a certain degree of unity in action or commonality of purpose,[1128] which assistance does not.[1129]

1966 More significantly, however, even supposing that the Render Assistance Obligation could be characterised as an obligation to "co-operate", the second instalment of the Further Payment could not be described as payment *solely* for that co-operation. To do so would be to overlook a number of valuable contractual promises, in addition to the Render Assistance Obligation, given by Hughes in exchange for the second instalment of the Further Payment. These included Hughes' resignation without protest, the release in Cargill Australia's favour, and the Confidentiality and Non-Disparagement Obligation.[1130]

1967 *Secondly*, and relatedly, the second instalment of the Further Payment was not dependent upon Cargill Australia's "satisfaction" with Hughes' co-operation or assistance.[1131] The mere fact that the second instalment was payable 26 weeks after the first instalment created no such dependency. The only conditions on the payment of the second instalment were that Hughes had provided full and frank assistance to Cargill and had complied with his obligations under the Hughes/Cargill Agreement. Whether or not there was a "breach" of those obligations was a question of objective fact, rather than something to be determined at Cargill Australia's discretion. In any event, the finite period of 26 weeks meant the duration of any possible dependency

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1127 The word "co-operation" (or related words) did not appear in the Hughes/Cargill Agreement. Nonetheless, the Hughes/Cargill Agreement was described by the Viterra Parties as the "Secret Hughes Co-operation Agreement", and the second instalment of the Further Payment as the "Secret Hughes Co-Operation Payment".

1128 *Macquarie Dictionary* (7th ed, 2017) "co-operation" (n[1], def 1), "assistance" (n, def 1); *Oxford English Dictionary* (2nd ed, 2019) "co-operation" (n, def 1), "assistance" (n, def 3a).

1129 That is not to say that opposing parties to a civil proceeding cannot co-operate: *Civil Procedure Act*, s 20.

1130 See pars 1882-1895 above.

1131 See par 1945 above.

would have necessarily expired long before the possible hearing and determination of any future proceeding. The fact that Hughes may have had to repay part of the second instalment, or have been liable for damages, if he breached the Hughes/Cargill Agreement was of little significance. It was the obverse of the contractual obligations to assist, which obligations were entirely consistent with the due administration of justice.

1968 *Thirdly,* the Cargill Covenant cannot be properly characterised as a "litigation threat" against Hughes. Hughes repeatedly sought the Cargill Covenant. The Cargill Covenant offered a degree of protection to Hughes against litigation that Cargill Australia might, but for the Cargill Covenant, threaten against him. To characterise the Cargill Covenant, given in favour of Hughes and at his urging, as a threat against him would be to ignore the context in which it came into being. It would also ignore the context of the Cargill Covenant itself, including that it required nothing more of Hughes than to be "full and frank" in providing assistance and to comply with the Hughes/Cargill Agreement.

1969 *Fourthly*, subject to obligations of confidentiality,[1132] the Hughes/Cargill Agreement and the Cargill Covenant did not necessarily prevent Hughes from co-operating or assisting other parties in this proceeding, if he was ever inclined to do so.[1133] At a general level, it does not follow that an obligation to assist a party necessarily forecloses the possibility of assisting another. The Hughes/Cargill Agreement contains positive obligations to assist Cargill Australia, but not negative obligations that prevent Hughes from assisting other parties to the litigation.[1134] Further, the Non-Disparagement Obligation cannot be properly construed as precluding Hughes from communicating the facts as he understood them. Clause 7 was concerned with comments Hughes may have otherwise made, and not with any facts which he might

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1132 See par 1972 below.

1133 As an opposing party in the proceeding, there would have been every prospect that Hughes would have been advised not to assist the Viterra Parties, irrespective of any perceived inability to do so because of the Hughes/Cargill Agreement: *Commonwealth v Sanofi (formerly Sanofi-Aventis)* [2017] FCA 382, [83] (Nicholas J).

1134 In this regard, compare the treatment of clauses 6 and 8 of the agreement at issue in *Commonwealth v Sanofi (formerly Sanofi-Aventis)* [2017] FCA 382, [17], [19], [82].

communicate.

1970 *Fifthly*, the Hughes/Cargill Agreement and the Cargill Covenant did not have the effect of aligning the interests of Hughes and Cargill Australia in this proceeding. This is most acutely demonstrated by the fact that the Hughes/Cargill Agreement did not foreclose, and the Cargill Covenant explicitly acknowledged, the possibility that Hughes would be joined by the Viterra Parties in this proceeding; and that as a result, Hughes and Cargill Australia's objectives in material respects would be likely to be fundamentally different (if they were not already). This, of course, is precisely what has occurred. The fact that Hughes received payments which, in part, were referable to him providing assistance to Cargill Australia, did not result in Hughes being "beholden" to Cargill Australia, nor, in light of the terms of the Hughes/Cargill Agreement viewed objectively, did they constitute some "more subtle" form of influence.[1135]

1971 *Finally*, there is nothing sinister or inimical to the due administration of justice for an employer to secure the assistance of an outgoing employee with respect to likely upcoming litigation, particularly in circumstances where the employer has only recently acquired the business that employed the outgoing employee. Of course, the terms of any such agreement need to be carefully scrutinised; but provided the terms are consistent with the principles which apply to the absence of property in a witness and like matters,[1136] they may well be entirely consistent with the administration of justice. Indeed, in many instances, it would be remiss of the employer not to enter into such an arrangement as part of an overall settlement of the employee's termination.

1972 Equally, the imposition of an obligation of confidentiality is not inconsistent with the due administration of justice. Although clause 6 of the Hughes/Cargill Agreement

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1135 See par 1943 above.

1136 See, for example, *Commonwealth of Australia v Helicopter Resources Pty Ltd* (2020) 94 ALJR 466, 473 [20] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) in the context of criminal proceedings; *Crown Resorts Limited v Zantran Pty Limited* [2020] FCAFC 1, [2]-[7], [24]-[60] (Allsop CJ, with whom White J agreed), [83]-[86] (Lee J, with whom Allsop CJ and White J agreed); *Harmony Shipping Co SA v Davis* [1979] 1 WLR 1380, 1384H, 1386D-G (Lord Denning MR), 1387A (Waller LJ agreeing).

would be likely to limit what information Hughes could voluntarily disclose to others about the Joe White Business and matters relating to the Acquisition, that clause would not interfere with Hughes' discovery obligations or, if sought and appropriate, any other disclosure obligations ordered by the court. Courts often have to deal with confidentiality regimes in commercial litigation, this case being no exception. Those regimes are usually part of normal and proper commercial practice, and, in themselves, do not undermine or prejudice the due administration of justice. The fact that a litigant, or prospective litigant, puts steps in place to ensure legal privilege or confidentiality may be maintained is not contrary to public policy, even if a consequence of that is that it limits the ability of an opposing party to have access to information or the means by which it might be accessed.[1137]

1973 Although I accept the Cargill Parties' submission that the Hughes/Cargill Agreement did not necessarily foreclose Hughes co-operating with the other parties, in all likelihood, because of clause 6, that would have been its effect to some extent.[1138] However, for the reasons explained, that does not establish a proper basis for the Viterra Parties to have parts of the Statement of Claim struck out.

1974 On the issue of confidentiality, it was proper for Cargill Australia to seek to maintain confidentiality with respect to any discussions that were had after the Hughes/Cargill Agreement was executed. Ordinarily, an aspect of maintaining litigation privilege is the existence and maintenance of confidentiality.[1139] In dealing with Hughes, without such an obligation, Cargill Australia would have run the risk of losing a right it was, and is, lawfully entitled to.

1975 For completeness, it should be noted that it would have been surprising if Cargill Australia had not entered into an agreement like the Hughes/Cargill Agreement when it was likely that the ability to make any claim successfully would require collecting evidence of the Joe White Business operations before it came under Cargill's

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1137 Ibid; *Commonwealth v Sanofi (formerly Sanofi Aventis)* [2017] FCA 382, [83] (Nicholas J).

1138 There is no evidence as to whether, in fact, this ever occurred.

1139 *Evidence Act*, s 119. See also *Australian Securities and Investments Commission v Mining Projects Group Pty Ltd* (2007) 164 FCR 32, 42-43 [30], [32] (Finkelstein J).

control.

W.1.10 Conclusion

1976 Thus, the application must fail.[1140] For clarity, the dismissal of this application in no way is intended to convey that the court sanctions the payment of a large sum of money in order to secure the services or evidence of a lay witness. For the reasons set out above, the Viterra Parties' submission to that effect mischaracterised the nature of the arrangement entered into between Hughes and Cargill Australia.[1141]

W.2 Credibility of witnesses

1977 The credibility of a number of witnesses was challenged by opposing parties. As a general comment, most witnesses before the court appeared to be doing their best to give evidence of the events as they recalled them, or of such other matters as required.

1978 This cannot be said of Mattiske. As would be readily apparent from some of his evidence referred to above,[1142] numerous aspects of his evidence were unsatisfactory. Rather than answering questions directly and confining himself to matters within his knowledge, Mattiske demonstrated a propensity to give non-responsive or argumentative answers consistent with what he undoubtedly perceived to be an account of events in the interests of the Viterra Parties. By way of illustration only, the following 2 passages are good examples of where Mattiske strayed into making assertions and extraneous comments, rather than simply answering the questions that were put.

1979 Under cross-examination by the Cargill Parties' senior counsel, the following exchange took place:

> You accept you were not told that the customers had been told [about the practices]?---I expected - can I just clarify what I think the question is?

1140 In these circumstances, it is unnecessary to consider what prejudice might have been suffered by the lateness of the application in light of the decision not to call Hughes: see par 1927 above.

1141 See par 1951 above.

1142 See pars 1235, 1348, 1357, 1364, 1402-1404, 1513 above. Further, a reading of the transcript demonstrated many further examples could be given.

No, just see if we can concentrate on my question?---I'm trying to.

Do you accept that you were not informed, so you were not informed that customers had been informed of the practices?---I don't know what I expected.

I'm not asking you what you expected. Do you accept that you were not in fact told that the customers had been informed of the practices?---No, I'm honestly not sure. I'm not sure.

Mr Mattiske, what I'm struggling with is how you can be not sure about that question, for this reason. What I'm suggesting to you is that had you been told affirmatively that the customers knew about these practices, you would remember that, that would have been the end to the matter; is that not correct?---No, I don't believe that's entirely correct, but---

What's wrong about that proposition, Mr Mattiske?---Well, I didn't know anything about these practices and my knowledge is still very limited. *My sole - not sole reliance, but my main reliance was that the customers, as I've said many times, had accepted delivery of the product and were happy---*

Mr Mattiske, you keep making that sort of statement. You are not answering my question?---That was important to me at the time, your Honour.

Yes, you have said that countless times now?---Yes.

I'm just asking you to concentrate on my question, and my question, proposition, is this: do you accept that had you been informed that the customers had been told about the practices, you would remember getting that information?---It is probable that I would have remembered that, yes.

And:

Could you go down the page and you will see the dot point, "Traditionally, off-grade was taken largely as a necessity through seasonal conditions and elements outside Viterra control." Pausing there, *you knew that at times of climatic conditions where particular varieties of barley couldn't be obtained it might be customary to use off-grade barley; was that your understanding of the position?---And that there's absolutely nothing wrong with using off-grade barley.*

And that, I take it - did you understand that the use of off-grade barley in those conditions was done with the knowledge and consent of the customer?---*I can't see why it would ever be an issue with the customer because they were still getting exactly what they want. But I imagine the customers would know about this. It's not a secret. Everyone knows. We do it for Cargill now.*

Mr Mattiske, you knew back in 2013, didn't you, that it was important to disclose to the customer if a particular grade of barley was to be used that was different to the specification that related to the supply to that customer?---*But in this case what they are talking about here isn't that.* What they are talking about here is delivering exactly what the customer wants under the customer contract. Off-grade is not off-variety. Off-grade is off-grade. So you can have Gairdner, Gairdner malt industrial, Gairdner feed. As long as you can blend Gairdner with Gairdner you still get Gairdner. It's still the same barley, still the same specifications. That is what it means.

> You say you can use feed-grade barley?---All barley is barley. It depends on specifically how it tests within a lab as to how it's graded. We sell feed barley to maltsters all over the world every day. All barley can be germinated and turned into malt.
>
> Do you tell these maltsters all over the world that that's what you are doing, selling them feed-grade barley, and do you get their consent?---Yes, we tell them exactly what they are going to be delivered and they get exactly what they have asked for. Absolutely. *And then they test it in the labs themselves to make sure they are happy with the quality, as all of these customers did, and accepted the barley they were getting.*
>
> HIS HONOUR: When you say "as all of these customers did", are you talking about Joe White customers, are you?---Yes. So the customers you sell your barley to test the barley on receival to make sure they are happy with it.
>
> MR ANASTASSIOU: Mr Mattiske, you don't know - you didn't know in 2013, anyway, which of the Joe White customers tested barley and - tested the malt and which didn't, did you?---I presumed all of them do. It's a very standard practice worldwide for all grain trading.
>
> I think we established on either Wednesday or Thursday last week you didn't ask anybody the question, did you?---No, *but I presume that to be the case.*
>
> You are keen to argue Glencore's case, aren't you, Mr Mattiske?---No, I'm keen to tell you the facts of the case.
>
> (Emphasis added.)

W.3 Witnesses not called

W.3.1 Overview of the witnesses in question

1980 The Viterra Parties submitted that the Cargill Parties failed to call a number of witnesses, and did not provide an adequate explanation for their failure. These potential witnesses fall into various categories.

1981 *First*, there are persons who at the time of trial and at all relevant times were employees of Cargill and who were involved in matters the subject of dispute, including events leading up to the Acquisition Agreement and the Acquisition.

1982 *Secondly*, there are those who were employed in relation to the Joe White Business leading up to the Acquisition, and beyond, who are not parties to the proceeding.

1983 *Thirdly*, there are former employees who worked in the Joe White Business, who are also some of the Third Party Individuals.

1984 *Fourthly*, there are persons who were employees at Joe White at the time of the trial who are the remaining Third Party Individuals.

1985 *Fifthly*, there are Joe White's customers, none of whom were called.

1986 Further, the Cargill Parties made submissions concerning the absence of some witnesses.

W.3.2 Legal principles[1143]

1987 Before a court makes its determination, all evidence must be weighed according to the proof that was in the power of a party to have produced, and the power of an opposing party to have contradicted.[1144] In weighing the evidence, a court may consider not only the evidence itself, but also inferences that are open on that evidence (or any lack of evidence).

1988 The inference the court was invited to draw with respect to numerous witnesses is commonly referred to as the *Jones v Dunkel*[1145] inference, and has been described as follows:[1146]

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party [itself] or [its] opponent claims that the facts would thereby be elucidated, *serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party*. These inferences, to be sure, *cannot fairly be made except upon certain conditions*; and they are also open *always to explanation* by circumstances which made some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.
>
> (Emphasis added.)

1989 The unexplained failure to call a witness *may* give rise to a number of possible

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1143 Ordinarily, it would not be necessary to expound on this area of the law generally to deal with submissions concerning witnesses not being called. However, given the number and variety of witnesses, the subject of such submissions, it is appropriate to do so.

1144 *Blatch v Archer* (1774) 1 Cowp 63, 65 [98 ER 969, 970] (Lord Mansfield), referred to with approval in *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 405 [144], 412 [166] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 441 [250] (Heydon J).

1145 (1959) 101 CLR 298.

1146 Ibid, 320.10-321.2 (Windeyer J), quoting from *Wigmore on Evidence*, 3rd ed (1940) vol 2, s 285, 162. See also 308.5-308.7 (Kitto J) and 312.6-312.8 (Menzies J).

inferences. These include: (1) the uncalled evidence would not have assisted the party that failed to call the witness;[1147] (2) the court may draw, with greater confidence, any inference unfavourable to that party if that witness would be able to "cast light on whether the inference should be drawn";[1148] (3) the court may more readily accept evidence because it was left uncontradicted;[1149] and (4) the failure may permit a court to be less inclined to draw inferences favourable to that party from other evidence on that issue.[1150]

1990 Such inferences may be drawn not only by reason of a failure to call witnesses to give evidence, but also where a witness is called and the party calling the witness fails to adduce evidence on particular topics. Failing to do the latter may be more significant than the former.[1151]

1991 Naturally, before a court can draw an inference, there must first be a proper basis for it do to so. Each case turns on its facts. The applicability and the extent of any applicability to be accorded to the relevant principles may vary depending on the circumstances, including the particular inference under consideration.[1152] That said, it is generally accepted that the court must be satisfied of certain conditions before drawing an inference. They are as follows:[1153]

1147 Sometimes referred to as an "adverse" inference, but, to be clear, the inference is that the evidence would not assist, not that it, in itself, would be adverse or unfavourable to the party's case: *Kuhl v Zurich Financial Services Australia Limited* (2011) 243 CLR 361, 385 [64] (Heydon, Crennan and Bell JJ); *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2009) 264 ALR 201, 225 [102] (Gilmour J).

1148 *Kuhl v Zurich Financial Services Australia Limited* (2011) 243 CLR 361, 384-385 [63] (Heydon, Crennan and Bell JJ).

1149 *Jones v Dunkel* (1959) 101 CLR 298, 308.6 (Kitto J); 312.7 (Menzies J). See also *Fabre v Arenales* (1992) 27 NSWLR 437, 445B (Mahoney JA, with whom Priestley and Sheller JJA agreed), citing *R v Burdett* (1820) 4 B&Ald 95, 122, 162 [106 ER 873, 883, 898].

1150 *Kuhl v Zurich Financial Services Australia Limited* (2011) 243 CLR 361, 384-385 [63] (Heydon, Crennan and Bell JJ).

1151 *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389, 418E-419G (Handley JA); see also 398B (Kirby P); *R v GEC* (2001) 3 VR 334, 345-346 [41] (Vincent JA, with whom Charles and Batt JJA agreed); *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1, 114-115 [452]-[453] (Austin J).

1152 See, for example, *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206, 222C (Mahoney JA).

1153 *Payne v Parker* [1976] 1 NSWLR 191, 201E (Glass JA, dissenting). See also *Flash Lighting Co Ltd v Australia Kunqian International Energy Co Pty Ltd (No 3)* [2018] VSC 711, [718]-[720] (Robson J), and the cases there cited; *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 413 [169] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 446-447 [263]-[266] (Heydon J); *Australian Securities and*

(1) There must be an expectation that the party would call the witness, particularly if that witness is in that party's camp, or because that witness is available to that party rather than the other.

(2) The evidence of the witness would explain a particular matter or issue in dispute. What is required is more than a mere assertion by the opposing party that the witness has knowledge, or may have knowledge.

(3) There has been no explanation for the absence, or the explanation proffered by the relevant party is considered unsatisfactory. (The *Jones v Dunkel* principle has no application in circumstances where the party that otherwise ought to have called the witness, provides a satisfactory explanation for not doing so.)[1154]

(4) There are no principles of law which prevent the inference being relied upon.[1155]

1992 Determining whether an inference ought to be drawn requires the application of common sense.[1156] The issue is whether, based on the circumstances of the case and on the balance of probabilities, the inference might reasonably be considered to have a degree of likelihood.[1157] The inference "must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is mere matter of conjecture".[1158]

1993 The effect of an inference may be significant, in that "if drawn [the inference] may

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Investments Commission v Rich (2009) 75 ACSR 1, 113-114 [448]-[449] (Austin J); *Manly Council v Byrne* [2004] NSWCA 123, [53] (Campbell JA, with whom Beazley JA and Pearlman AJA agreed), and the cases there cited.

1154 *Fabre v Arenales* (1992) 27 NSWLR 437, 445G-446A (Mahoney JA, with whom Priestley and Sheller JJA agreed). The onus of establishing the unavailability of a witness is on the party against whom the principles would operate: *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1, 116 [457] (Austin J).

1155 *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206, 222D (Mahoney JA).

1156 *Jones v Dunkel* (1959) 101 CLR 298, 321.2 (Windeyer J).

1157 Ibid, 310.2 (Menzies J).

1158 Ibid, 309.8-310.1. See also 319.8 (Menzies J).

weigh the scales, however slightly, in favour of the opposing party".[1159] However, there are limitations on the principle in addition to the matters referred to above. It will not ordinarily operate where it is merely cumulative evidence that the witness would contribute (such as an attendee at a meeting when evidence has been given by numerous others who were at the meeting),[1160] or where senior decision-makers were called and more junior participants, who contributed to the decision-making process, were not.[1161] Further, an inference cannot be used to "fill gaps or to convert suspicion into inference".[1162] Furthermore, the principle applies only where there is a requirement for the party to explain or contradict evidence;[1163] if there is no issue between the parties as to a particular matter, the party against whom the inference is being sought to be drawn need not provide an answer.[1164]

1994 With respect to the adequacy of any explanation and whether it precludes an inference being drawn, the following explanations have been found to be satisfactory:[1165]

(1) The party not being sufficiently aware of what the witness would say to warrant the inference that it feared to call her or him.[1166]

(2) The party is aware that a witness will refuse to assist or has a reason for not being truthful.[1167]

(3) Further to (2) above, notwithstanding a close relationship with a party, there exists a reasonable apprehension that the witness is biased in favour of the opposing party.[1168]

1159 *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 141 [649] (Giles JA).

1160 *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1, 120 [360] (O'Loughlin J). See also J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 11th ed, 2017) 38-46 [1215].

1161 *Apand Pty Ltd v The Kettle Chip Company Pty Ltd* (1994) 52 FCR 474, 490E (Lockhart, Gummow and Lee JJ).

1162 *Jones v Dunkel* (1959) 101 CLR 298, 313.4 (Menzies J).

1163 Ibid, 321.2 (Windeyer J).

1164 See J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 11th ed, 2017) 38-46 [1215].

1165 Ibid.

1166 A party is not required to call a witness "blind": *Fabre v Arenales* (1992) 27 NSWLR 437, 450A (Mahoney JA, with whom Priestley JA and Sheller JJA agreed).

1167 *Fabre v Arenales* (1992) 27 NSWLR 437, 450B.

1168 *Spence v Demasi* (1988) 48 SASR 536, 548.2 (Cox J, with whom White J agreed).

(4) The trouble and expense involved in having to call the witness outweighs the value of any evidence that would be elicited, particularly where the claim or the issue is small, or relatively so.[1169]

(5) The party is not in a position to call the witness.[1170]

(6) The witness is suffering from an illness, is overseas, or by reason of some other unavailability, is unable to attend to give evidence.[1171]

(7) A defendant (or a third party) considered that a plaintiff (or a defendant) had not made out its case.[1172]

(8) A witness fearing that she or he will prejudice themselves.[1173]

1995 A party's decision to limit the number of witnesses called,[1174] and a defendant's belief that the evidence of the plaintiff is insufficient,[1175] have both been found to be unsatisfactory explanations. Naturally, each case will depend on its particular circumstances.[1176]

1996 Finally, the fact an inference is able to be drawn is not the end of the matter. The court must then consider whether the inference *should* be drawn.[1177] This requires an examination of "the logical coherence of the conclusion, its consistency with other facts, premises or principles or the weighing of it against other facts or conclusions",[1178] and a consideration of whether general human experience (plain

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1169 *Packer v Cameron* (1989) 54 SASR 246, 254.10 (Cox J, with whom Duggan and Mullighan JJ agreed).

1170 *Fabre v Arenales* (1992) 27 NSWLR 437, 449G.

1171 *Payne v Parker* [1976] 1 NSWLR 191, 202E (Glass JA, dissenting); *Smith v Samuels* (1976) 12 SASR 573, 581.3 (Bray CJ, dissenting).

1172 *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 148 [664] (Giles JA, with whom Mason P and Beazley JA agreed). See also *Bridgman v Thompson* [2008] VSC 561, [81] (Hollingworth J), citing *Jones v Dunkel* (1959) 101 CLR 298, 322.

1173 *Smith v Samuels* (1976) 12 SASR 573, 581.5.

1174 *Packer v Cameron* (1989) 54 SASR 246, 253.8, though this must now be viewed through the rubric of the *Civil Procedure Act*.

1175 *Daoud v Boutros* [2013] NSWSC 687, [32] (Sackar J), citing *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 148 [663]-[664] (Giles JA, with whom Mason P and Beazley JA agreed).

1176 See, for example, *Bridgman v Thompson* [2008] VSC 561, [79]-[85] (Hollingworth J).

1177 *Fabre v Arenales* (1992) 27 NSWLR 437, 444D, 448C. See also *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206, 222F (Mahoney JA).

1178 *Fabre v Arenales* (1992) 27 NSWLR 437, 448F.

common sense) will not be contradicted if the inference is drawn.[1179] Particular caution must be exercised if the inference sought to be drawn is what an individual would or would not have done.[1180]

W.3.3 Ongoing Cargill employees

1997 Hermus and Christianson were, at the time of trial and at all relevant times, employees of Cargill. Both were involved in the Due Diligence preceding the Acquisition Agreement. The Viterra Parties contend that the court ought to make a finding that the decision by the Cargill Parties not to call Hermus and Christianson was strategic and that, generally, it ought to draw an inference that their evidence would not have assisted the Cargill Parties' case.

1998 For the reasons that follow, no such inference will be drawn.

W.3.3.1 Hermus – his role

1999 Hermus was the European quality manager. Prior to the Acquisition, he was responsible for the preparation of Certificates of Analysis for malt for Cargill, Inc subject to the direction of De Samblanx. Hermus was based in Mechelen, Belgium.

2000 In mid-April 2013, he was assigned as the food safety quality and regulatory lead on Project Hawk. A spreadsheet setting out activities by project delivery process stipulated Hermus' role in the Due Diligence with respect to feasibility, development, planning, and the execution of implementation.[1181]

1179 Ibid, 445F-446A, 449G-450B.

1180 *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206, 223F (Mahoney JA).

1181 These included:

> Identify applicable food and feed regulations and evaluate project accordingly.
>
> Identify appropriate resources and capabilities needed for food safety/regulatory compliance risk management.
>
> Perform the Cargill Corporate Food Safety and Regulatory Affairs Audit as part of Due Diligence activities.
>
> Finish the [due diligence] document request list (section M4 [Food Safety, Quality and Regulatory]).
>
> Review [due diligence] documents.

2001 Hermus was involved in aspects of the reports that arose out of the Due Diligence. As the food safety quality and regulatory lead, Hermus reviewed documentation contained in the Data Room. De Samblanx's evidence was that in reviewing the Data Room, he understood Hermus was trying to find what was important in Hermus' area of responsibility.

2002 Hermus also formulated some questions, which were included in the Tracking Sheet.[1182] The Tracking Sheet identified the questions he devised. These related to, amongst other things: (1) the results of the last HARAM proficiency test by Joe White; (2) the latest "ISO 22000 findings"; (3) the extent to which gibberellic acid, betaglucanase and multifect were used in production; (4) Joe White's reaction to customers requiring a germination time of more than 4 days; (5) contaminant analyses in barley and malt. See "Request" column, rows 108-119); (6) how Joe White assured that if delta T requirements were not met for certain customers, that malt was not used in blends for those customers; and (7) whether Joe White's employees had to annually sign a code of ethics. During cross-examination, Eden stated that those questions were all important, with some more important than others.

2003 The questions as recorded did not entirely mirror questions put forward by Hermus

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> Review [Joe White's Food Safety, Quality and Regulatory] organization and determine the gaps to get to the Cargill [Food Safety, Quality and Regulatory] organization model.
>
> Create a [Food Safety, Quality and Regulatory] plan to mitigate and manage identified risks and needed changes [from] the [Corporate Food Safety and Regulatory Affairs] Audit, the [due diligence] Document Checklist, and the Organization review.
>
> Update and follow-up on [the plan referred to in the preceding item] to mitigate and manage the identified risks and need changes …
>
> Complete plans for eliminating/mitigating [Food Safety, Quality and Regulatory] compliance risks (include capital needs).
>
> Continue to review [due diligence] documents.
>
> Conduct [a Food Safety, Quality and Regulatory] follow-up meeting, involving Corporate Food Safety, Quality and Regulatory as appropriate, to discuss the prepared … action plan.
>
> Understand customer needs, product specifications, and analytical testing procedures.
>
> Ensure that customer needs can be met.

1182 See par 931 above.

to De Samblanx for consideration. In an excel spreadsheet, in early July 2013, "Questions for [Joe White]" were listed which, according to De Samblanx' evidence, was "the only written thing" he got from Hermus.[1183] De Samblanx discussed these proposed questions with Hermus. During his cross-examination, De Samblanx gave his account of the discussions, including some conclusions reached. After his discussions with Hermus, De Samblanx submitted the questions to the Project Hawk team.

2004 Further, the question formulated by Hermus as to whether Joe White employees were required to sign annually a company code of conduct or ethics charter was contained in the Tracking Sheet, but attributed to someone other than Hermus. The question was put and answered to the effect that Joe White employees read and acknowledged they understood and complied with the code of conduct on an annual basis. Furthermore, to the question concerning a required germination period of 4 days,[1184] the response was that it rarely occurred. Moreover, the question concerning delta T received the response that it was a question that was not relevant to value.

2005 Not all the questions raised by Hermus were put to Viterra. The first 3 questions listed in paragraph 2002 above were not put.[1185]

2006 De Samblanx gave evidence that he, with Hermus, amongst others, also had a role in giving a more complete picture of the risks involved in purchasing Joe White.

2007 According to contemporaneous records, Hermus accessed the Data Room a total of 34 times, and reviewed 136 documents, including the Management Presentation Memorandum, the Joe White chemical register, all plant dossiers,[1186] the "Viterra Malt

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1183 See par 821 above. De Samblanx suggested he cut and pasted what was provided by Hermus and included it in the excel spreadsheet. There was no discovery of such a document being sent by Hermus, however the Tracking Sheet made it plain that, at least for most of them, the questions emanated from Hermus.

1184 See par 2002(4) above.

1185 However as to the third question, De Samblanx gave evidence that he asked Youil directly whether gibberellic acid was used in breach of Joe White customer's contracts and was told it was not: see par 788 above.

1186 The dossiers were for the Joe White malting plants located at Cavan, Delacombe, Devonport, Sydney, Perth, Port Adelaide and Tamworth, as at June 2013. The dossiers contained information about each

Risk Management Policy" dated May 2013, a summary of the key customer contracts,[1187] and the Malt Proficiency Scheme policy document. The Viterra Parties emphasised that a number of these documents were not viewed by De Samblanx and that none of the Cargill Parties' witnesses accessed all the documents that Hermus reviewed.

2008 By way of further background, Hermus had been referred to in a series of affidavits, and court orders and rulings since at least 8 December 2017.[1188] It is unnecessary to traverse in detail the circumstances surrounding those orders and rulings, save to say that they relate to the creation of due diligence reports for the purposes of Project Hawk and the alleged failure by the Cargill Parties to discover certain documents.[1189] Hermus was plainly someone who had relevant information in relation to the existence or otherwise of some of the matters raised.

2009 However, the extent of his involvement in material events surrounding the Acquisition was limited. During cross-examination of the Cargill Parties' witnesses other than De Samblanx, the following evidence was elicited:

(1) Eden knew of Hermus, but did not recall whether he was involved in the preparation of any due diligence reports.

(2) Viers knew Hermus as "1 of our technical folks".

(3) Sagaert stated that Hermus reported to De Samblanx in 2013.

(4) Jewison knew Hermus and recorded him as the "food safety, quality and regulatory lead", but was not aware of, nor did she follow up as to, whether he performed the duties she assigned to him during the interim

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plant, including barley varieties utilised, and barley and malt storage capacities.

1187 The customers were not named, but were referred to by letters of the alphabet.

1188 For example, see *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 6)* [2018] VSC 44, [13]; *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 4)* [2017] VSC 797, [42]-[44].

1189 For example, orders were made on 20 December 2017 and 9 February 2018, whereby the Cargill Parties were ordered to discover drafts and final versions of due diligence reports produced for the Acquisition and prepared by the commercial and operations workstream, the tax and restructuring workstream, the valuation and synergies workstream and the legal and regulatory workstream of Cargill Australia.

period before Engle and Le Binh took over, as it was not her role.

(5) Le Binh did not know who Hermus was, but upon reviewing previous email correspondence, accepted that he was part of the due diligence work group from the operational side. Le Binh said Hermus did not raise concerns with him at any stage.

(6) Hawthorne recognised Hermus' name, but did not remember precisely what his role was. He believed that Hermus was on the technical side in food safety and quality assurance, but did not recall ever having contact with him.

(7) Engle reviewed a workstream work chart that stated that Hermus was responsible for the food safety quality assurance aspect of the Due Diligence for Project Hawk. Engle dealt primarily with the workstream leaders, and not with members within the workstream subgroups. He said he did not recall his name until he was preparing to give evidence. Engle only had a very vague recollection of Hermus and did not recall interacting directly with him. Engle's evidence was that, since Hermus worked with De Samblanx, he would not "immediately jump" to the conclusion that Hermus would have needed to produce a report independently of De Samblanx. Engle gave evidence that he did not recall receiving anything by way of a report from Hermus, nor did he come across anything in preparing to give evidence.

(8) Bowe did not recall Hermus or even his name, and did not interact with him.

2010 Hermus' involvement continued after the Acquisition Agreement was entered into. He exchanged various emails with De Samblanx before Completion, including an email which noted that all legal non-conformance with respect to Joe White was required to be immediately reported to him on the first day after Completion. However, there was no evidence (and according to the Viterra Parties' submissions,

no discovery) which indicated that anything was reported to Hermus in this regard.

W.3.3.2 The Cargill Parties' submissions and related evidence

2011 Two key reasons were advanced for not calling Hermus.

2012 *First,* the Cargill Parties submitted that the work performed by Hermus, and therefore the evidence that would be elicited from him, was thoroughly covered by the evidence of De Samblanx. It was submitted that Hermus did not visit any malting sites, nor did he speak to any of the Viterra Parties' representatives. According to the Cargill Parties, Hermus' role was largely confined to a "remote desk top review of documents from his office". It was contended, therefore, that it was not surprising that the majority of the members of the Project Hawk team did not recall, or only vaguely recalled, Hermus. In short, it was submitted that because of Hermus' limited involvement in the relevant events, considered in the context of the other witnesses called, the inferences the court was being invited to draw were not open.

2013 *Secondly,* Hermus had been on extended sick leave since 3 June 2015, and following their analysis of Belgian employment law, the Cargill Parties formed the view that it was not lawful for them to ask Hermus to give evidence in the proceeding.[1190]

2014 As to the second matter, the Cargill Parties relied on the following:

(1) Evidence of Filip Tilleman ("Tilleman"), a Belgian employment lawyer.

(2) Evidence of Steven Vinken ("Vinken"), Cargill, Inc's human resources market leader for Belgium and France.

(3) An affidavit of Savona sworn on 16 May 2018.

2015 Tilleman is a partner of a Belgian law firm, Tilleman van Hoogenbemt, and is a member of the Antwerp Bar in Belgium. He has specialised in the area of employment

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1190 The court was informed during the course of the trial that Cargill was unsure whether or not this witness could be called to give evidence. In late July 2018, Cargill had not made a final decision on whether or not Hermus would be a witness at trial. Cargill's position was that it was taking advice from lawyers concerning the restrictions that existed in relation to the calling of, or even approaching, an employee under Belgian law when the employee was absent from work for reasons of illness.

law since 1987. He has given hundreds of lectures and seminars regarding labour law. Tilleman provided responses to 4 questions put to him in relation to the sick leave currently taken by Hermus.

2016 To the question whether an employer could require an employee to perform services for the employer if the employee was absent from work on sick leave, Tilleman's answer was unequivocally no. He stated that:

> During the suspension of the execution of the contract, it is *prohibited* for the employer to require the employee to perform services. If the employer would require the employee to perform services, this would be an infringement of the legal suspension of the execution of the employment contract. During the period of work disability, the execution of *the employment contract has been suspended so the employer can't require the employee* who is absent from work on sick leave, to perform services.
>
> (Emphasis added.)

2017 On the issue of whether an employer could request or ask an employee to perform services for the employer, reference was made to article 31 § 2 of the Law of 3 July 1978 on employment contracts. Under this article, an employer is only entitled to be informed of the existence of a disability and its likely duration, but not the nature and reason for it (which is considered medically confidential). Tilleman then stated that because an employer does not know the disability, there is a risk of further deterioration or interference with the healing process if an employer were to ask an employee to perform services whilst on sick leave. He continued:

> In [the] case of absence of the employee because of illness, the *employer must be very careful*. The employer has to respect the consequences of the suspension of the execution of the employment contract.
>
> So if an employee is absent from work on sick leave, the employer *may not* request the employee to perform services for the employer.
>
> (Emphasis added.)

2018 Dealing with the third question on the meaning of "services" in this context, Tilleman said both "services" and "perform the work" were very widely interpreted under Belgian law. Tilleman expressed the view that, as the employment contract had been suspended, an employer could not ask the sick employee to perform any services that

were related to work.

2019 In response to the final question whether a requirement or request to perform services included, or was capable of including, assistance with or giving evidence in a court proceeding, Tilleman answered in the affirmative. In doing so, he referred to a judgment handed down on 10 April 2009 by the Labour Court of Appeals of Ghent.[1191] In that case, an employee was asked to attend an internal disciplinary hearing by their employer whilst on sick leave. It was held that the suspension of an employment contract because of illness included suspending any obligation of an employee to attend a hearing.

2020 During cross-examination, Tilleman agreed that under Belgian law there was no concept of precedent, but said a decision of the Court of Appeal of Ghent was a valuable opinion that would be followed by other labour tribunals. Tilleman also accepted that there is no specific statute which stipulated that the giving of evidence by an employee in a court proceeding, at the behest of their employer or otherwise, constituted performance of their duties under their employment contract. However, he referred to a general principle of suspension of the execution of an employment contract, which he considered prevented an employer from asking an employee to give evidence during a period of sickness. He also observed that it was impossible in a written law to enumerate everything an employer could not ask or could not do. Tilleman stated that, depending on the circumstances, such as when a request was made by the employer, the giving of evidence could be considered as "performing or connected to" the employment contract.

2021 With respect to the Ghent Court of Appeal decision, he acknowledged the case concerned a professional soccer player who was injured and claimed wrongful termination of his contract. He further accepted the case was concerned with a failure of the player to attend an internal disciplinary hearing, to be conducted at the club's facilities, which the player had been directed to attend, as opposed to being concerned

1191 Labour Court Ghent (2nd Court) 10 April 2009, Chr DS – Soc Kron, 2010, 07.

with a request to give evidence in a court proceeding.[1192]

2022 A passage in this decision stated that an employee on sick leave was under no obligation to present himself at the employer's office for the hearing.[1193] He said this passage amounted to a finding that the giving of evidence in a court case constitutes the performance of an employee's functions. In light of his other evidence, I did not understand this answer to suggest the passage was directly on point; rather that it was entirely consistent with the opinion Tilleman held on the issue in question before this court. Indeed, Tilleman volunteered that he was not aware of any case under Belgian law where the specific issue concerning Cargill's position in light of Hermus' sick leave had been decided.

2023 In relation to Vinken's evidence, an affidavit sworn by him exhibited a series of Hermus' doctors' certificates commencing on 3 June 2015. Hermus had been on sick leave from that time.[1194] When he commenced with Cargill in June 2017, Vinken was appointed to the position of human resources market leader. He had no knowledge of the facts in issue in this case.[1195] He gave evidence of Cargill, Inc's position in the following terms:

> *[Cargill, Inc's] practice in respect of employees on sick leave is not to contact such employees about their work*, as under article 31 § of the Belgian law of 3 July 1978 on employment, the execution of an employment contract is automatically suspended in case of work disability due to sick leave. During the suspension of the execution of the employment contract, *it is prohibited for the employer to require the employee to perform services*.
>
> (Emphasis added.)

2024 During cross-examination, Vinken also accepted that Belgian law does not explicitly prohibit an employer from asking an employee to voluntarily perform services whilst on sick leave, and presumed it technically could be possible to ask, but stated that, from Cargill's perspective, it was its "practice to not address such questions to employees". His evidence was that Cargill did not do so as a matter of principle.

1192 Later in his evidence, Tilleman seemed to suggest the decision covered requests as well as requiring an employee to attend.

1193 Labour Court Ghent (2nd Court) 10 April 2009, Chr DS – Soc Kron, 2010, 07, 380 [3.1.6].

1194 This evidence was based on Cargill, Inc's records rather than Vinken's own knowledge.

1195 He gave evidence that he had only heard of this litigation a few weeks before giving his evidence.

Vinken stated that he was not aware of Hermus being contacted by Cargill, Inc whilst he was on extended sick leave, nor if Hermus had been asked whether he was willing to give evidence in this case.

2025 Also under cross-examination, Vinken was presented with a series of email exchanges in February 2018. These included an email Savona sent to De Samblanx dated 12 February 2018, referring to Cargill being in the middle of a "continuous onslaught" of requests for documents from the Viterra Parties in relation to the Due Diligence. In addition to De Samblanx's involvement, Savona referred to the fact that Hermus was recorded as having worked on the Due Diligence, and that his name kept coming up in the requests as well. Savona said she thought she had previously heard De Samblanx say to her that Hermus was on an extended period of leave from work due to illness and, as a result, that meant "we" could not speak to Hermus directly. Nevertheless, Savona asked De Samblanx to call him and ask a series of questions she had set out concerning the existence or location of certain due diligence reports (which she also asked De Samblanx to answer for himself). Savona said that if this were to occur, at least the court could be told that Cargill had made enquiries, and the result of those enquiries.

2026 In reply, De Samblanx confirmed Hermus was on long-term sick leave and said that he would make attempts to contact him. De Samblanx sent a further email, informing Savona that he had spoken to Hermus, who stated that he was "not sure of having had such [due diligence] reports". That email also stated Hermus had returned his laptop to Cargill, Inc about 1½ years earlier, in accordance with a rule of Cargill, Inc to do so if a laptop is "idled" for more than 1 year.

2027 Savona then repeated her request 1 day later that De Samblanx obtain Hermus' answers to the same series of questions. In that email, Savona stated that she would not ordinarily be so pedantic, but noted there was a court order requiring the steps to be taken and that Cargill needed to confirm to the court that it had acted accordingly. Subsequently, De Samblanx responded attaching an email from Hermus which stated, "Below my answers". Hermus' email stated, amongst other things, that Hermus was

not aware if there were final versions of the due diligence reports for each of the identified workstreams. He also said he had no knowledge in relation to each of the other questions raised by Savona.

2028 After being shown this correspondence, Vinken confirmed his understanding that under Belgian law and by Belgian practice, Cargill, Inc did not contact employees whose contracts were suspended due to illness, but noted that he could not guarantee someone else in the corporation would not contact an ill employee. Vinken then accepted the proposition that from a "purely legal" position, there was no prohibition on Cargill merely asking Hermus to give evidence. He also acknowledged, in light of the matters that had been put before him for the first time, that Cargill, Inc's practice had not been followed "on multiple occasions" in 2018. When it was suggested that the reason Cargill, Inc was not making enquiries of Hermus was because, in substance, he would give evidence unfavourable to Cargill, Inc, Vinken was in no position to comment given his very limited involvement in this case.

2029 In summary, the Cargill Parties submitted that there was a satisfactory explanation for not calling Hermus; namely, Cargill held a belief that it was not permitted to call Hermus, with such a belief being reasonable in light of Belgian employment law.

W.3.3.3 The Viterra Parties' submissions and related evidence

2030 The Viterra Parties similarly led evidence from an expert lawyer in Belgian employment law, Jacques Aubertin ("Aubertin"). Aubertin was admitted to the Brussels Bar and was a partner of Stibbe, a law firm in Brussels. Aubertin has practised in the area of employment law for 15 years and stated that he is recognised as a specialist in the area, having published "several contributions" regarding Belgian labour law.

2031 Like Tilleman and Vinken, Aubertin accepted that the performance of an employment contract is suspended for the period an employee is on sick leave. He gave evidence that, during this suspension, both the employer and employee are released from their

obligations under the employment contract.[1196]

2032 Aubertin also agreed that Belgian law prevents an employer from requiring an employee to return to work. However, he expressed the opinion that Belgian law does not prevent an employer from *asking* an employee to return to work or to perform job activities. Whilst he acknowledged an employer cannot place pressure on, or force, the employee to work, Aubertin considered that an employer is not prohibited from making contact by telephone or email with an employee on sick leave.[1197] He stated that, if contact were made, it would be open to the employee to ignore or not respond to that communication, or to refuse any request. He also stated that an employer was not prohibited from contacting the employee and requesting her or him to work, but could not place pressure on the employee, including by conveying an expectation that the request would be complied with.[1198] However, he said it would not be advisable for an employer to make repeated requests, as this could be perceived as harassment.

2033 In forming this view, Aubertin relied upon a decision by the Belgian Court of Cassation on 10 January 1983.[1199] A passage in that case stated that an employee may still, despite being on sick leave, perform work under the employment contract. In short, "suspension" does not prohibit the employee from working and performing the contract, though an employer is not under an obligation to allow the employee to work.

2034 In addition, Aubertin stated that an employee giving oral evidence in a court proceeding did not fall within the ambit of discharging her or his duties under an employment contract, but constituted "a matter of personal civic responsibility" (as opposed to a legal obligation). However, under cross-examination he accepted there was no clear legal provision in that respect. His evidence was that "anyone needs to serve" based on a civil responsibility for witnesses in cases where she or he might

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1196 An employer has to pay the normal remuneration for the first month of leave.

1197 See further fn 1201 below.

1198 This was the evidence Aubertin ultimately gave on the point. He also gave evidence that it was not permissible to harass an employee, but to contact the employee "so that [she or he] may have maybe the impression that he is required to work is, as such, not prohibited". The critical point of his evidence appeared to be whether pressure was placed on the employee.

1199 Cass 10 January 1983, *Pas* 1983, 543.

help, regardless of the existence or otherwise of an employment contract; but whether the "need to serve" arose would depend on the circumstances.

2035 Aubertin also agreed that there was no legal principle to the effect that it could never be the case that an employee giving evidence in a court proceeding would not be doing so in the course of discharging her or his employment obligations. He accepted that it would depend on the circumstances as to whether there was a sufficient link between the giving of evidence in court and the employment contract. He declined to express an opinion as to whether a request to give evidence in a foreign court, involving travel and being away from home for a period of time, would be assessed as being related to the performance of an employment contract, only repeating it would depend on the circumstances.

2036 Further, in relation to the Ghent Court of Appeal decision,[1200] Aubertin stated that it did not support the propositions Tilleman had put forward. However, when cross-examined, Aubertin accepted that there was no principle of Belgian law that, when an employee gives evidence in a court proceeding, the employee is not doing so in the course of discharging her or his employment contract.

2037 In addition, Aubertin accepted that, depending on the circumstances of the case, under Belgian law it would be open to conclude that requesting an employee to return to work could compromise the safe well-being of an employee; albeit he said it would only be in very exceptional cases.

2038 Aubertin acknowledged the positive obligation of an employer to avoid creating circumstances that would cause harm to the well-being of an employee, including stress or "burnout".

2039 He also accepted that there were circumstances where, depending on what was being asked of the employee and the individual's predicament, a request by an employer may have the potential to cause the sick employee stress.[1201] Since an employer is not

1200 See par 2019 above.

1201 For clarity, ordinarily there is nothing preventing an employer merely contacting a sick employee;

permitted to know of the nature of the illness (unless the employee willingly proffers that information), Aubertin accepted that an employer must take into consideration the potential harm when deciding whether to make a request of their employee. Further, again subject to the circumstances, he accepted it may be reasonable for an employer to form the view that asking an employee to do something may give rise to stress or pressure; and, accordingly, for the employer to conclude that the request should not be made because it might violate the employer's obligation not to cause harm to the employee.

2040 Aubertin acknowledged that the Belgian Court of Cassation decision he had referred to involved an employee who wanted, and had offered, to return to work. He further acknowledged the case did not explicitly stand for the proposition that an employer may make a request for an employee to return to work, and that there was no Belgian case dealing directly with that point. But he also said scholars considered a request could be made of the employee. He gave evidence this position was based on the Belgian Court of Cassation decision, and "this is the case". Aubertin's evidence was that, whilst there is no statutory provision or decided case explicitly permitting an employer to make a request of their employee, it was a matter of common sense involving an assessment of all the circumstances in the case.

2041 In summary, based on Aubertin's opinions and the other evidence before the court, the Viterra Parties submitted that:

(1) Hermus was "the" person in the Project Hawk team responsible for investigating and assessing Joe White's engagement in the Alleged Industry Practices and the alleged Undisclosed Matters.

(2) The Cargill Parties were not, according to Belgian law, prohibited from contacting Hermus and requesting that he give evidence in the proceeding.

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indeed, Aubertin gave uncontroverted evidence that there was a duty to keep in contact to some extent to see how the employee was going and whether she or he was recovering.

(3) Belgian law did not state that giving evidence in a court proceeding constituted performance of a person's employment duties; the giving of evidence is a matter of "personal civic responsibility" that exists regardless of whether the person's employer was a party to the proceeding.

(4) The Cargill Parties did not adduce any evidence as to whether they had any knowledge of Hermus' medical condition, and whether they had reason to believe that because of his medical condition the Cargill Parties would be harassing Hermus if they requested that he provide evidence in the proceeding.

(5) The Cargill Parties did not adduce any evidence that they had asked Hermus whether he was willing to give evidence in the proceeding, either before or after the matter commenced in October 2014.

(6) The Cargill Parties did not establish how they formed a reasonable opinion that they were precluded from contacting Hermus to make a "simple request" as to whether he could provide evidence in the proceeding.

(7) Cargill had previously communicated with Hermus,[1202] contrary to Cargill Inc's "so-called practice" of not contacting employees on sick leave, and that the questions put to Hermus on that occasion related to matters relevant to the proceeding.

2042 In light of the above and the various other matters raised in their submissions,[1203] the Viterra Parties submitted that in circumstances where the Cargill Parties did not provide a credible explanation for Hermus' unavailability, the court ought to infer that:

(1) Between October 2014 (when the proceeding commenced) and June 2015

1202 See pars 2025-2027 above.

1203 Which have been largely reflected in the section above dealing with Hermus' role.

(when Hermus took sick leave), the Cargill Parties had communicated with Hermus and discussed the evidence he would give in the proceeding.

(2) If Hermus' evidence assisted the Cargill Parties' case, there was no legal prohibition preventing Hermus from being called.

(3) If Hermus had refused to give evidence, the Cargill Parties would have adduced evidence to that effect to explain his unavailability.

(4) Hermus, "as the person to whom all Joe White legal non-compliances were to be reported following completion", would not support Cargill's case that Joe White routinely, without informing customers, supplied malt in accordance with the Viterra Practices.

(5) Hermus would not have given evidence that the Undisclosed Matters were not disclosed to him or that he was otherwise unaware of them.

(6) Hermus would not have given evidence that the Alleged Industry Practices did not exist, nor that he was unaware of them.[1204]

(7) Hermus would not have given evidence that the Due Diligence was conducted with reasonable care.

(8) As a result of the information received during the Due Diligence, Hermus believed, before the Acquisition Agreement was entered into, that: (a) Joe White's production involved non-conformance with customer specifications, and addressing this non-conformance could result in a reduction of Joe White's plant capacity; (b) there was a risk that Joe White's procedures were inconsistent with the Cargill Code and therefore changes would be required to Joe White's operating

[1204] In support of this, the Viterra Parties referred to the fact that Hermus was responsible for preparing the Cargill Blending and Certificate of Analysis Procedure from 2011 to 2013. With respect to the 2 documents recording this fact, they also recorded that De Samblanx either approved or verified Hermus' work.

procedures; (c) in relation to barley available to and used by Joe White, around half of Joe White's contracts did not specify a variety, Joe White purchased significant quantities of non-grade 1 malting barley, Joe White used up to 30 percent of non-grade 1 malting barley, and Joe White regularly purchased Hindmarsh; (d) Joe White used gibberellic acid as an additive "which was normally not allowed by most international brewers" and there was a risk that it was being used when it was not allowed; (e) Joe White's analytical approach was to record a result as being non-conforming only if the result was plus or minus more than 2 standard deviations from the target parameter.

(9) On the basis that Hermus raised the question as to whether Joe White had a code of conduct in relation to Certificates of Analysis, Hermus believed there was a risk that Joe White was engaging in unethical conduct in relation to the production of Certificates of Analysis.

W.3.3.4 Hermus - conclusion

2043 For a number of reasons, no material inference will be drawn from the fact that the Cargill Parties did not call Hermus as a witness.

2044 Before addressing the multitude of inferences put forward by the Viterra Parties that have not been established, it is convenient to make a number of observations and findings.

2045 As to the experts called, both of them were credible witnesses and the views they expressed, although different in some respects, were reasonable in light of the uncertainty under Belgian law surrounding the issues in question. Both made proper concessions with respect to their lack of certainty of their opinions.

2046 It is likely that Hermus was not asked by Cargill, and that he has never refused, to give evidence. I accept the Viterra Parties' submission that if such a state of affairs existed, Cargill would have adduced that evidence in order to explain his unavailability. It is far more likely, and I so find, that Cargill has never asked Hermus

to give evidence, and that this was by reason of his long-term illness. Such a finding is consistent with Cargill simply having implemented its company policy.

2047 Further, in circumstances where the details of Hermus' condition are confidential under Belgian law and the court has no information as to the nature of his illness beyond the fact that Hermus has been unwell for a number of years, there is no basis to find that Cargill knew or had any substantive belief as to the nature of his illness.

2048 Furthermore, the decision not to ask Hermus to give evidence was in line with Cargill's company policy in Belgium.[1205] The fact that, in February 2018, Savona indirectly approached Hermus, through De Samblanx, did not suggest that the company policy did not exist or was only intermittently adhered to. There was no evidence that Savona was aware of the company policy in Belgium. Even if Savona had been, it is clear she was acting upon court orders and believed Cargill had an obligation to behave in accordance with those orders in making the enquiries that she did. Obviously, any company policy would not override an order of the court.

2049 It is unnecessary for the court to determine which of the 2 employment experts' evidence was correct. For present purposes, it suffices to say, based on the evidence of both of them and the circumstances, that Cargill's adoption of the company policy with respect to Hermus was reasonable given the law in Belgium.

2050 Next, when the evidence is considered as a whole, Hermus could not objectively be considered to have been a material witness. Without being exhaustive, this can be illustrated in a number of ways.

2051 *First,* it is likely that any substantive evidence which might have been elicited from Hermus could have been largely addressed by De Samblanx. As the leader of the operations workstream for Project Hawk,[1206] De Samblanx participated in a discussion with members of the Project Hawk team on 23 May 2013 about the Information Memorandum, attended the Management Presentation, made site visits between 26

1205 See par 2023 above.

1206 De Samblanx also referred to himself as the manufacturing technology lead for Project Hawk.

and 28 June 2013, was a participant in the Operations Call with Youil and Hughes,[1207] circulated his own due diligence report known as his "Resumé of Findings", and travelled to Minneapolis between 16 to 18 July 2013 to attend a working session to review all assumptions.[1208]

2052 It was he, not Hermus, who went beyond performing a "desk-top" exercise and was involved in the decision-making process of the Due Diligence. There are already many findings that demonstrate this, but by way of illustration the following points are referred to.

2053 With respect to the Management Presentation, De Samblanx recalled enquiring about Joe White's malt storage capacity based on his review of documents in the Data Room.[1209]

2054 With respect to the site visits, in addition to making the observations that he did, De Samblanx prepared the Operations Spreadsheet, which summarised his observations with respect to matters such as steeping, germination, the control rooms, and the kilns at each of the Joe White plants. Further, De Samblanx stated that during his investigations, he attended to the majority of the "activities" assigned to him. De Samblanx deployed his own method of due diligence. As De Samblanx explained, sometimes there are very complex guidelines and he was not a "paper person". He described himself as someone of practice and relied on his experience. He said it was acceptable to do it his way. He said the guiding principles in the Cargill Code were more important to him than whatever documents or procedures that had to be complied with. There was no evidence to suggest De Samblanx relied upon Hermus in any material way such that De Samblanx was dependent on Hermus for the views that he formed.

2055 Furthermore, De Samblanx gave evidence that the question as to Joe White's use of

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1207 See par 865 above.

1208 The meeting was initiated by Le Binh, with Engle, Jewison and Christianson in attendance: see pars 862-864 above.

1209 See par 737 above.

gibberellic acid[1210] was put to Youil, who was "very firm", and stated that Joe White would not use gibberellic acid when a customer did not allow it.

2056 With respect to the Operations Call, De Samblanx stated that the responses he received from Hughes and Youil satisfied any concerns he had with respect to the operations aspect of the Joe White Business. According to De Samblanx, "from that moment on I got really the comfort that my doubts about silo capacity and in relation [to] Certificates of Analysis were satisfactorily answered". This was because De Samblanx was informed that Joe White had "good upcountry storage", was in the process of building more silos at its Sydney plant, and there was no issue with limited storage capacity as Joe White had limited customer books allocated to each plant which took into consideration the types of barley varieties available and the capabilities of the individual plants. De Samblanx concluded that Joe White was "simplifying according to the possibilities or capabilities of the plant, as well [as] processing-wise, [specification]-wise". De Samblanx was also informed that Joe White was seeking certification from Heineken to supply "A" malt and was already delivering "B", "C" and "D" malt, and further, that Doderer was conducting the audits. De Samblanx considered this statement significant, because according to De Samblanx, if Heineken had approved Joe White as a supplier, it verified the (high) standard at which Joe White operated.[1211] De Samblanx drew the same conclusion when he was informed that Joe White also supplied malt to SAB Miller.

2057 With respect to his role generally, De Samblanx admitted that he was a person "well able to judge the capabilities of a malting plant and the capabilities of those who operate the malting plant". According to Eden, the responsibility of considering specific queries (such as the ISO 22000 certification) lay with the management team, and were more relevant to a person of De Samblanx's standing and position in Cargill. It was Eden's understanding that De Samblanx was tasked to "go in and to look at the

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1210 Being one of the questions devised by Hermus: see par 2002 above.

1211 Further, according to De Samblanx, as a supplier to Heineken, Joe White was also therefore a participant in the HARAM ring test scheme, a proficiency testing standard in which Heineken required its suppliers to submit testing results and ranked those results with other suppliers: see fn 554 above. Suppliers with low rankings were expected to improve. This was a query raised by Hermus in the Operations Spreadsheet.

deeper areas of the operational" performance of the Joe White Business.

2058 Though not to understate Hermus' role in the operations workstream, amongst the individuals involved in the Due Diligence, De Samblanx was primarily responsible for the operations side. In my view, De Samblanx's experience in the industry, the site visits and his general level of involvement were critical in the decision-making process and in providing a more in-depth means of conducting the Due Diligence.[1212]

2059 In summary, De Samblanx was cross-examined extensively on his participation in key meetings, his discussions with key Joe White personnel, and his attendance at Joe White's malting plants regarding the operations aspect of Joe White. Most of these meetings and events Hermus did not attend.[1213] On that basis, it can be said that whilst Hermus was involved in the Due Diligence, his role in the Acquisition pertained to alerting De Samblanx of matters requiring further investigation, and that it was De Samblanx who ultimately needed to be satisfied that the manner in which Joe White operated was acceptable.[1214] Any information that Hermus uncovered during his review of the Data Room was disclosed to, and to the extent considered necessary investigated further by, De Samblanx.[1215]

2060 *Secondly*, the probative value of the documents that Hermus viewed in the Data Room that De Samblanx did not access has not been established.[1216] Although the

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1212 Indeed, when it was put to him that some of the questions contained in the Tracking Sheet (devised by Hermus) were not formally put to the Viterra Parties because they were of low importance to Cargill, Le Binh stated that "there were other ways to actually collect the information. A lot of the questions get answered through the site visits or through conversations with the Joe White management team".

1213 The fact Hermus' role in the Due Diligence was restricted to viewing documents in the Data Room was reinforced by De Samblanx when he stated that Hermus was "surely not" at the meeting held in Minneapolis between 16 to 18 July 2013, because De Samblanx was "the only one" representing the operations workstream.

1214 It was De Samblanx who informed the other leaders of Project Hawk that he was prepared to proceed with the Acquisition.

1215 De Samblanx gave evidence that Hermus "spot" and "drew to [De Samblanx's] attention" the inventory for gibberellic acid.

1216 By way of background, a spreadsheet was created which recorded which person accessed which document or documents at which time or times: see further fn 3794 below. This spreadsheet was voluminous. It was not tendered in its entirety. The parties were directed to prepare a summary. In short, there were a large number of documents referred to in the spreadsheet not tendered at trial. The agreed summary was put before the court on the basis that it was an annotated version of part of the spreadsheet, which only contained the documents tendered and did not include the full list of the 71 persons representing Cargill who had access to the Data Room. As the agreed summary was confined

contemporaneous record (which was not in dispute) showed De Samblanx accessed 56 documents, whereas Hermus accessed 136 documents, most of these documents were not in evidence.

2061 Relevantly, of the tendered documents there were only 4 documents reviewed by Hermus that De Samblanx did not review: slides comprising the Management Presentation Memorandum; the barley purchasing contracts for the 2010/2011, 2011/2012 and 2012/2013 seasons; the Joe White Maltings Risk Management Policy; and a summary of the key customer contracts. Each of these will be dealt with in turn.

2062 The Management Presentation Memorandum said nothing about the Operational Practices; quite the opposite.[1217] Further, numerous attendees of the Management Presentation were available for cross-examination. It is far from apparent what Hermus might have seen in the Management Presentation Memorandum that no one else did. Nothing was suggested in the Viterra Parties' closing submissions.

2063 The barley purchasing contracts were relied upon by the Viterra Parties for their disclosure of certain facts, including that half of Joe White's contracts for the purchase of malting barley did not specify any particular variety, that Joe White purchased significant quantities of non-grade 1 malting barley, and that Joe White purchased substantial quantities of Hindmarsh in each season.

2064 As to the first of these points, it follows from the fact that around half of Joe White's contracts for the purchase of malting barley did actually specify the particular variety or varieties required that there was nothing disclosed by this which indicated that purchases being made by Joe White would give rise to contractual breaches with customers. Further, the fact that Joe White purchased up to 30 percent of non-grade 1 malting barley was something known generally within Cargill. It was expressly recorded in the notes to the Barley Inventory Call, which became part of the

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to documents tendered, it did not contain a full list of the documents in the Data Room, but that list was already in evidence as it was part of the Acquisition Agreement.

1217 See pars 716, 718, 727 above.

Acquisition Agreement.[1218] Finally, the knowledge of the use of Hindmarsh has been discussed elsewhere.[1219] It could not be sensibly inferred that Hermus had some special knowledge about this barley variety that others in Cargill did not. Regardless of this, Hermus did not have access to Joe White's customer contracts to know whether or not the use of Hindmarsh was permitted.

2065 It follows that the significance of Hermus accessing the barley purchasing contracts for the preceding 3 financial years was minimal.

2066 The Joe White Maltings Risk Management Policy was not referred to by the Viterra Parties in either their written or oral closing submissions. It was far from clear what was to be considered significant about Hermus reviewing this document. As was observed by Argent's counsel, the key aspects of this policy found their way into the Management Presentation Memorandum. Further, the policy in the Data Room was also reviewed by Bowe, Breszee, Clark, Jewison, Le Binh, Sagaert and Viers, all of whom were witnesses in the case, and were asked questions about this document.

2067 The summary of key customer contracts provided a breakdown of customer sales volumes for Joe White's top 10 customers. This was the only observation made about this summary in the Viterra Parties' closing submissions. There was simply no basis to infer that Hermus gained relevant knowledge above and beyond De Samblanx with respect to operations because he reviewed this document.

2068 Although De Samblanx gave evidence that Hermus viewed documents in the Data Room in "trying to find what was important for him in the area of his responsibility", in light of the above matters, evidence from Hermus about what he viewed would have been of little moment.

2069 *Thirdly*, in circumstances where Cargill, Inc was precluded from knowing details of Hermus' medical affliction, which had been ongoing for a number of years, it was not unreasonable to err on the side of caution as his employer. Even if Cargill had some

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1218 See pars 924-926 above.

1219 See pars 954-955 above and pars 2702, 2715 below.

idea in mid-2015 about the illness (there was no evidence to suggest that it did), and even if initially that illness had not been serious (which seemed highly unlikely given the duration of his absence), that is not to say that by 2018 Hermus' illness had not developed into something far more serious. Further, whatever might be considered to be someone's "civic responsibility", if Hermus had given evidence in this case it would have been inextricably interwoven with his role as a Cargill employee.

2070 *Fourthly*, and further to the preceding matter, the fact that it was Cargill, Inc's company policy not to communicate with employees whilst on sick leave demonstrated that Cargill, Inc was an employer that erred on the side of caution as a matter of course by refraining from communicating with its employees for fear of harassment or creating undue stress. There was nothing to suggest that Hermus was being treated any differently to the manner in which any other Cargill employee in Belgium on long-term sick leave would have been treated.

2071 *Fifthly*, the fact Cargill previously communicated with Hermus through De Samblanx was of little moment. Although this indicated that Hermus was able to respond to some limited issues relating to the case (albeit to say, effectively, he could not answer any of the questions asked in a substantive manner), and purely as a matter of fact he could have been contacted to be asked whether he could have given evidence in the proceeding, the circumstances surrounding the confined communications on the limited subject matter in February 2018 cannot be ignored. It would have been an entirely different matter to ask Hermus to be a witness in a very large and hotly contested proceeding between 2 multinationals involving millions of dollars.

2072 Turning to the specific inferences the Viterra Parties invited the court to draw:[1220]

(1) There was no basis to find that between October 2014 and June 2015, the Cargill Parties had communicated with Hermus and discussed the evidence he would give in the proceeding. In the first months this proceeding was on foot, the parties were engaged in an extensive

1220 See par 2042 above.

discovery process. There was no order for witness statements or outlines until long after June 2015, and the Viterra Parties did not point to any matter upon which it could be concluded that Hermus had been approached before this time for the purpose of discussing his evidence.

(2) The next inference proceeded on the assumption that Cargill had obtained some form of proof from Hermus. Accordingly there is no basis to draw the inference. In any event, Cargill was justified in relying upon its company policy.

(3) I have accepted that if Hermus had refused to give evidence, the Cargill Parties would have adduced evidence to that effect to explain his unavailability.[1221]

(4) The suggestion that Hermus would not have supported Cargill's case that Joe White routinely, without informing customers, supplied malt in accordance with the Viterra Practices is contrary to the facts as found.[1222] In light of the extensive history evidencing the Viterra Practices, there was no basis for such an inference to be drawn.

(5) This suggested inference, concerning the Undisclosed Matters, appears to run directly contrary to the suggested inference immediately above. In any event, the material relevantly of substance that he reviewed that was in addition to what De Samblanx accessed, provided no basis to suggest Hermus would not have given evidence that the Undisclosed Matters were not disclosed to him or that he was otherwise unaware of them. On the contrary, that material suggested the Undisclosed Matters were also not disclosed to Hermus.

(6) There was nothing in the evidence to infer Hermus would not have given evidence that the Alleged Industry Practices did not exist, nor that

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1221 See par 2046 above.
1222 See issue 10 below

he was unaware of them. The mere fact that he was involved in the preparation of the Cargill Blending and Certificate of Analysis Procedure at the relevant time did not establish otherwise. Further, the suggested inference is contrary to the facts as found.[1223]

(7) The court cannot form a view about what Hermus would have deposed in relation to whether the Due Diligence was conducted with reasonable care. In those circumstances, no inference can be properly drawn.

(8) It is not necessary to deal with each of the individual beliefs it was alleged by the Viterra Parties that the court should infer Hermus would have had. For the reasons set out above, there is no basis to infer that Hermus' beliefs would have been materially different to those of De Samblanx.

(9) Hermus was not the only person involved in Project Hawk that raised the question as to whether Joe White had a code of conduct. It was self-evidently a prudent question to ask. By asking such a question, the enquirer would not necessarily have made any assumption that Joe White was doing anything unlawful or unethical. There was nothing to suggest that Hermus had such a belief when he made this enquiry. In any event, the question was asked and an affirmative response was received. Presumably, in such circumstances, if Hermus did have any belief of the kind alleged at the time he formulated the relevant question, such a belief would have been dispelled upon being informed that a code of conduct was in place.

2073 Accordingly, save for the minor exception referred to, the court will not draw any of the inferences the Viterra Parties invited it to make. To the extent that the suggested inferences were not contrary to the evidence, essentially the inferences have not been drawn because the Viterra Parties sought to fill gaps in the evidence or elevate what

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1223 See issue 13 below.

might, at its very highest, have given rise to a bare suspicion to seek that inferences be drawn about what Hermus would have thought, and therefore what Cargill believed. Further, assuming there might have been some basis for an inference, an additional ground for rejecting the submissions was that the court cannot be satisfied that Hermus would have given any evidence of any materiality, adverse to Cargill or otherwise; particularly in light of the other witnesses called. In any event, even if Hermus could have been considered to be a material witness, the decision by the Cargill Parties not to call Hermus was adequately explained by Hermus' extended sick leave, and Cargill, Inc's company policy in the context of Belgian law with respect to not communicating with its employees while on sick leave.

W.3.3.5 Christianson – his role

2074 In his role as 1 of the "content experts", Christianson was responsible for preparing the due diligence report with respect to barley varieties, and along with Purser was assigned as the barley supply chain workstream lead. Christianson was the lead of the global merchandising team, and was responsible for sourcing grain and conducting market analysis "most closely" within the malting business unit. He worked "hand in hand" with members of the grain and oilseeds supply chain in seeking to ascertain synergies in that regard.

2075 Christianson reported directly to Viers.[1224] Viers considered Christianson the individual within Cargill who was dedicated to barley trading and malt sales in Australia "for nearly the full project". During cross-examination, Viers stated that questions pertaining to the sufficiency of supply of malting varieties ought to be directed to Christianson, "the person leading the malting barley assessment".

2076 Viers also gave evidence of the conclusions reached concerning barley supply to Joe White in Australia before the Acquisition Agreement was entered into. He said the conclusions touched upon buying directly from the farmer, position earnings by taking long or short positions, freight economics, and a number of other things. He

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1224 The evidence was that Viers directed or led Christianson, supervised his work and was the person to whom Christianson "was responsible".

said the work was benchmarked against "a very similar market", being Canada, where there had been a thorough analysis of how things evolved there and what margins were experienced. Further, Viers said Christianson spent several days with trading experts in Melbourne, working in detail to understand the facts relating to barley supply. On the topic of the spread of feed barley and malt barley, although he was certain the question was examined, Viers was unable to give any evidence "as we sit here today" on what the spread was. However, he recalled conclusions on where Cargill believed the sources of value were coming from, and that there were a number of sources, including directly from farmers. As to the effect that the spread had on the production by Australian farmers, Viers' evidence was that he would have observed the spread at the time, but could not recall his observations when giving his evidence.

2077 Christianson devised only 4 questions for the Tracking Sheet,[1225] which were marked as "1 (Critical)". Each of them was put and answered. Broadly, the questions related to: whether all malting barley was purchased through Viterra Ltd, and, if not, what volumes were purchased from other sources; the annual by-product volumes sold by Joe White in the last 3 years; and the use, economic benefit, and the extent of subsequent ownership of the Dom Boxes following the Acquisition. The answers to the 4 questions, as provided on 22 and 23 July 2013, appeared in a column of the Tracking Sheet and were intelligible and responsive to the questions put.

2078 Christianson accessed 53 documents in the Data Room, including: the Management Presentation Memorandum, the barley purchasing contracts for the 2010/2011, 2011/2012 and 2012/2013 seasons, the Joe White Maltings Risk Management Policy, a summary of the key customer contracts,[1226] and various accounts and the Data Books. Like others, he was not permitted to access the black box documents.

2079 Christianson came to Australia in June 2013, but was not present at the Management Presentation as he went to Melbourne "to do barley work". He participated in the

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1225 Out of a total of 132 questions in the relevant section of the Tracking Sheet: see pars 931-933 above.

1226 Each of these documents has been addressed above: see pars 2061-2067 above.

Barley Inventory Call along with other Cargill employees.[1227] According to Engle, the Barley Inventory Call was "primarily an opportunity … to leverage [Christianson's] expertise and to better understand their barley procurement process".

2080 He also may have attended the meeting in Minneapolis on around 18 July 2013,[1228] considered by De Samblanx as "the most important meeting in the whole process of due diligence". During this meeting, the Project Hawk workstream leaders each indicated that they were prepared to proceed with the Acquisition.

2081 Christianson prepared a due diligence report for Project Hawk in relation to the supply of barley, which he forwarded to Viers on 17 July 2013.[1229] The report included "Key insights". Insights affecting valuation included a statement that the grain and oilseeds supply chain already had resources in place to facilitate the origination of malting barley. Further, it was stated that with the annual demand for Joe White, Cargill would be responsible for originating 20 to 25 percent of the Australian barley crop, and would be a strategic player in the Australian barley market. On the topic of future integration, it was stated there would be a need to originate a large percentage of the volume, in the order of 70 percent, through Cargill's grain and oilseeds supply chain to realise origination synergies. Reference was also made to a need to effectively pass through the actual barley market replacement cost to the customer to achieve projected barley margin revenues.

2082 He also, jointly with Viers, prepared an internal memorandum entitled "Potential Cargill Malt, [Grain and Oilseeds Supply Chain] Australia origination structure" dated 17 July 2013.[1230] This document outlined the proposed terms of a commercial origination agreement between Joe White and Cargill's grain and oilseeds supply chain in Australia to originate the annual "malt barley needs" for the Joe White

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1227 In addition to the agreed summary of the Barley Inventory Call being in evidence (see par 924 above), each of the other Cargill employees referred to in par 924 above was called to give evidence.

1228 See par 862 above. Neither De Samblanx nor Le Binh could be certain about whether Christianson was there. Eden did not recall the meeting.

1229 No other witness was asked any questions about the comments made in this document: though note par 2076 above.

1230 Viers was not asked any questions about this memorandum; Purser was the only Cargill witness cross-examined about it.

Business. Also on 17 July 2013, Christianson, amongst numerous others, was recorded in an email from Viers as having been required to attend in the malt conference room in Minneapolis to discuss key questions for the upcoming Commercial Call with Hughes. There was no evidence as to whether or not Christianson attended, but it appeared likely that he did.

2083 On the issue of how synergies and margins were estimated in July 2013, Purser gave evidence that the assumption was made (without specific verification or enquiry) that, because of the existing relationship Cargill's grain and oilseeds supply chain had with barley suppliers in Australia, the required varieties of barley would be able to be purchased.

W.3.3.6 The Cargill Parties' submissions

2084 The Cargill Parties submitted that there was no basis on which to draw an inference against Cargill concerning Christianson that would serve to assist in the determination of the issues in dispute.

2085 The Cargill Parties submitted that the fact Christianson's evidence was absent could not fill the "evidentiary gap" that could have suggested Cargill was aware that Hindmarsh (an Australian variety) was a non-malting barley variety being used by Joe White. It was submitted that Christianson, as a merchandising leader in Canada for Cargill, had some knowledge about the barley industry in Australia, but it could not be said that he knew that Hindmarsh was not a malting variety. Further, it was submitted that unless Christianson had access to Joe White's customer contracts, there was no basis to conclude that Christianson would know whether Hindmarsh was a customer-approved barley variety.[1231]

2086 The Cargill Parties also referred to statements made during the Barley Inventory Call that "malt blending with lower and higher grade barley up to 30% of non-malt 1 varieties can be utilised". They submitted that there was no basis for finding Christianson would have understood the implication of that information as being that

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1231 See also evidence of Purser's knowledge and the difficulties with that part of the Viterra Parties' case: see pars 954-955 above.

Joe White used non-malting grade barley contrary to customer specifications.

2087 Further, Savona made the same enquiries of Christianson as she made of De Samblanx and Hermus with respect to due diligence reports.[1232] In short, Savona's evidence was that Christianson could not recall or could not provide an unequivocal answer as to the status (or whereabouts) of final versions of the due diligence reports for the various workstreams.

W.3.3.7 The Viterra Parties' submissions

2088 The Viterra Parties submitted that there was an expectation that Christianson would be called to give evidence and that the Cargill Parties failed to provide an explanation for failing to do so.

2089 They submitted that Christianson had detailed knowledge of barley procurement in Australia, and the questions he devised for the Tracking Sheet demonstrated that he was investigating whether Joe White was able to procure the barley it required to fulfil customer requirements. They also submitted that having attended the Barley Inventory Call, Christianson was informed on a number of occasions that Joe White utilised "non-malt 1 barley".

2090 Further, the Viterra Parties relied upon the evidence of Viers, to the effect that he did not recall whether he asked Christianson to review documents in the Data Room pertaining to barley varieties or whether Christianson drew his attention to the "large quantities of Hindmarsh barley".

2091 Furthermore, it was also submitted that, given Christianson's familiarity with Cargill's barley requirements for malt, he would have noticed if Joe White's barley procurement was significantly different to that of Cargill.

2092 Moreover, it was submitted, by reference to the cross-examination of Purser, that Cargill was careless in conducting the Due Diligence. The Viterra Parties referred to the memorandum prepared by Viers and Christianson,[1233] and put to Purser that by

1232 See par 2025 above.
1233 See par 2082 above.

not knowing what barley varieties would be supplied by the grain and oilseeds supply chain, Cargill Australia could not have properly identified synergies and analysed margins for the purposes of Project Hawk.

2093 Based on the above, the Viterra Parties submitted that Christianson ought to have been called as a witness, and it should be inferred that "as the person responsible for due diligence in relation to barley supply" he would not have given evidence that the Cargill Parties conducted the Due Diligence with reasonable care.

W.3.3.8 Christianson - conclusion

2094 No inference of the kind suggested by the Viterra Parties will be made by reason that Christianson was not called as a witness. There are a number of reasons for this.

2095 *First*, the relationship between Christianson and Viers was similar to that of Hermus and De Samblanx. Viers was the enterprise risk manager for Cargill, Inc's food ingredient and bio-industrial enterprise. Since 2010, he had been Cargill's global commercial manager for malt, which involved the purchasing of barley and the selling of malt. For Project Hawk, Viers was assigned the commercial leader and became the integration manager for the integration of Joe White. Christianson reported to Viers and assisted Viers during the Due Diligence. With minor exceptions, Viers was able to address the relevant issues concerning barley varieties.

2096 As for the minor exceptions, there was a real possibility that, if Christianson had been called, he may have been able to give evidence on some topics that no other witness was able to address. However, it was highly unlikely this would have been material. Christianson, like the other Cargill employees, was not able to access Joe White's contracts with its customers. In the circumstances, it was not plausible that Christianson could have formed any view that required barley varieties were unavailable or would be unavailable in the foreseeable future. The evidence identifying the relevant circumstances included that barley varieties in Australia were different to those elsewhere, and that it was quite possible that some customers could have authorised the use of non-malting barley or malting barley that was not grade 1. Further, there was no suggestion whatsoever that Joe White was covertly not

complying with customer contracts or specifications.

2097 *Secondly*, there was nothing in the evidence to suggest that Christianson withheld information from Viers. Viers gave evidence that, although he could not recall, he would expect that Christianson would have reported to Viers what he found when he reviewed the information in the Data Room. Viers went so far as to say that if Christianson observed there was Hindmarsh barley in large quantities in Joe White's inventory and he knew it was a non-malting variety, then he would have reported it to Viers. There was no suggestion any such report was made. Viers had no recollection of it.

2098 Further, given the manner in which the Due Diligence was conducted, it would be fanciful to think that Christianson would have discovered a materially adverse piece of information and chose to conceal that fact from Viers and others. Furthermore, documents that Christianson received which purported to demonstrate the use of Hindmarsh barley, such as the minutes of the Barley Inventory Call prepared by Merrill Lynch and Goldman Sachs, were also circulated to Viers. The fact that Cargill was informed of the existence of Hindmarsh barley in Joe White's inventory was not in controversy. Equally uncontroversial was the fact that no one informed Cargill that Hindmarsh was a barley variety which was not approved for malting or that there were no Joe White customers who had approved the use of Hindmarsh and, notwithstanding, Hindmarsh was being used by Joe White in the production of malt for some of its customers.

2099 *Thirdly,* it is important to focus upon the inference invited concerning a want of care in relation to the Due Diligence. The matters referred to above identify why it was that Christianson would not have understood there was or would have been any material problem with barley supply. Further, the Viterra Parties' submissions appeared to run somewhat counter to Christianson being involved in an inadequate due diligence. The submissions included the statement that Christianson received "detailed information" in making the submission that Cargill had "detailed

knowledge" in relation to the procurement of malting barley in Australia.[1234]

2100 Therefore, I do not consider it appropriate for the court to draw an inference that Christianson would have given evidence to the effect that Cargill conducted the Due Diligence without reasonable care or any other inference to the effect that Christianson's evidence would not have assisted Cargill Australia's case.[1235]

W.3.3.9 Savona – her role

2101 Savona was in-house legal counsel at Cargill Australia. Her role in the relevant events became more active in the 2 or so weeks before Completion. As well as taking and giving instructions herself, she attended on a number of occasions when instructions were given to Allens with respect to Cargill being informed about matters relevant to the Operational Practices and what might have followed from that.[1236] She was also directly involved in the preparation of the Cargill 22 October Letter and the Cargill 29 October Letter. No explanation was given as to why she was not called as a witness. She was often present in court during the course of the trial.

W.3.3.10 The Cargill Parties' submissions

2102 The Cargill Parties submitted that there was no evidentiary gap for Savona to fill. In short, they contended the evidence of other witnesses was well and truly sufficient for the court to draw the relevant conclusions about reliance and causation.

W.3.3.11 The Viterra Parties' submissions

2103 The Viterra Parties submitted that Savona had a key role in October 2013. They referred to conversations with Clark and various Cargill employees to which Savona was privy, as well as her involvement in correspondence with the Viterra Parties.

2104 It was contended that the court should draw inferences that Savona would not have given evidence that Cargill was forthcoming in its instructions to Clark about everything Cargill knew relevant to what it had been told up to and including 15 October 2013; nor would she have given evidence that Cargill Australia, and not

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1234 A significant amount of information was referred to in making this submission, the detail of which is not necessary to set out.

1235 See issue 80 below.

1236 See pars 1161, 1178, 1187, 1195, 1417, 1427 above.

Cargill, Inc, drove the transaction and initiated this proceeding in its own right independently of Cargill, Inc.

W.3.3.12 Savona - conclusion

2105 In relation to the first suggested inference, those who gave instructions to Savona (principally, Viers, De Samblanx and, to a lesser extent, Eden) were all called as witnesses. They were all the subject of cross-examination about the details of instructions given to Allens and Savona. Unlike the other relevant Cargill witnesses, Savona could not have been expected to give material evidence about matters concerning the malting industry or the Joe White Business, or the extent to which the matters under consideration would have been material to Cargill's decision on how to proceed.

2106 Further, Clark was called and, generally speaking, was able to give the substance of the instructions Allens received.

2107 Furthermore, there was no suggestion that Savona herself was responsible for any of the decisions made in October 2013 concerning the course that Cargill might have adopted or did in fact adopt. The same observation may be made in relation to the decision to commence this proceeding.[1237]

2108 Although Savona may have been able to shed some light on the meaning of some of her notes, there was no obvious reason for the Cargill Parties to call Savona as a witness.

W.3.4 Employees who worked at Joe White[1238] and who are not parties to the proceeding

2109 The Viterra Parties identified a number of "Joe White employees" that they submitted ought to have been called by the Cargill Parties.

W.3.4.1 Sheehy – her role

2110 Sheehy was the chief chemist at Joe White, who was appointed as the technical

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1237 See issue 101 below.

1238 This phrase is used as Joe White was not the employer at the relevant times.

services manager in 2012. Until Cargill took control of Joe White, Sheehy reported to Stewart. She ceased her employment with Cargill in late 2015. Sheehy was the author of both versions of the Viterra Certificate of Analysis Procedure. Stewart delegated to Sheehy the task of preparing the first draft, and approved both versions. Although McIntyre was the person who changed results on most Certificates of Analysis up to October 2013, from time to time Sheehy was also involved in pencilling results and arranging for Certificates of Analysis to be issued in accordance with the changed results.

W.3.4.2 The Cargill Parties' submissions

2111 The Cargill Parties submitted that there was already very extensive and clear evidence about all the matters upon which Sheehy could have given evidence. In those circumstances, it was contended it was unnecessary to call her.

W.3.4.3 The Viterra Parties' submissions

2112 The Viterra Parties referred to various facts and sought to demonstrate that significant matters were not the subject of evidence because Sheehy was not called.

2113 They referred to an email sent by Sheehy in October 2012, and submitted that it was Sheehy who decided that the second version of the Viterra Certificate of Analysis Procedure should be marked as obsolete.[1239] In fact, the email stated that "we" had decided to make the procedure obsolete, the email having been copied to several other employees including Stewart and McIntyre. This email was not put to either Stewart or McIntyre during their cross-examination. In the circumstances, on the face of the document, it suggested that the decision was not made by Sheehy alone. Further, although during Stewart's cross-examination by the Cargill Parties he agreed that Sheehy seemed to be taking the lead when it came to organising for the filing of the Viterra Certificate of Analysis Procedure as obsolete, there was no suggestion that it was only her decision to "disguise" the document in this way. The evidence was to the opposite effect.[1240]

1239 See par 287 above.

1240 Ibid. See in particular the reference to Hughes' direction.

2114 Next, the fact that Sheehy took over the responsibility for benchmarking compliance with the Viterra Certificate of Analysis Procedure was referred to.[1241] However, this evidence was of little significance. When Testi was responsible for benchmarking before Sheehy took over, she said the spreadsheet created for that purpose was only used for a very short period of time. Further, there was no evidence referred to by the Viterra Parties of the details of the benchmarking performed by Sheehy, much less why that evidence might be material given the amount of discretion that existed under the Viterra Certificate of Analysis Procedure, particularly with respect to pencilling and the approval of out-of-specification malt for shipping.

2115 Next, the Viterra Parties correctly pointed out that the evidence did not establish which of the test results were adjusted by any of McIntyre, Sheehy or Moller. McIntyre gave evidence that both Sheehy and Moller also engaged in pencilling, but she could not even hazard a guess as to what proportion of the total Certificates of Analysis issued were the result of either Sheehy or Moller changing test results. However, the submission did not address the uncontested evidence of McIntyre that she changed the test results on most occasions.[1242]

2116 Next, it was submitted that in light of McIntyre's evidence that she did not understand why some adjustments were being made by other staff, and that Sheehy had more technical knowledge than McIntyre, Sheehy ought to have been called. But this submission did not address the fact that Stewart was amply qualified to answer any technical questions with respect to the Viterra Certificate of Analysis Procedure. Indeed, he was asked many questions on the topic. Further, when it was put to McIntyre that each of Stewart, Testi and Sheehy had more technical knowledge about the science of malting than her, McIntyre gave unchallenged evidence that Stewart did but expressed doubt about Sheehy in stating "perhaps, yes". There was no gap in the evidence in this regard. Again, it was relevant that it was McIntyre who, herself, was responsible for most of the pencilling giving rise to the issuing of the Certificates of Analysis. Furthermore, McIntyre gave evidence that at times, Sheehy's Sign-Out

1241 See par 224 above.
1242 See pars 75-76 above.

Reports would show amendments to results that were within specification, and she did not understand why those amendments had been made, but also said on those occasions she would discuss the amendments with Sheehy. McIntyre was asked no questions during cross-examination about those discussions.

2117 Next, the Viterra Parties referred to the fact that Sheehy was originally a witness on Cargill's witness list, but before the trial started the court was informed she would no longer be a witness.

2118 The Viterra Parties submitted that because Sheehy was not called by the Cargill Parties it ought to be inferred that Sheehy's evidence, in relation to each of the matters listed below, would not have assisted Cargill's case that Joe White routinely supplied Certificates of Analysis that misstated the results of analytical testing and reported that the malt complied with contractual requirements and specifications when it did not:

(1) The preparation of the Viterra Certificate of Analysis Procedure (including its purpose, how it was intended to operate and the outcome it was intended to achieve).

(2) The reasons why the Viterra Certificate of Analysis Procedure was marked obsolete in "Viterra's system" and not stored in official procedure folders.

(3) Any instructions that Sheehy gave to Moller or McIntyre, or both, in relation to how the Viterra Certificate of Analysis Procedure should be applied.

(4) The purpose for and manner in which Sheehy made adjustments herself.

(5) The reasons for any differences between original test results (as measured by Sheehy "or members of her team") and reported results (as adjusted by her).

(6) The factors Sheehy considered when deciding whether to approve Certificates of Analysis.

(7) The manner and extent to which members of the "Technical Services Team" (including McIntyre and Moller "as her proxies from 26 September 2012")[1243] complied with the Viterra Certificate of Analysis Procedure, having regard to Sheehy's supervision of them, and further or alternatively in her role in benchmarking compliance with the Viterra Certificate of Analysis Procedure.

W.3.4.4 Sheehy - conclusion

2119 A number of the bases upon which the Viterra Parties sought to place significance on the evidence Sheehy might have given have already been rejected in addressing the position they adopted. More generally, whatever approach Sheehy might have taken with respect to the propriety or otherwise of the Viterra Certificate of Analysis Procedure,[1244] on the evidence before the court it would not reasonably be open to draw any inference to the effect that Joe White was not routinely engaged, up until October 2013, in misstating the test results in Certificates of Analysis.[1245]

W.3.4.5 Moller - her role

2120 Moller was the technical centre chemist at Joe White from around May 2009.[1246] Under the first version of the Viterra Certificate of Analysis Procedure, Moller (or her nominated proxy) was stated to be the person authorised to make adjustments to test results.[1247]

1243 See fn 238 above.

1244 Compare the position of Stewart who was entirely unsuccessful in any attempt to justify the underlying premise of the Viterra Certificate of Analysis Procedure: see, for example, pars 168-182 above.

1245 See issue 10 below.

1246 This evidence was taken from Stewart's witness statement. In giving extensive evidence about the operations of Joe White, it was the only time throughout the entirety of Stewart's evidence that he referred to Moller.

1247 The Viterra Parties submitted that as neither version of Joe White's sign-off procedures, dated 9 July 2010 and 26 September 2012, identified any proxies for the technical centre chemist, it followed that Moller was the only person authorised to make adjustments under the first version of the Viterra Certificate of Analysis Procedure: see also fn 238 above as to the position under the second version. There were 2 difficulties with this submission. *First*, the uncontested evidence of McIntyre that, as a matter of fact, it was McIntyre who changed most of the results with respect to Joe White's Certificates of Analysis. *Secondly*, neither of the sign-off procedure documents was put to any witness, nor was any

W.3.4.6 The Cargill Parties' submissions

2121 Essentially, the Cargill Parties adopted the same approach with Moller as they did with Sheehy. In light of the evidence led, they contended it was unnecessary to call Moller as a witness.

W.3.4.7 The Viterra Parties' submissions

2122 The Viterra Parties referred to the Cargill Parties' opening, in which it was stated that Moller would be called to give evidence in relation to Joe White "shipping malt as though it was within specification when it was not". They further referred to the Cargill Parties informing the court on day 32 of the trial that Moller would no longer be called as it was not necessary having regard to the matters covered already by McIntyre. The Viterra Parties submitted that not calling Moller should not be seen as anything other than a forensic decision, and it ought to be inferred that it was considered the testimony would not be sufficiently helpful to the Cargill Parties.

2123 Similar to the submission made with respect to Sheehy, the Viterra Parties contended Moller's evidence would not have assisted Cargill's case with respect to the Reporting Practice with regard to the following matters:

(1) Any instructions provided to Moller by Sheehy in relation to how the Viterra Certificate of Analysis Procedure was to be applied (including in relation to the period up to 26 September 2012 when Moller was the "only person authorised to make adjustments").[1248]

(2) The purpose for and manner in which Moller made adjustments herself (including in relation to the period up to 26 September 2012).

(3) The reasons for any differences between original tests (as measured by Moller) and reported results (as adjusted by Moller) (including in relation to the period up to 26 September 2012).

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proposition to the effect that because of these documents no one other than Moller was authorised to make adjustments. For completeness, the evidence was that Sheehy also made changes.

1248 See fn 1247 above.

W.3.4.8 Moller - conclusion

2124 For substantially the same reasons that the court declined to draw inferences with respect to Sheehy, none of the suggested inferences will be drawn in relation to Moller. In short, Cargill led more than enough evidence to establish its case on the issue of the Reporting Practice and the Undisclosed Matters; the evidence that was led established that none of the suggested inferences were open.

W.3.4.9 Production managers

2125 In light of the rulings given above concerning Sheehy and Moller, this aspect of the Viterra Parties' submissions may be dealt with briefly. Essentially, they contended it should be inferred that none of the production managers were called because their testimony would have been unfavourable to the Cargill Parties. It was submitted that their absence, coupled with the failure to tender data about domestic customers, meant it ought to be inferred that their evidence would not have assisted in establishing the routine adoption of the Reporting Practice to misstate test results. The absence of evidence with respect to domestic customers is dealt with elsewhere.[1249] As the evidence led by the Cargill Parties clearly established the Operational Practices were routinely implemented, including by witnesses to whom the production managers reported, there was no significance in the fact that none of the production managers gave evidence.

W.3.5 Former employees who worked at Joe White and who are Third Party Individuals

2126 There were 2 potential witnesses identified to fall into this category, Hughes and Wicks. The position of Hughes has been dealt with elsewhere, including the fact that Hughes was not a person in Cargill's camp.[1250] Quite the contrary, once Hughes became a third party to the proceeding, he had a direct interest in the Viterra Parties succeeding because if they were to do so no claim could be successful against Hughes. Further, given the clear and incontrovertible role Hughes had in signing off on substantial parts of the Information Memorandum and the Management Presentation

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1249 See pars 225, 283 above and pars 2318-2319, 2413 below.

1250 See par 1970 above.

Memorandum, together with the manner in which he presented the Joe White Business more generally before mid October 2013, it would be expected that Hughes' position would be very defensive to many of the more significant allegations made by Cargill Australia.[1251]

2127 With respect to Wicks, the Viterra Parties referred to him being responsible for negotiating supply contracts and maintaining customer relationships. On this basis, it was submitted that Wicks would be "the relevant person who may *perhaps* have been able to shed some more light on the issue [of the Varieties Practice]" (emphasis added). The Viterra Parties also highlighted the fact that Wicks was subpoenaed by the Cargill Parties to give evidence, and that the outline of evidence was filed on his behalf by them. Based on these matters, it was contended that the court should infer that Wicks would not have given evidence in support of the allegation that Joe White routinely failed to comply with customer requirements concerning barley variety.

2128 In my view, there is no basis to draw the suggested inference. Like Hughes, as a third party in the proceeding, Wicks was not in Cargill's camp. Further, there was little significance in the fact that, early in the trial, the Cargill Parties chose to subpoena Wicks and file a witness outline of the evidence they anticipated he was going to give, along with each of the other Third Party Individuals. No doubt, this would have been done out of an abundance of caution in the event that the Cargill Parties formed the view after calling their other witnesses that there were still some matters that needed to be the subject of evidence. It must be inferred that, having obtained the evidence of others, including Lindner being called by the Cargill Parties and Stewart being called by the Viterra Parties,[1252] the Cargill Parties concluded it was unnecessary to call any of the Third Party Individuals in order to prove Cargill Australia's case. Further, in light of what Hughes said on the topic of barley varieties in October 2013,[1253] if any inference were to be drawn about what Wicks might have said, it would

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1251 Similar to Stewart's position: see par 168 above. But, again like Stewart, such defensiveness would not equate to being able to justify the Viterra Practices or, with respect to Hughes, the Undisclosed Matters.

1252 For reasons it is not necessary to explain here, the Cargill Parties had the ability to call further evidence by way of evidence from the Third Party Individuals after Stewart had given his evidence: *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 12*) [2018] VSC 454, [30]-[31].

1253 See par 1307 above.

be the opposite to that suggested by the Viterra Parties.

W.3.6 Employees who worked at Joe White and who are Third Party Individuals

2129 There were 2 potential witnesses in this category of Third Party Individuals, Youil and Argent.

2130 In relation to Youil, the Viterra Parties referred to the fact that he was general manager of operations at Joe White from 2010 until after the Acquisition, and would have been capable of giving evidence in relation to Joe White's operational capabilities both pre- and post-Acquisition, including what particular factors impacted its operations.

2131 With respect to Argent, the Viterra Parties relied upon Argent being the financial controller of Joe White at all relevant times, including after the Acquisition. They submitted he could have given evidence of Joe White's financial performance, including what particular factors impacted Joe White's financial results.

2132 Although the position was not as clear as that of Hughes and Wicks given that Youil and Argent were employees of Cargill at the time of trial, in my view it could not be said with any conviction that Youil or Argent were relevantly in Cargill's camp. Despite their position as employees, they were being sued for significant amounts in this proceeding as individuals. Each of them had separate independent legal representation. Further, like Hughes and Wicks (and Stewart), it was in the direct interests of each of Youil and Argent as individuals for Cargill Australia's claim to fail.

2133 For completeness, the same observations made in relation to Wicks may be made with respect to the fact that Youil and Argent were the subject of subpoenas issued at the behest of, and witness outlines of evidence filed by, the Cargill Parties.

W.3.7 Joe White's customers

2134 The issue with respect to Joe White's customers was that none was called in circumstances where the Cargill Parties contended that those customers were misled by the Operational Practices.

W.3.7.1 The Cargill Parties' submissions

2135 It was submitted that it was unnecessary for any of Joe White's customers to be called (who, of course, became Cargill customers) because of the extensive evidence tendered that demonstrated that compliance with contractual terms was a matter of utmost importance to customers. Those documents were tendered for the truth of their contents. They also referred to the evidence of Joseph Hertrich ("Hertrich"), called as an expert brewer, as to the absence of the Alleged Industry Practices.[1254] Further, it was submitted that it could be readily understood that considerable difficulty would be created in maintaining commercial relations if Cargill was to ask brewers to come to court to give evidence about something in the past when Cargill had gone to great lengths to restore the relationships. Furthermore, it was submitted that it was fatuous to suggest that the court would not know the position of customers' expectations because they were not called.

W.3.7.2 The Viterra Parties' submissions

2136 The submissions of the Viterra Parties were premised on the basis that Cargill had failed to prove the analytical specifications of Joe White's customers and the failure to meet those specifications. On this basis, it was submitted that it must follow that it had not been established that Joe White misstated analytical test results when providing Certificates of Analysis. After referring to the inferences that it was contended ought to have been drawn by reason of Sheehy, Moller, and the production managers not being called, it was submitted that Cargill had also failed to establish this allegation because none of Joe White's customers were called.

2137 Further, it was submitted that Cargill had failed to lead evidence in relation to what Joe White's obligations to its customers were in relation to information reported in Certificates of Analysis. By way of example, it was submitted that it had not been established that Joe White's customers expected that a Certificate of Analysis would record the "rule measurements" of individual test results, rather than "simply being a representation of what the attributes of the lot were based on various factors which include[d] Joe White's consideration of the raw analytical test results". In addition,

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1254 See par 2817 below. See more generally issue 13 below.

the Viterra Parties submitted that, in light of the limitations of analytical testing procedures, it was more likely that Joe White's customers had an expectation that Certificates of Analysis would report something other than "raw analytical test results". Finally, in these circumstances, it was submitted that not calling any customers should give rise to the inference that those customers did not in fact expect Certificates of Analysis would record raw analytical test results without regard to factors such as bias, error and uncertainty.

2138 The Viterra Parties suggested that there may have been various reasons why Cargill called no customers, including that Cargill could not identify with precision which particular shipment or shipments Joe White should have told customers about, or which customers were unsatisfied with the malt supplied.

W.3.7.3 Joe White's customers - conclusion

2139 The underlying premise of these submissions, namely that the analytical specifications of customers and the failure to meet those specifications was not established, has been rejected.[1255] Further, in circumstances where the evidence was that breweries treated their specifications and the requirement to meet them seriously,[1256] there was no sensible basis to infer that Joe White's customers across the board would have permitted a completely non-transparent process to be engaged in, whereby results were allowed to be amended and reported differently even when beyond 2 standard deviations. Nor could it be inferred that they would have assumed such matters would have been occurring.[1257]

2140 Additionally, it would be self-evidently unseemly (given the subject matter) for Cargill to call upon its customers to get involved in a dispute between it and another large multinational in relation to conduct that occurred approximately 5 or more years before the trial. In some cases, it might be necessary for a corporation to do such a thing in order to establish its case. In this case it was not.

2141 For completeness, insofar as customers might have given evidence about the Alleged

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1255 See pars 2324-2413 below.
1256 See, for example, pars 18, 1709, 1834 above and pars 2817-2821 below.
1257 See issue 13 below.

Industry Practices, it was the Viterra Parties who raised the issue by way of a defence. Establishing the extent or otherwise of any industry practices formed no part of Cargill Australia proving its case. Furthermore, and in any event, the Viterra Parties submitted that the "only rational way" the evidence from the industry experts could be reconciled was on the basis that the Alleged Industry Practices were not ordinarily disclosed to customers. In these circumstances, and accepting the premise of this submission for present purposes only, on the Viterra Parties' own case there was no real prospect that customers might have given probative evidence about the existence or otherwise of the Alleged Industry Practices. Moreover, in circumstances where Joe White went out of its way to conceal the Operational Practices, it was highly likely that Joe White's customers would not have been aware of them.

W.3.8 Viterra employees

2142 The Cargill Parties identified a number of witnesses that were not called by the Viterra Parties, including Hughes, Fitzgerald, Rees, Norman, Pappas, Gordon, Ross and Mahoney. They contended that an inference ought to be drawn that the evidence of each of those witnesses would not have assisted the Viterra Parties' case. To the extent considered necessary, the Cargill Parties' submissions on this point will be examined in the context of the relevant issues below.

W.3.9 Some further remarks

2143 The matters set out above deal with the submissions concerning the absence of certain witnesses at trial. Although these reasons need not be supplemented, before leaving this topic some further observations should be made. There were many individuals who could have given evidence that were not called. In the context of a trial that commenced in June 2018 and had its last hearing date in April 2020,[1258] with a total of 114 hearing days, considerations of whether or not witnesses ought to be called must also be considered in light of the overarching purpose of conducting civil proceedings

[1258] This does not include hearings in 2021 in relation to applications concerning confidentiality issues: see *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 26)* [2021] VSC 242; *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 27)* [2021] VSC 321.

in a manner to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.[1259] Leaving aside that some key witnesses in the case (including some of the parties themselves) did not give evidence, for the Cargill Parties and the Viterra Parties to have called all potential witnesses would have substantially increased the duration of the trial. Such a course would not have been consistent with the overarching purpose prescribed by the *Civil Procedure Act*.

X. Issues for determination

2144 As has been noted,[1260] the parties helpfully provided the court with a list of issues requiring determination. Broadly speaking, the issues were grouped into the various claims, counterclaims and third party claims in the proceeding, and sequentially addressed the questions of fact and law necessary to resolve those claims. As may be expected in a case of this magnitude and complexity, elements of some issues overlap in such a way that makes their neat categorisation difficult, and consequentially findings have been cross-referenced between issues where necessary. Nonetheless, the remainder of this judgment is structured according to the parties' agreed list of issues.

2145 Without being exhaustive, the issues for determination fell into the following broad categories:

(1) **Issues 1-23** address Cargill Australia's claims for misleading or deceptive conduct and deceit in respect of the Financial and Operational Performance Representations and other matters relating to the sale process and its context.[1261]

(2) **Issues 24-38** address Cargill Australia's claims for misleading or deceptive conduct and deceit in respect of the Pre-Completion Representations.[1262]

1259 *Civil Procedure Act*, s 7.
1260 See par 1861 above.
1261 See par 2826 below.
1262 See par 3299 below.

(3) **Issues 39-47** address Cargill Australia's claims that Viterra breached certain Warranties in the Acquisition Agreement.

(4) **Issues 48-53** address Cargill Australia's claims for misleading or deceptive conduct and deceit in respect of the Warranty Representations.[1263]

(5) **Issues 54-60** address Cargill Australia's claims for misleading or deceptive conduct and deceit in respect of the Other Bidders Representations.[1264]

(6) **Issues 61-68** related to certain claims arising in respect of the Co-Operative Bulk Agreement, however these claims were abandoned by Cargill Australia in closing submissions.

(7) **Issues 69-72** address various matters relating to an expert determination on certain issues.

(8) **Issues 73-84** address loss and damage claimed by Cargill Australia.

(9) **Issues 85-99** address the Viterra Parties' counterclaims against Cargill Australia.

(10) **Issues 100-123** address the Viterra Parties' third party claims against Cargill, Inc.

(11) **Issues 124-134** address the Viterra Parties' third party claims against Joe White and the Third Party Individuals for misleading or deceptive conduct.

(12) **Issues 135-143** address the Viterra Parties' third party claims against the Third Party Individuals for breach of contract.

(13) **Issue 144** addresses Cargill, Inc's counterclaim in relation to the

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1263 See par 3739 below.

1264 See par 3777 below.

Confidentiality Deed.

(14) **Issue 145** addresses clause 15.4(b) of the Acquisition Agreement and what effect that clause has on Cargill Australia's claims as a result of the sale of Joe White by Cargill in 2019.

X.1 Did the Information Memorandum contain statements pleaded in the Statement of Claim and in the Defence?

2146 Ultimately, there was no issue that the relevant parts of the Information Memorandum pleaded by Cargill Australia and the Viterra Parties respectively in substance reflected those parts of the Information Memorandum relied upon.[1265] The statements in the Information Memorandum upon which Cargill Australia contended that it relied in 2013, were as follows:

(1) Joe White's historical and forecast future operational and financial performance was as set out in the Information Memorandum.[1266]

(2) Joe White's earnings platform was supported by its long-term customer contracts.

(3) Joe White's business model was focused on developing relationships with key global and regional brewers underpinned by Joe White's high-quality product and tailored service offering.

(4) The effectiveness of Joe White's business model was demonstrated by the strong track record of contract renewal and the strength of customer relationships.

(5) Joe White's leading Australian market position was underpinned by long-term customer relationships, and its earnings platform was supported by long-term customer contracts and a strong history of contract renewals.

(6) Joe White was focused on developing a detailed understanding of specific customer requirements with respect to volume, demand, consistency, certainty of supply and innovation.

(7) Joe White's strong track record of contract renewal demonstrated the depth of the customer relationships and the quality of the service offering.

(8) Joe White devoted significant time and effort to understand its customers' product specifications.

(9) Joe White had an annual production capacity as set out in the Information Memorandum, in a portfolio of modern, well-capitalised, state-of-the-art manufacturing facilities with high levels of capacity utilisation as set out in the Information Memorandum.[1267]

1265 The terms of the Information Memorandum and related matters are relevantly set out in pars 475-542 above.

1266 See annexure B to these reasons.

1267 This included information set out in par 532 above.

(10) Joe White's asset base included best-in-class production facilities requiring limited future capital investment after the 2013 financial year.

(11) Over the last 10 years, Joe White had undertaken a substantial capital investment program which had created a state-of-the-art manufacturing footprint with high operational efficiency and low future capital needs in the short to medium term.

(12) Joe White's production function was underpinned by state-of-the-art manufacturing facilities which consistently produced high-quality malt.

(13) Joe White utilised technical analysis and strict quality control measures to ensure that customer specifications were consistently met.

(14) Joe White's high-quality manufacturing assets had an outstanding reputation for product uniformity, consistency and an ability to produce to a customer's exact specifications, and 1 of its key areas of focus included creating state-of-the-art malt analytical laboratories to ensure the highest level of quality assurance.

(15) Joe White had a "proven effective business model" underpinned by a commitment to quality, in that Joe White's business model was focused on delivering high-quality products and adhering to specific customer requirements.

(16) Joe White's business model was focused on ensuring its customers received the highest quality malt to meet their exact specifications and requirements. To achieve this, Joe White ensured that quality remained the key consideration across each of its key operational functions of sales and marketing, procurement and production.

(17) Joe White's success was based upon its strong commitment to consistently meet the product specifications of its customers.

(18) Joe White had an unrelenting focus on quality across all areas of its business to ensure that it met customers' requirements.

(19) Joe White had consistent access to high-quality malting barley.

(20) Joe White's procurement function was focused on the selection of high-quality barley that best met customers' specifications.

(21) Joe White's procurement process was focused on meeting customer specifications.

(22) Once a customer's specific needs had been identified, the procurement function ensured the appropriate quantity of malting barley was acquired to meet the specifications.

(23) The barley procurement function was driven by the sales and marketing team, together with "Technical", identifying varieties best suited to meet customers' malt specifications.

(24) Stringent internal protocols and control measures were in place across the entire production cycle.

(25) Regular compliance and audit of all production facilities was undertaken.

(Collectively, "the Information Memorandum Statements".)

2147 The Viterra Parties submitted that the Information Memorandum Statements had to be understood in the context of the relevant disclaimers, including those contained in the Information Memorandum. In addition, they pleaded that the Information

Memorandum contained the following:[1268]

(1) The document comprising the Information Memorandum had been prepared by Glencore and its subsidiaries to provide background information to assist the recipient in deciding whether to further consider the possible acquisition of Glencore and its subsidiaries' interest in the malt business trading as "Joe White Maltings" ("Proposed Transaction").

(2) This document was being provided on a confidential basis to selected recipients.

(3) In accepting this document, each recipient agreed for itself and its related bodies corporate and their respective directors, officers, employees, agents, representatives and advisers (together, the "Recipients") that it was provided on the terms and conditions of this disclaimer.

(4) This document was being delivered subject to the terms of a confidentiality undertaking and may only be used in accordance with the terms of such confidentiality undertaking.

(5) This document was not to be considered as a recommendation or legal or financial advice by Glencore or any of its affiliates or subsidiaries (the "Glencore Group"), Merrill Lynch International or any person named in or involved in the preparation of this document or any of their respective directors, officers, employees, agents, contractors, advisers, shareholders, partners, related bodies corporate or affiliates (together, the "Discloser") in relation to the Proposed Transaction.[1269]

(6) The Recipient should conduct and rely on its own investigations and analysis of the information in this document and other matters that may be relevant to it in considering the Proposed Transaction.

(7) A Recipient that was considering the Proposed Transaction must make, and would be taken to have made, its own independent investigation and analysis of the information in this document.

(8) Independent expert advice (including from a Recipient's accountant, lawyer or other professional adviser) should be sought before making a decision in connection with the Proposed Transaction.

(9) This document did not purport to contain all the information that may be necessary or desirable to enable the Recipient to properly evaluate and consider the Proposed Transaction.

(10) To the maximum extent permitted by law, no representation, warranty or undertaking, express or implied, was made and, to the maximum extent permitted by law, no responsibility or liability was accepted by the Discloser or any other person as to the adequacy, accuracy, correctness, completeness or reasonableness of this document, including any statements or information provided by third parties and reproduced or referred to in this document, or any other written or oral communications transmitted or made available to a Recipient.[1270]

1268 In relation to subparagraphs (1) to (23), the disclaimer in full appears at par 475 above.

1269 This term appeared under the heading "Recipient to Conduct own Investigation and Analysis".

1270 This term appeared under the heading "No Responsibility for Contents of Document".

(11) To the maximum extent permitted by law, no responsibility for any errors in or omissions from this document, whether arising out of negligence or otherwise, was accepted.

(12) The information contained in this document had not been independently verified.

(13) This document contained various opinions, estimates, forward-looking statements and forecasts which were based on assumptions which may not prove to be correct or appropriate.

(14) No representation or warranty as to the fairness, adequacy, accuracy, validity, certainty or completeness of any of the assumptions, information, opinions, estimates, forward-looking statements or forecasts contained in this document or any written or oral information made available to any interested party was made by the Discloser and no liability whatsoever was accepted by any such Discloser in relation to any such information, opinion, estimates or forecasts.

(15) The information or opinions contained in this document or any written or oral information made available to any interested party did not purport to be comprehensive and had not been independently verified.

(16) The Discloser was under no obligation to correct any errors or omissions in connection with the information contained in this document.

(17) Each Recipient acknowledged that no person had been authorised to give any information concerning the Joe White Business or the Proposed Transaction itself other than as contained in this document and, if given, that information could not be relied upon as having been authorised by the Discloser.[1271]

(18) In particular, no representation or warranty was given as to the accuracy, completeness, likelihood of achievement or reasonableness of any forecasts, projections or forward-looking statements contained in this document.[1272]

(19) Forecasts, projections and forward-looking statements were by their nature subject to significant uncertainties and contingencies.

(20) A Recipient should make its own independent assessment of the information and should seek its own independent professional advice in relation to the information in any action taken on the basis of the information.

(21) The information contained in this document had been prepared as at 1 May 2013.

(22) The Discloser made no representation or warranty that the information contained in this document remained correct at, or at any time after, 1 May 2013.

(23) The Discloser was under no obligation to update this document or to correct any inaccuracies contained in this document at any time after 1 May 2013.

(24) Joe White was able to generate stable earnings through expansion in malt margins and a disciplined approach to cost reduction.

(25) The Management team of Joe White included: Hughes as executive manager; Argent as financial controller; Wicks as general manager, commercial; Stewart as general manager, technical; and Youil as general manager, operations.

(26) Financial information for the forecast period of the 4 years ending 31 October 2016 had been prepared by Joe White management.

1271 This term appeared under the heading "Acknowledgements".

1272 This term appeared under the heading "Accuracy of Financial Information".

(27) Joe White management's primary focus during the 3 years ending 31 October 2012 had been on increasing malt margins, rather than sales revenue.

(Together, "the Information Memorandum Disclaimers".)

X.2 During the Operations Call, did representatives of (a) Glencore and/or (b) Viterra say words to the effect pleaded in paragraph 17 of the Statement of Claim?[1273]

2148 The circumstances and content of the Operations Call have been described elsewhere.[1274] Given some of the submissions made, it is necessary to set out precisely what was alleged in the Statement of Claim to have occurred during the Operations Call.

2149 Cargill Australia alleged:

> In [the Operations Call] between representatives of Cargill and representatives of Glencore and/or Viterra on 18 July 2013:
>
> (a) representatives of Cargill asked how [Joe White] dealt with quality problems when they arose;
>
> (b) representatives of Glencore and/or Viterra said words to the effect that:
>
> (i) [Joe White] malt plants supplied to a customer base with a wide range of specifications, enabling malt to be reassigned to another customer in the event it did not meet targeted specifications;
>
> (ii) [Joe White] was able to blend malt into a wide variety of specifications;
>
> (iii) [Joe White]'s plants were sufficient to produce malt to customer specifications; and
>
> (iv) all of [Joe White]'s malt plants had malt storage capacity that was more than sufficient for their requirements, save that, in Sydney, construction of sufficient storage capacity was underway.

(Collectively, "the Operations Call Statements".)

2150 It was admitted by the Viterra Parties that, during the Operations Call representatives

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1273 The phrase "and/or" appeared frequently in the parties' agreed list of issues, and has been adopted accordingly.

1274 See pars 865-884 above.

of Cargill, Inc or Goldman Sachs, or both, asked questions about quality and specifications, and storage. Specifically, with respect to quality and specifications, it was admitted that questions were asked about how often Joe White experienced quality problems; how Joe White reprocessed product that was not within specifications; and what were the internal tolerances around specifications. It was further admitted that it was asked, in looking at the system and current storage limitations, what sorts of challenges that presented; whether Joe White had outside storage or outside blending capabilities; and how Joe White managed malt quality and grades of barley for its customers.

2151 As to the responses given, it was admitted that *Hughes or Youil*, or both,[1275] made the following statements during the Operations Call:

(1) Joe White's plants supplied to a customer base with a wide range of specifications, enabling malt to be reassigned to another customer in the event it did not meet the originally targeted specifications.

(2) Joe White was able to blend malt into a wide variety of specifications.

(3) All of Joe White's malt plants had malt storage capacity that was more than sufficient for their requirements, other than Sydney, where the plant was in the process of building 2 additional storage silos.

2152 Ultimately, as between Cargill Australia and the Viterra Parties,[1276] 2 issues remained in dispute. *First*, whether Hughes or Youil, or both, made the statement that "Joe White's plants were sufficient to produce malt to customer specifications". *Secondly*, whether Hughes or Youil, or both, were acting as representatives of Glencore or

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1275 To be clear, this admission still left in issue the extent to which Youil made any of the Operations Call Statements.

1276 Some additional matters were raised by Youil in the context of his defence to the Third Party Claim against him, which are dealt with below: see par 2156 and fn 1280 below. To be clear, the allegations against Youil in the Third Party Claim against him were that he made the alleged statements to Glencore and Viterra. During closing submissions, the Third Party Individuals were told that the court was proceeding on the basis that none of the Third Party Individuals took issue with any of the admissions in the Viterra Defence unless it was told otherwise. After this position was stated, no Third Party Individual raised any such issue.

Viterra, or both, during the Operations Call.

2153 In paragraph 17 of the Statement of Claim, the alleged statements were the subject of particulars, which stated the Operations Call Statements were oral and made by both Hughes and Youil. The record of the Operations Call was relied upon.[1277] The particulars did not further allege that the statements pleaded were also implied by what was actually expressly stated.[1278] Accordingly, the first issue required a comparison between the agreed record of the Operations Call and any other evidence given of what was actually stated, and the specific statements alleged.

2154 As already noted, there was no dispute that during the Operations Call, in response to questions about the frequency of quality problems and the ability of Joe White to reprocess malt not within specifications, it was stated that Joe White supplied to a customer base with a wide range of specifications and this enabled it to reassign to another customer "in the event the malt did not meet the specification it was originally targeted towards".

2155 The Cargill Parties submitted it was implicit in such statements that Joe White was supplying malt that met customer specifications. They also relied upon the subsequent statement made in the same context that all of Joe White's plants (other than Sydney, which was being expanded) had "more than sufficient" malt storage capacity to meet Joe White's requirements.[1279] There was considerable force in these submissions, but they did not reflect how the case was pleaded. Accordingly, although it was likely De Samblanx understood from what he was told that Joe White's plants were sufficient to produce malt to customer specifications and, for that matter, that Joe White's Sydney plant would have sufficient malt storage itself after the construction of the 2 additional silos was completed, those statements were not

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1277 See par 884 above.

1278 This is not an insignificant matter, and may have affected the manner in which cross-examination was conducted. When the way in which the allegation had been pleaded was raised in closing submissions, the Cargill Parties' senior counsel accepted that the allegations may have been pleaded very economically. It was submitted that annexure E to the Statement of Claim made it clear what was relied upon. However, it was reaffirmed that the Cargill Parties' position was that the words were not said and that the statement in question arose by way of implication.

1279 See par 884 above.

actually made expressly and thus the allegations as pleaded were not made out.

2156 For completeness, it was alleged in paragraph 17 of the Statement of Claim that it was represented during the Operations Call that construction of "sufficient" storage in Sydney was underway. The admission in the Defence reflected the agreed record, namely that 2 additional silos were being built, without acknowledging anything about its sufficiency. The Viterra Parties' closing submissions did not appear to make a separate point of this. However, in case a finding is necessary, the issue will be addressed. For the same reasons stated above, the pleaded case was that this representation was expressly stated, which it was not. Accordingly, what has been established on the pleaded case included that a statement was made during the Operations Call which made the reference to sufficiency of malt storage space, but it was confined to all of Joe White's plants other than Sydney.

2157 So there is no misunderstanding, it should be added that what is set out above does not amount to a finding that the representation in question was not made. Rather, it is a finding that the case as pleaded on this point has not been made out. The representation made as to all plants having sufficient malt storage, except Sydney, coupled with informing Cargill what was happening with Sydney and there being no suggestion that the additional storage would be insufficient, probably would have been understood to implicitly convey that the construction of additional malt storage underway would be sufficient for Joe White's requirements in Sydney. However, this was not the manner in which the case was pleaded and no application to amend the Statement of Claim was made in this regard.

2158 In my view, not much, if anything, turned on this minor point. In the context of the Due Diligence to assess (amongst other things) the viability of Joe White throughout its Australian operations, there was very little difference between a representation that all plants had sufficient malt storage except Sydney, where 2 additional silos were being built, and a representation that all plants had sufficient malt storage except Sydney, where construction of sufficient storage capacity was underway. Further, there was no suggestion during the Operations Call that Sydney's current storage

capabilities meant that customer specifications were not being met. On the contrary, further explanation was given as to how the Sydney plant was successfully operating in its then current condition.[1280]

2159 As to the *second* issue, although De Samblanx only wanted to speak to Youil, that was not what occurred. The Operations Call was coordinated by Glencore, through Merrill Lynch, so that Youil was not left to speak to De Samblanx alone.[1281]

2160 Both Hughes and Youil were employees of Viterra Ltd, being a Seller and the sole shareholder of Viterra Operations, which in turn was the sole shareholder of Viterra Malt (being the other 2 Sellers). There could be no dispute that Glencore was represented during the Operations Call by Merrill Lynch. Further, Hughes had been retained by Glencore and Viterra to assist in the sale of the "Viterra Malt" business.[1282]

2161 The Operations Call was part of the Due Diligence. In these circumstances, Hughes, who did nearly all the talking in response to Cargill's queries, was acting for Glencore and the Sellers. In these circumstances, the submission made by the Viterra Parties that Hughes' duties in July 2013 were "exclusively" in relation to the Joe White Business was inconsistent with Hughes' position, and ignored the ongoing role

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1280 Briefly dealing with the other matters raised by Youil, it was submitted that the allegation that representatives of Cargill asked how Joe White dealt with quality problems when they arose did not reflect the evidence or the admissions made by the Viterra Parties. While it was correct that the Viterra Parties did not admit the entirety of this allegation, the allegation referred to the substance of the subject matter of questions asked, the details of which were precisely particularised. Youil's counsel also focused on the summary of evidence in par 812 of the Cargill Parties' closing submissions, and contended that because nothing contained in that paragraph was misleading that that was fatal to Cargill Australia's claims based on the exchange during the Operations Call. However, that paragraph was only concerned with De Samblanx's evidence of what he could specifically recall. That evidence did not in any way diminish or alter the other evidence before the court, including the agreed record of what was said (which formed part of annexure E to the Acquisition Agreement), nor the scope of the admissions made by the Viterra Parties. Further submissions were made by Youil on the basis that the Cargill Parties had not confined themselves to the pleading, but it is unnecessary to address these in circumstances where this issue has been decided on the pleadings.

1281 See par 872 above.

1282 See par 1876 above. The Viterra Parties sought to distinguish the position of Viterra Operations and Viterra Ltd on the basis that the Operations Call was concerned with the Joe White Business and not the sale of property held by these 2 companies. On that basis, it was submitted that neither Viterra Operations nor Viterra Ltd had any interest or involvement in the Operations Call. As has already been noted, as employees of Viterra Ltd, both Hughes and Youil were acting on its behalf. Further, it was entirely artificial to seek to distinguish these 2 companies in this way when the sale was always to include the assets held by these 2 companies as part of the sale of the Joe White Business and no such effort to so distinguish them was made in the Information Memorandum, the Management Presentation Memorandum or the other presale documents or discussions.

Hughes played at the direction of Glencore in assisting with the sale. Further, although Youil was not subject to the same formal arrangements as Hughes in relation to his assistance with the sale process, his involvement in the Operations Call evidenced an arrangement or understanding that Youil would assist Glencore and Viterra with the sale in this regard. It was no part of his usual responsibilities as an employee of Viterra Ltd to be assisting in the sale of Joe White and could not sensibly be viewed as part of his usual responsibilities as a Joe White executive. De Samblanx's preference to speak to Youil alone, outside the Due Diligence regime had been thwarted and there was no ability for Youil to "stray" from Glencore's desired message by Youil giving his own personal uninhibited view on things.

2162 Furthermore, at the very least, Youil must have been acting for his employer, Viterra Ltd. Whether or not he acted for Glencore or the other Viterra companies was of little moment in circumstances where Hughes did nearly all of the talking. There was no statement identified which could be attributed to Youil alone. In closing submissions, Youil sought to emphasise this and pointed out that, beyond proving that Youil spoke for only 5 to 10 percent of the time,[1283] it was not established that Youil made any of the particular statements in the agreed record. However, this submission must be viewed in light of the fact that Youil helped to finalise the agreed record of what was said.[1284]

2163 In conclusion, as a matter of fact, each of the statements found to have been made during the Operations Call was made on behalf of Glencore and the Sellers.[1285] In any event, in relation to the Sellers this position reflected what the parties agreed in the Acquisition Agreement.[1286]

X.3 During the Commercial Call, did representatives of (a) Glencore and/or (b) Viterra say words to the effect pleaded in paragraph 18 of the Statement of

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1283 See par 873 above. De Samblanx gave evidence that he could hardly remember Youil saying anything.
1284 See issues 125-126 below, including in particular pars 4889-4890 below.
1285 The legal principles in relation to attribution are discussed below, particularly in issues 11 and 18.
1286 See pars 2178-2179 below in the context of discussing the Management Presentation and management presentations more generally.

Claim?

2164 On this issue, with respect to what was said during the Commercial Call, little more need be done than set out the terms of paragraph 18 of the Statement of Claim. During closing submissions, the Viterra Parties' senior counsel simply read out each of the subparagraphs and stated either the particular allegation was true or it would be interesting to see why it was said it was false.[1287]

2165 Paragraph 18 alleged that during the Commercial Call Glencore or Viterra, or both, stated in substance:

(1) Although there was a shortfall in profits for the then-current financial year, Joe White was currently seeing conditions return to normal, partly due to a good Australian barley crop.

(2) A factor supporting Joe White's earnings base was its high-quality malt.

(3) Joe White had always managed to secure the right amount of barley, even during times of drought.

(4) Joe White also had a good record of communicating with customers.

(Collectively, "the Commercial Call Statements".)

2166 The only issue which remained in dispute was whether what was said by Hughes was said on behalf of the Viterra Parties.

2167 For the reasons set out in response to issues concerning the Operations Call,[1288] Hughes was acting for Glencore and the Sellers in making these statements during the course of the Commercial Call.

X.4 During the Management Presentation, did representatives of Viterra on behalf of (a) Glencore and/or (b) Viterra say words to the effect pleaded in paragraph 18A of the Statement of Claim, and did the Management

1287 The Viterra Parties' written submissions in substance also accepted the allegations.
1288 See pars 2159-2163 above.

Presentation Memorandum contain the Management Presentation Memorandum Disclaimers pleaded in paragraph 29B of the Viterra Defence?

X.4.1 Were the statements as pleaded made during the Management Presentation?

2168 It was admitted that all but 1 of the statements pleaded in the Statement of Claim were made during the delivery of the Management Presentation; the admitted statements were reflected in the Management Presentation Memorandum.[1289] They were:

(1) Joe White's business model was focused on ensuring customers received the highest quality malt to meet their exact specifications and requirements.

(2) Joe White had a top-down approach to understand each customer's unique requirements.

(3) In relation to procurement, Joe White selected and had access to high-quality barley that best met customer specifications.

(4) Joe White had best-in-class manufacturing facilities producing consistently high quality malt.

(5) Quality and technical capabilities underpinned each operating function within Joe White.

(6) Joe White had an ability to retain customers who had established long-term relationships, due in part to having high quality product.

(7) Joe White had a stable, high-quality barley supply.

(8) Joe White had an active barley research and development program in place with the University of Adelaide and closely collaborated with customers, barley breeders and researchers to enhance the research and

1289 See pars 711-734 above.

development effort, with specific programs completed for 9 of Joe White's top 10 customers since 2006.

(9) In relation to capital expenditure, Joe White had low future capital needs in the short to medium term.

(10) Joe White had a reputation for production uniformity, consistency and ability to meet exact specifications.

(11) In relation to risk management: (a) Joe White maintained a disciplined approach to minimising operational, business and financial risks whilst securing quality malting barley to allow full plant operation over the medium term; and (b) in relation to exposure to the operational risk of being unable to source barley of the correct variety, quality and specification, the risk management disciplines were barley sampling (on delivery and in storage), self-insurance and contract terms.

(12) Whilst Joe White had limited storage capacity, Joe White managed its customers well, and there were no real quality issues.

(Collectively, "the Management Presentation Statements".)

2169 The final of these statements,[1290] which remained in dispute, was alleged to have been said by Hughes. This statement was not included in the agreed record of the questions and answers, which became annexure D to the Acquisition Agreement. Reflecting the form in which it was drafted before being agreed upon, annexure D stated "[w]e request that you review this document and confirm that the messages conveyed are consistent with your understanding of the meeting". This duly occurred. However, as annexure D was expressed to be a summary, which "contain[ed] the key themes/concepts that were articulated", the absence of the statement in question did not indicate that it was not made.

1290 See par 737 above.

2170 Eden gave evidence that he believed the question as formulated with respect to limited storage capacity was asked,[1291] and that on this subject, in essence, Hughes had said that "on the barley side they had limited storage but they had upcountry storage arrangements to handle a just-in-time delivery of barley". De Samblanx gave evidence that Hughes made the statement in response to his own question about low silo capacity.[1292] His evidence on this point was not challenged, including by Hughes' senior counsel who cross-examined De Samblanx.

2171 The evidence of De Samblanx should be accepted. He was a credible and generally reliable witness. He was asked many questions throughout his cross-examination about what he could recall of various discussions back in 2013 and was discerning and careful in confining his answers to the substance of what he could recall. Although the versions of Hughes' answer given by Eden and De Samblanx were different, Eden stated he could only recall "the essence" of the answer and his evidence was not inconsistent with the substance of the statement described by De Samblanx; that is, that the limited storage was managed so that it did not cause any real quality issues.

2172 It follows that it has been established that each of the representations alleged by Cargill Australia to have been part of the Management Presentation was made.

X.4.2 Were the statements pleaded made by a representative of Viterra on behalf of Glencore and/or Viterra?

2173 The extraordinary lengths to which the Viterra Parties had to go in order to submit that Hughes was not acting or making any representations on their behalf during the selling process was apparent from their submissions on this point.

2174 Significantly, those submissions did not refer to what was stated in the Management Presentation Memorandum about by whom the document was prepared, namely Glencore and its subsidiaries (which included each of the Sellers), or the fact that Hughes and Argent each fell within the definition of "Discloser".[1293] They did not

1291 See par 736 above.
1292 See par 737 above.
1293 See pars 475, 711 above.

refer to the fact that both Hughes and Argent were required by Glencore to attend rehearsals before giving the Management Presentation, or the evidence of King that such rehearsals were to ensure Hughes and Argent were familiar with the key messages they were required by Glencore to deliver.[1294] Further, no reference was made to King's evidence that Glencore, including Merrill Lynch, checked with management to ascertain whether the type of message being conveyed was what Glencore wanted from its perspective. Furthermore, the significance of King's evidence that he gave advice to Hughes about how he might modify the presentation and improve the message was not addressed.[1295] Equally, no reference was made to Hughes' understanding that he was not to stray from the approved message on this or other occasions and, with the agreement of Merrill Lynch (conducting the sale process on behalf of Glencore), that Hughes should ensure others did likewise.[1296] Moreover, no mention was made in their submissions on this issue of the fact that both Hughes and Argent had been incentivised by Glencore and Viterra to assist in the sale of Joe White on the basis of a successful divestment.[1297] Notably, it was the incentivised Joe White management who were asked to give the Management Presentation, and no one else.

2175 The Viterra Parties submitted that the very nature and purpose of the Management Presentation was to provide Cargill with an opportunity to obtain information from and ask questions of Joe White's management. It was submitted the Viterra Parties could not have substituted Hughes and Argent with any other "non-Joe White persons" as their role as representatives of Joe White was the essential reason they gave the presentation. It was further submitted, without reference to any evidence, that Cargill knew Hughes and Argent were representing Joe White *and not the Viterra Parties*.[1298] In addition, it was contended that, as the Management Presentation was

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1294 See pars 696-700 above. See also par 1876 above concerning Hughes' assistance being "require[d]".

1295 Ibid.

1296 See par 872 above.

1297 See pars 366-367, 373, 1876 above.

1298 Whilst there was no question that Cargill knew Hughes and Argent were part of the senior management of Joe White and were there to give a presentation because they held those positions, it did not follow that they also knew Hughes and Argent were giving the Management Presentation exclusively

directed at the operations of the Joe White Business, Viterra Operations and Viterra Ltd had no interest or involvement in the presentation.

2176 The Viterra Parties' submissions must be rejected. On the face of the cover page of the document, the Management Presentation Memorandum was being put forward by Glencore (defined to mean Glencore and its subsidiaries) and Merrill Lynch.[1299] On the first page of the Management Presentation Memorandum itself it was expressly stated the document had been prepared by Glencore (again, meaning Glencore and its subsidiaries) to provide background information to assist in the decision as to whether to purchase Joe White. Further, much of the Management Presentation involved Hughes, and to a much lesser extent Argent, delivering the messages contained in the Management Presentation Memorandum. It was irrefutable that, in doing so, Hughes and Argent were making representations authorised by Glencore, as part of the selling process, which contained the messages Glencore wanted delivered.

2177 The fact that each of Hughes and Argent were Joe White executives, and were in attendance by reason that they held those positions, did not somehow exclude them acting for the Viterra Parties. In short, the submissions of the Viterra Parties emphasising the fact that Hughes and Argent were Joe White executives were not to the point.[1300]

2178 Furthermore, the conclusion reached on this point was supported by what the parties agreed on 4 August 2013. The agreed record of this presentation, being annexure D to the Acquisition Agreement, was expressly referred to in schedule 8 and recorded the fact that the Management Presentation had been "conducted by Representatives

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connected with their position as officers of Joe White and not on behalf of the Viterra Parties: see pars 2177-2180 below. In any event, if any belief was held by any representative of Cargill (there was no evidence of any Cargill witness that a belief was held that Hughes or Argent were in attendance as Joe White management only, to the exclusion of them acting in the sale process on behalf of the Viterra Parties), then such a belief would have been entirely misplaced.

1299 The cover page consisted of some photos with the words "Joe White Maltings Management Presentation June 2013" and next to that a visual design which might be described as Joe White's coat of arms. The only other information contained on the cover page was the words below this, being "Glencore" and "Merrill Lynch" together with Merrill Lynch's corporate symbol.

1300 See par 402 above.

of the Seller".[1301] In this regard, it was agreed that what had been represented on behalf of the Seller was not confined to what was contained in annexure D; rather it incorporated all management presentations, including what was set out in annexure D.[1302] In other words, in schedule 8 identifying of what the Disclosure Material consisted, the agreed position was that "management presentations", not just the Management Presentation, were conducted by Representatives of the Seller.[1303] Similar to the position with annexure D, the management presentations were specified to have included "to the extent identified in any written summary of those management presentations prepared by the Representatives of the Seller". As set out above,[1304] the written summaries in the Acquisition Agreement included summaries for the Operations Call, the Commercial Call and the Barley Inventory Call.

2179 While dealing with schedule 8 of the Acquisition Agreement, the fact that it identified other matters and information that fell within the meaning of Disclosure Material should be referred to. Disclosure Material also included all written information and data provided or communicated as part of or during the site visits,[1305] "including to the extent identified in any written summary of these site visits *prepared by Representatives of the Seller*" (emphasis added). Equally, the description included "any formal or informal information request process *conducted by or on behalf of the Seller* in conjunction with the review by the Buyer of the Data Room Documentation (*including*

1301 Schedule 8, (d)(i) of the Acquisition Agreement. It was not clear which Seller was being referred to in this clause, but nothing turned on this: see the definition of Seller and Sellers in par 1022 above. If it had been intended in this clause to confine Seller in the context to a particular Seller, then no doubt "Share Seller" (for Viterra Malt), "Land Seller" (for Viterra Operations) or "Dom Box Seller" (for Viterra Ltd) would have been inserted.

1302 For completeness, for the purposes of defining Disclosure Material the information or data provided or communicated had to be in writing.

1303 In relation to the Management Presentation, this must have included a reference to Hughes and Argent as the Representatives as both of them spoke to the Management Presentation Memorandum and what was stated by them was included in a written summary. Although in attendance, and also making representations on behalf of the Viterra Parties (see par 709 above), the fact that Merrill Lynch performed that role did not relevantly affect the proper characterisation of Hughes and Argent as persons acting on behalf of the Viterra Parties. The position was the same with respect to the other "management presentations" that were the subject of written summaries included in the Acquisition Agreement.

1304 See pars 884, 910, 924 above.

1305 See pars 641, 744 above.

the information set out in Annexure E)" (emphasis added).[1306] Presumably by reason of oversight, the Viterra Parties did not address any of these matters in contending the pleaded statements were not made on behalf of Viterra (or Glencore). Nevertheless, the wording in the Acquisition Agreement reflected the clear understanding and agreement that the information being disclosed was being provided as part of the sale process of the "Seller". This position confirmed what was apparent from the sale process and documentation itself, for the reasons already stated.[1307]

2180 Returning to the Management Presentation, the fact that something said during the Management Presentation was not in the Management Presentation Memorandum or was not subsequently reduced to writing did not alter the capacity in which Hughes and Argent were acting at the time they made statements as part of the Management Presentation. Both of them were duly authorised by the Viterra Parties to present the Joe White Business in positive terms and in the manner that had been rehearsed under the supervision of Glencore and Merrill Lynch.[1308] The possibility that they may have gone off-script to some extent in presenting the Joe White Business that was for sale (though, Hughes' statement in response to the question about silo capacity was entirely consistent with the positive message King wanted to be conveyed) did not mean that they would then somehow not be acting for the Viterra Parties and would be acting solely for Joe White.[1309]

2181 The various terms relating to the "Discloser", including the acknowledgement in the legal disclaimer to the effect that no person had been authorised to give any information concerning the Joe White Business other than what was contained in the Management Presentation Memorandum, and if given could not be relied upon as having been authorised by the "Discloser", did not change the position. Primarily,

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1306 Annexure E concerned questions and answers from various discussions including those at the finance meeting on 5 July 2013 (see par 832 above), the Operations Call (see par 865 above), the Commercial Call (see par 910 above) and the Barley Inventory Call: see par 924 above. Further, this contemplated position existed before any of these calls took place as it was so provided in the draft acquisition agreement forwarded to Cargill on or about 14 July 2013: see fn 612 above.

1307 See pars 475-483, 711 above.

1308 See par 699-700 above.

1309 See par 3088 below.

this was because both Hughes and Argent fell within the definition of Discloser as that term was defined in the Management Presentation Memorandum. Each of them were persons involved in the preparation of the document as well as being officers or employees of Glencore's "affiliates or subsidiaries".[1310] Further, the very premise of the Management Presentation was that senior Viterra Ltd executives, Hughes and Argent (who had been retained to assist with the sale), had been expressly authorised by the Viterra Parties to attend the Management Presentation and to discuss the Joe White Business with prospective purchasers in the presence of the Viterra Parties' representative, Merrill Lynch.

2182 Although not part of the reasoning for the conclusion expressed in the previous paragraph, for completeness, it should be noted that there was no opportunity for the Cargill employees in attendance on 26 June 2013 to read the Management Presentation Memorandum Disclaimers before the Management Presentation itself.

2183 Finally, on the issue of the additional statement made by Hughes, the Viterra Parties submitted that there was no request by Cargill to include this additional statement in annexure D, and that it followed that Cargill knew Hughes was not representing the Viterra Parties in making the statement. Why this followed was not explained. Perhaps it was a reference to the fact that if it was not in writing, it would not form part of the Disclosure Material for the purposes of schedule 8.[1311] In any event, any omission of a particular statement in a document that on its face was not purporting to be exhaustive was in no way indicative of Cargill's state of mind with respect to authority at that time.

2184 In making these findings, it must follow that the submission that Viterra Operations and Viterra Ltd had no interest or involvement in the Management Presentation is also rejected. Not only did the introductory words "Glencore and its subsidiaries" in the Management Presentation Memorandum include these companies as being

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1310 This definition of Discloser also included Merrill Lynch who was present throughout the Management Presentation. See further par 2670 below.

1311 See also cll 13.1 and 13.4 of the Acquisition Agreement.

involved in the preparation of the document as well as the preparation and provision of background information to assist in a prospective purchaser deciding whether to purchase the Joe White Business,[1312] but each of these companies was 1 of the proposed Sellers.[1313] In these circumstances, the submission that these 2 companies had no interest or involvement was without substance; even more so given it was Viterra Ltd's employees, Hughes and Argent, who were making the Management Presentation.

2185 The Management Presentation Memorandum was included in the Data Room and therefore formed part of the Data Room Documentation for the purposes of the Acquisition Agreement. The Viterra Parties acknowledged the Management Presentation Memorandum was subsequently incorporated into the Warranties and formed part of the Acquisition Agreement "for the purposes provided for in the [Acquisition Agreement] but not otherwise". Naturally, the fact that the document was incorporated into the Acquisition Agreement on a particular basis did not alter what had occurred before, nor the fact that its contents were proffered by "Glencore and its subsidiaries".

X.4.3 Did the Management Presentation contain the Management Presentation Memorandum Disclaimers pleaded in paragraph 29B of the Defence?

2186 It was agreed that the Management Presentation Memorandum contained the disclaimers as pleaded ("the Management Presentation Memorandum Disclaimers").[1314] It is unnecessary to set them out here, as in substance they repeated the Information Memorandum Disclaimers.[1315]

1312 Also the definition of "Discloser" in the Management Presentation Memorandum reflected what was contained in the Information Memorandum: see par 475 above, under the heading "Recipient to Conduct own Investigation and Analysis".

1313 See also fn 1301 above.

1314 See par 2147 above. See also pars 475, 711-714 above.

1315 See par 2147 above. The Management Presentation Memorandum Disclaimers covered: (1) each of the matters set out at par 2145(1)-(20) above by reference to the Management Presentation Memorandum rather than the Information Memorandum, except that: (a) in relation to the statement at par 2145(3), the disclaimer was said to apply both to the document and the presentation of it, (b) in relation to the statement at par 2145(4), the confidentiality undertaking applied both to the document and the

X.5 Did the Confidentiality Deed contain the confidentiality deed terms pleaded at paragraph 18 of the Defence, and the further terms referred to in paragraph 18 of the Reply, and did the confidentiality deed terms apply to Cargill, Inc and Cargill Australia prior to the provision to Cargill, Inc of the Phase 1 Process Letter and the Information Memorandum?

2187 The *first* issue is not contentious. As agreed by the parties, the Confidentiality Deed contained the terms as pleaded both in the Defence and in Cargill Australia's reply to the Defence ("the Reply").[1316] Those terms comprised various definitions and clauses within the Confidentiality Deed ("the Confidentiality Deed Terms").[1317]

2188 As to the *second* issue, the Cargill Parties contended that the terms of the Confidentiality Deed did not apply to Cargill until 27 May 2013, when the final form of the Confidentiality Deed was executed by Glencore.[1318] The Viterra Parties on the other hand submitted that the Confidentiality Deed was binding on Cargill from 13 May 2013, before the Phase 1 Process Letter and the Information Memorandum were provided to Cargill.[1319]

2189 The issue is straightforward. For the reasons that follow, Cargill, Inc was bound by the terms of the Confidentiality Deed as originally executed and it did not matter that the Confidentiality Deed of 13 May 2013 was not countersigned by Glencore.

2190 The Confidentiality Deed executed by Cargill, Inc on 13 May 2013 became contractually binding, at the very latest, when Glencore (through Merrill Lynch)

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presentation, (c) in relation to the statement at par 2145(7), it was provided that the Recipient must make, and will be taken to have made, its own independent investigation and analysis of the information in the document and the presentation of it; (2) the information contained in the document had been prepared as at 21 June 2013; (3) the Discloser makes no representation or warranty that the information contained in the document remained correct at, or at any time after, 21 June 2013; and (4) the Discloser is under no obligation to update the document or to correct any inaccuracies contained in the document at any time after 21 June 2013.

1316 See pars 585-590 above.

1317 The provisions pleaded were: (1) the definitions of Approved Purpose, Confidential Information, Information, Loss, Representative and Transaction (see pars 586, 588 above); (2) clauses 2.1, 2.2, 3.1(b), 3.2, 3.3, 8.1(a)-(e), 8.2, 8.3, 9.3(b), 10.1, 10.2, 10.3, 10.4, 11: see par 590 above.

1318 See pars 584-585 above.

1319 In closing submissions, the Viterra Parties also referred to Cargill being estopped from denying the operation of the Confidentiality Deed, but as this was not pleaded it will not be considered.

provided the Information Memorandum to Cargill, Inc by email later on 13 May 2013 and Cargill, Inc agreed to accept it.[1320]

2191 Although not strictly necessary,[1321] adopting the lens of offer and acceptance,[1322] the execution of the Confidentiality Deed by Cargill, Inc was an offer, which Glencore accepted by either agreeing to furnish or by in fact furnishing Cargill, Inc with the Information Memorandum. As consideration for Cargill, Inc's promise to perform the obligations set out in the Confidentiality Deed, Glencore agreed to provide and provided the Information Memorandum. Given the commercial context including the terms of the Confidentiality Deed itself, an intention to create legal relations existed. On the basis of the above, the elements of contract formation were satisfied on 13 May 2013 and Cargill, Inc was bound by the Confidentiality Deed from this point. The position was affirmed by Cargill, Inc accepting the Information Memorandum on the terms specified by Glencore in the Phase 1 Process Letter (including that the terms of the Confidentiality Deed applied).[1323]

2192 In any case, the Confidentiality Deed was patently a deed, on the basis of its form, substance and objects as a whole,[1324] and thus binding;[1325] irrespective of Glencore failing to countersign. There were several contextual indications that manifestly proved the parties' intention that the instrument be executed as a deed. These included:[1326] (1) the instrument was entitled "Confidentiality Deed"; (2) the word

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1320 Although the Phase 1 Process Letter accompanying the Information Memorandum, addressed to Hawthorne and sent via email, was dated 14 May 2013, the documents were first provided to Hawthorne on the evening of 13 May 2013 (no doubt the difference being explained by the different time zones).

1321 See, for example, *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 177-179 [74]-[81], 181 [85] (Heydon JA); 196-197 [171]-[175] (Ipp AJA, with whom Mason P agreed).

1322 See generally *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523 (Kirby P, Samuels and McHugh JJA); *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

1323 See par 469 above.

1324 *Comptroller of Stamps (Vic) v Associated Broadcasting Services Ltd* (1988) 19 ATR 1401, 1403.6-1404.4 (Murphy J, with whom Gobbo and Southwell JJ agreed).

1325 See *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Bros* [1977] 2 NSWLR 109, 118D (Helsham CJ); *Federal Commissioner of Taxation v Taylor* (1929) 42 CLR 80, 87.03 (Rich, Starke and Dixon JJ).

1326 See, for example, *Twenty Ninth Macorp Nominees Pty Ltd v George* [2017] VSC 136, [236] (Almond J); Nom de Plume Nominees Pty Ltd v Fingal Developments Pty Ltd (2016) 337 ALR 303, 320-323 [73]-[86] (McLeish JA, with whom Tate JA and Ginnane AJA agreed) and the cases referred to therein; 400

"deed" appeared consistently throughout the instrument; (3) the execution block for Cargill, Inc was drafted on the basis that the instrument was a deed, applying the phraseology "signed, sealed and delivered"; and (4) the instrument included the phrase "executed as a deed".

2193 Regardless of whether the basis on which the Confidentiality Deed was binding was as an executory contract or as a deed, Glencore and Cargill, Inc's subsequent conduct was consistent with both operating on the basis that Cargill, Inc was bound by the Confidentiality Deed executed on 13 May 2013.[1327] In addition to the matters set out above, this can be inferred on the basis of the following.

2194 *First*, during the negotiations for the Confidentiality Deed, it was clear that the Information Memorandum would only be provided once the Confidentiality Deed was settled, executed by Cargill, Inc and returned to Glencore. This was understood by Cargill from the outset.[1328] *Secondly*, the Information Memorandum disclaimer contained a statement that the document was "subject to the terms of a confidentiality undertaking".[1329] Cargill, Inc took no exception to this. *Thirdly,* when Merrill Lynch emailed the Phase 1 Process Letter and Information Memorandum to Hawthorne on 13 May 2013, the email stated "[t]hank you … for executing the Confidentiality Deed", which statement was also reiterated within the Phase 1 Process Letter.[1330] *Fourthly,* the Phase 1 Process Letter expressed that the Information Memorandum "represents Confidential Information as defined in the Confidentiality Deed".[1331] *Fifthly,* when Hawthorne circulated the Information Memorandum by email to, amongst others, Eden, Sagaert, Jewison and Engle, Hawthorne expressly stated that the information

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George Street (Qld) Pty Ltd v BG International Ltd [2012] 2 Qd R 302, 316 [32]-[34] (Muir JA); *Comptroller of Stamps (Vic) v Associated Broadcasting Services Ltd* (1988) 19 ATR 1401, 1403.6 (Murphy J, with whom Gobbo and Southwell JJ agreed). See also *Corporations Act*, s 127(3).

1327 Subsequent conduct may be considered in determining whether or not a contract existed: cf *Regreen Asset Holdings Pty Ltd v Castricum Brothers Australia Pty Ltd* [2015] VSCA 286, [134] (Warren CJ, Kyrou and McLeish JJA), citing *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 163-164 [25] (Heydon JA).

1328 See par 454 above.

1329 See par 475 above.

1330 See par 462 above.

1331 Ibid.

was subject to strict confidentiality provisions pursuant to a "Non-Disclosure Agreement executed by Cargill, [Inc]".[1332]

2195 For the reasons discussed above, Cargill, Inc was bound by the Confidentiality Deed from 13 May 2013. To the extent that the Confidentiality Deed applied to Cargill Australia, it was also bound from 13 May 2013.[1333]

X.6 Did the Phase 1 Process Letter contain the Phase 1 Process Letter statements as pleaded at paragraph 12 of the Defence?

2196 Yes. It was conceded by the Cargill Parties that the Phase 1 Process Letter contained the 7 statements as pleaded at paragraph 12 of the Defence ("Phase 1 Process Letter Statements").[1334]

X.7 Did the Phase 2 Process Letter contain the Phase 2 Process Letter statements as pleaded at paragraph 25 of the Defence, and the further statements in paragraph 25 of the Reply?

2197 Yes. It was conceded by the Cargill Parties that the Phase 2 Process Letter contained the statements as pleaded at paragraph 25 of the Defence ("the Phase 2 Process Letter Statements").[1335] It also contained the statements pleaded in paragraph 25 of the

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1332 See par 471 above.

1333 The enforceability of the Confidentiality Deed against Cargill Australia is dealt with in issue 85 below. Pursuant to the terms of the Confidentiality Deed, employees of Cargill Australia who were given access to the Information Memorandum before 27 May 2013 were bound by its terms in any event: see cll 3.1(b), 3.2(a), 3.3, par 590 above. The evidence demonstrated that Cargill, Inc ensured employees were made aware of the Confidentiality Deed before any Confidential Information was disseminated.

1334 The 7 statements as pleaded were: (1) thank you for executing the Confidentiality Deed; (2) the Information Memorandum is being provided pursuant to the terms outlined in the Information Memorandum and represents Confidential Information as defined in the Confidentiality Deed; (3) on the basis of indicative bids received, Glencore intends to select a short list of parties who will be invited to participate in Phase 2 of the proposed transaction, which will include access to a virtual data room and discussions with Joe White management; (4) Glencore has a strong preference that your indicative bid be expressed as a single number and if a range of values is provided it will be assumed that your indicative bid is at the low end of that range; (5) Glencore and Merrill Lynch reserve the right, in their absolute discretion, at any stage during the proposed transaction, to restrict any party's access to Confidential Information or management (particularly with regard to commercial sensitivities); (6) you are required to make and rely on your own investigations and satisfy yourself in relation to all aspects of the proposed transaction; and (7) the existence and contents of the Phase 1 Process Letter in all discussions, communications and information relating to the proposed transaction are Confidential Information which is subject to the terms and conditions of the Confidentiality Deed.

1335 The pleaded statements were as follows: (1) in order to assist you in making your final bid, the Phase 2

Reply.[1336]

X.8 Was Cargill, Inc and its Representatives' access to the Data Room documentation (as defined in paragraph 26(a) of the Defence)[1337] pursuant to, and subject to, the Data Room Protocol and did the Data Room Protocol contain the terms pleaded in paragraph 26B of the Defence?

2198 As conceded by the Cargill Parties, Cargill's access to the Data Room "was *pursuant* and *subject to* the Project Ballarat Data Room Protocol dated 17 June 2013" (emphasis added). The terms set out in paragraph 26B of the Viterra Parties' Defence replicated clauses 1, 2.1, 2.3, 2.7, 3, 7(f), 8.1(a), 8.2 and 8.3 of the Data Room Protocol ("the Data Room Protocol Terms").[1338] This was also conceded by the Cargill Parties.

X.9 Is it the fact that:

(1) Any laboratory test measurement of the properties of material such as malt is necessarily subject to error and uncertainty?

(2) The main causes of such error and uncertainty are:
(a) inherent limitations on the precision of the testing equipment and testing procedures;
(b) random effects, including natural variability of the material;
(c) sampling effects; and
(d) systematic/recovery bias errors?

(3) As a result, any laboratory test measurement is only an estimate/approximation of the true value of the measurand (i.e. the physical/chemical property being measured), and merely implies a

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process will include (a) access to a data room and a Q&A process, (b) a management presentation, (c) site tours of Joe White's export super sites in Sydney, Adelaide and Perth, (d) the provision of a draft share purchase agreement; (2) we remind you that all information in Phase 2, including but not limited to the management presentation and data room documents, is subject to the Confidentiality Deed; (3) Glencore and Merrill Lynch reserve the right, in their absolute discretion, to conduct the process in a manner consistent with section 4 of the Phase 1 Process Letter; (4) you are required to make and rely on your own investigations and satisfy yourself in relation to all aspects of the proposed transaction; (5) you are reminded of your obligations under the Confidentiality Deed; and (6) we remind you that all information provided during the site visits is subject to the Confidentiality Deed.

1336 See pars 639-644 above.

1337 The definition in the Defence did not replicate the definition of Data Room Documentation in the Acquisition Agreement (see par 1022 above), but was simply defined as information and documents in an online data room established for the purposes of the Proposed Transaction, to which Cargill, Inc and its Representatives had access from about 14 June 2013. This description largely (but not completely) amounted to an admission of Cargill Australia's allegation in the Statement of Claim, which contained a definition of Data Room Documentation which was also slightly different to the definition in the Acquisition Agreement.

1338 Together with certain definitions contained in cl 9.3 and cll 1.1, 1.5, 2(a), 2(c), 5 and 9 of Schedule 2: see pars 650, 658 above.

range of values which can reasonably be attributed to the measurand, such that the true value of the measurand cannot be determined?

(4) Accordingly, the supplier/producer must seek to ensure that any particular laboratory test measurement best takes into account all of the known effects of error and uncertainty including by the application of the subjective experience or expertise of the laboratory professionals conducting the measurements?

(5) Recognising the matters set out in (3) and (4) above, a supplier/producer's process for determining whether or not a product complied with contractual specifications such that it can be released to its customer, can include a set of decision-making rules or policies ("a decision rule")?

(6) Uncertainty in laboratory test measurement can be addressed by the application of subjective experience/expertise of a suitably qualified person?

(7) A decision rule can take into account:
- **(a) inherent limitations on the precision of testing equipment and testing procedures; and**
- **(b) random effects, including natural variability of the material, by reference to industry accepted objective quantification of the magnitude of such uncertainty?**

(8) One such objective quantification accepted within the commercial malting industry and the brewing industry is that derived from continuing (corroborative) programs such as the American Society of Brewing Chemists Laboratory Proficiency Testing Scheme and the Maltsters of Great Britain Malt Analytes Proficiency Testing Scheme to incorporate a tolerance of 2 standard deviations to the measurement of measurands in respect of malt?

(9) The Viterra Certificate of Analysis Procedure is an example of a decision rule?

X.9.1 Background

2199 This issue for determination reflected the form of paragraph 30(e) of the Defence. Paragraph 30(e) was part of the response to a key allegation made by Cargill Australia; namely, that the Viterra Parties failed to disclose the existence of the Undisclosed Matters, including the Viterra Practices and Policies, before the Acquisition Agreement was entered into, and again failed to disclose the Undisclosed Matters to Cargill Australia prior to the Acquisition.[1339] By paragraph 30(e), it was contended that the Viterra Certificate of Analysis Procedure, which recorded and governed 1 of

[1339] See pars 36-44, 1851 above. The Viterra Parties' response to that allegation evolved in significant respects over the course of the proceeding: see *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 22)* [2019] VSC 351, [10]-[14]. See also par 45 above.

the Operational Practices, namely the Reporting Practice, was a permissible and scientifically-justifiable "decision rule" designed to take into account error and uncertainty inherent in chemical testing.[1340] If that was so, it was further contended, the Reporting Practice need not have been disclosed to Cargill as part of the sale process.

2200 Paragraph 30(e) was introduced very late in the proceeding. The background to its introduction may be briefly stated as follows.[1341] On 20 May 2019, some 11 months after the trial commenced, and shortly after the evidence had apparently concluded, the Viterra Parties sought leave to file and serve: (1) a proposed amended defence, which contained, amongst other proposed paragraphs, paragraph 30(e); and (2) an expert report on matters relevant to the proposed paragraphs.

2201 Ultimately, leave was granted to file and serve:

(1) The Defence, which introduced only paragraph 30(e).[1342]

(2) A limited version of an expert report ("the Hibbert Report") of Professor David Brynn Hibbert ("Hibbert"), an emeritus professor in analytical chemistry, on the basis that Hibbert be made available for cross-examination.[1343]

2202 The Defence and the Hibbert Report were filed and served on 22 May 2019. Hibbert gave evidence on 14 June 2019.[1344]

X.9.2 Hibbert's qualifications and approach

1340 *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 22)* [2019] VSC 351, [14].

1341 The background to the introduction of paragraph 30(e) is covered extensively in *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 22)* [2019] VSC 351, [15]-[36], [51], [66].

1342 Leave was refused in respect of sub-paragraphs (f) and (g) of paragraph 30: *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 22)* [2019] VSC 351, [61]-[65].

1343 Ibid, [2], [68]. Leave was only sought on a limited version of the Hibbert Report, excluding Hibbert's answer to a question relating specifically to the Viterra Certificate of Analysis Procedure. However, Hibbert's opinion on the Viterra Certificate of Analysis Procedure was ultimately elicited in cross-examination: see par 2230 below and see *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 22)* [2019] VSC 351, [35], [40]; *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 24)* [2019] VSC 438, [27].

1344 This delay was to allow sufficient time for the Cargill Parties to consider whether they wanted to file any expert report in response and to prepare for cross-examination.

2203 Appropriately, Hibbert's expertise and opinions were not substantively challenged by the Cargill Parties. Hibbert is an eminent chemist with special expertise in, relevantly, analytical chemistry, the chemical analyses of substances, and the uncertainty of quantitative chemical measurement results. He is presently a professor emeritus of analytical chemistry at the University of New South Wales, where, from 1987 to 2013, he held the chair of analytical chemistry. He is a fellow of the Royal Australian Chemical Institute and the Royal Society of Chemistry, amongst other professional bodies. He is also the author of several hundred refereed articles, including articles on topics directly relevant to the present issue, some of which were referred to in the Hibbert Report.

2204 Hibbert was a credible, reliable and truly independent expert witness, who gave thoughtful and helpful evidence to the best of his ability. In particular, Hibbert was careful to keep his evidence confined to those areas in which he had relevant expertise.[1345]

X.9.3 The key matters in issue

2205 Given that Hibbert's opinions and expertise were not substantively challenged, the real dispute between the parties related to the *application* of Hibbert's opinions to the Viterra Certificate of Analysis Procedure during the relevant period.[1346]

2206 Specifically, the issue related to whether Hibbert's evidence established that the Viterra Certificate of Analysis Procedure was, in form and application, a permissible and scientifically justifiable, "decision rule".

2207 It is convenient to address that issue by responding, in sequence, to the following 3 questions:

(1) What is a "decision rule" and how is it utilised?

1345 On a number of occasions, he appropriately declined to opine on matters or respond to questions in ways that would have taken him outside his areas of expertise.

1346 As already noted, this was not addressed directly in the Hibbert Report as tendered, but was addressed extensively in his cross-examination: see *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 22)* [2019] VSC 351, [35], [40]; *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 24)* [2019] VSC 438, [27].

(2) What relevant standards should a scientifically-justifiable "decision rule", in form and application, satisfy?

(3) Did the Viterra Certificate of Analysis Procedure, in form and application, satisfy those standards?

X.9.3.1 Question 1: The definition of a Decision Rule and its application generally

2208 Hibbert's evidence, on this question, was substantially accepted.[1347] In simple terms, a decision rule is a tool used in assessing whether or not a product or material complies or does not comply with specifications ("a Decision Rule").

2209 The use of such a tool is necessitated by the existence of "measurement uncertainty". As Hibbert explained:

> For chemical or physical *measurements* (whether industry or commerce, or any other sphere) of *quantities* associated with material there is always uncertainty regarding the *true value* of a *measurand,* which by definition is unknowable.
>
> (Emphasis in original.)

2210 In other words, measuring a quantity associated with a material (that is, a "measurand")[1348] does not yield a *true* value, but rather yields a *measured* value, which is attended by a degree of uncertainty. Naturally, no matter how precise an instrument of measurement may be, there is necessarily uncertainty in at least the last figure of a result, whether rounded or unrounded.

2211 "Measurement uncertainty" arises from, amongst other factors: the finite resolution of a measurement instrument; the samples of material selected for measurement; and systematic error. The first 2 matters are self-explanatory. As for systematic error, it is a type of error which, in replicated measurements, remains constant or varies in a predictable manner. Systematic errors may be estimated,[1349] and a "correction", which compensates for the estimated systematic error, may be applied to the initial measured

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1347 Whether it was faithfully reflected in paragraph 30(e) of the Defence, however, was another matter: see pars 2253-2263 below.

1348 Hibbert defined a "measurand" as being the quantity of the thing being measured.

1349 An estimate of a systematic error is referred to as a "bias".

result ("Bias Correction Standard").[1350]

2212 As a result of "measurement uncertainty", deciding whether or not a measured quantity can be treated as complying with precise specification limits on the basis of a measured value involves a degree of risk. The adoption and application of a Decision Rule addresses that risk by prescribing how "measurement uncertainty" is to be taken into account in accepting or rejecting a product according to its specifications and measured value.

2213 A Decision Rule must account for 3 things:

(1) The measured quantity value.

(2) Measurement uncertainty.

(3) The specification limit(s).

In doing so, it must also account for the acceptable level of *probability* of making an incorrect decision; that is, a decision that a material is in compliance with a specification when the true value is outside the specification limit (known as a "false acceptance"), and a decision that a material is *not* in compliance with a specification when the true value is within specification limit (known as a "false rejection"). What is considered an acceptable level of probability will depend on the requirements of the Decision Rule applied and the context in which it is used, including especially the risks associated with making an incorrect decision.

2214 A Decision Rule operates by determining the location of "acceptance zones" and "rejection zones" in respect of a measured quantity and a specified measurement process. Those zones are set relative to the specification limit or limits. The magnitude of the offset from the specification limit to the boundary of the acceptance or rejection zone is described as the "guard band". Where a measured quantity value falls within

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1350 If a "correction" is made in respect of a systematic error, then the initial measurement result should be corrected, and the "uncertainty of the correction" incorporated into the overall "measurement uncertainty".

the range of values comprising the "acceptance zone", it is to be accepted as compliant; conversely, where a measured quantity value falls within the range of values comprising the "rejection zone", it is to be rejected as non-compliant.[1351]

2215 An example of a Decision Rule in relation to a measurand for which the specification limit is an *upper limit* may be given. In simple terms, it is to set the upper boundary of the "acceptance zone" as the value of the specification limit *plus* the value of expanded measurement uncertainty. Expanded measurement uncertainty, or expanded uncertainty, is a quantity representing the result of a measurement that may be expected to encompass a large fraction of the distribution of values that could reasonably be attributed to the measurand. Accordingly, in this example, any measured value equal to or less than the specification limit *plus* expanded measurement uncertainty falls within the "acceptance zone"; conversely, any measured value greater than the specification limit *plus* expanded measurement uncertainty falls within the "rejection zone".[1352]

2216 In addition to its role in assessing conformity with specifications, a Decision Rule is also relevant to reporting conformity with specifications to third parties. A reference to the Decision Rule or Decision Rules used is to be stated when reporting on the compliance of the product or material tested. As Hibbert put it, any Decision Rule should be "stated and … available to people who need to see it", including, for example, auditors of the testing laboratory.[1353] Being open and transparent about the process is necessary to *justify* the decisions ultimately taken. Indeed, the importance of openness and transparency in chemical analysis was an important and overriding theme in Hibbert's evidence.

X.9.3.2 Question 2: What standards should a scientifically-justifiable Decision Rule, in form and application, satisfy?

2217 For a particular Decision Rule to be scientifically justifiable, it is necessary that it satisfies certain standards. The following standards, which emerged in Hibbert's

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1351 See further par 2226 below.
1352 See further par 2227 below.
1353 In this regard, see pars 90, 226, 285-293, 542, 1533 and fn 808 above.

evidence, are presently relevant.

2218 Any Decision Rule must establish a rule or procedure which operates in a mandatory fashion. It must prescribe a procedure for assessing compliance with specifications which, once the rule has been established, leaves no room for discretion. Further, it must determine an "acceptance zone" and a "rejection zone", and mandate that: a measurement result falling within the "acceptance zone" results in the product or material being declared compliant; and a measurement result falling with the "rejection zone" results in the product or material being declared non-compliant ("the No Discretion Standard").

2219 For completeness, Hibbert gave evidence that the use of some subjective judgment in the chemical analysis and reporting process is to be expected, and may be permissible. This evidence should not be misunderstood. It did not provide any justification for a procedure which permits general, non-transparent and non-systematic decisions to be made with respect to compliance. This was so for a number of reasons.

2220 *First*, Hibbert's evidence related not to the form of a Decision Rule, but to laboratory practice in respect of matters not explicitly addressed in written standards and procedures. As such, it should not be understood to detract from the No Discretion Standard, which relates to both the form and application of a particular written procedure, that is, a Decision Rule.

2221 *Secondly*, that some subjective judgment may be permissible does not mean that there exists a general licence to use subjective judgment or discretion in chemical analysis. The permissible use of subjective judgment is strictly confined in scope: to "eventualities" for which written standard operating procedures do not give clear written guidance. Such eventualities should be few. Consistent with Hibbert's evidence, laboratories should strive for standard operating procedures which are as thorough and comprehensive as possible, and leave as little room for subjective judgment as possible, provided that they produce a measurement result that is fit for purpose. At a minimum, written procedures should contain any "important series of

steps", and such steps should be followed.

2222 *Thirdly*, that some subjective judgment may be permissible does not mean that there is a general licence to depart from the written standards or procedures. Any subjective judgment must be used *consistently* with any written procedures or standards.

2223 *Fourthly*, where subjective judgment is used, it must be recorded, so that any supervisor or auditor of the laboratory may adequately understand how the laboratory's processes have been implemented, how testing results were achieved, and why the subjective judgment was warranted.

2224 Returning to the relevant standards, Hibbert recommended that the estimate of measurement uncertainty for which a Decision Rule accounts should be an estimate of measurement uncertainty *assessed by a particular laboratory for a particular result*. Conversely, it should *not* be an estimate of measurement uncertainty assessed on the basis of a dispersion of results obtained by different laboratories. This was because measurement uncertainty is "a property of a measurement result", and "not a property over method or a global assembly of results".

2225 Best practice, Hibbert stated, is that a single laboratory assess measurement uncertainty in respect of *each* particular result. An acceptable, and less time-consuming approach, is that a single laboratory take an average uncertainty figure in respect of *that* laboratory's experience of measurement uncertainty. An unacceptable approach, however, would be to use an average uncertainty figure in respect of multiple laboratories' experience of measurement uncertainty. Hibbert gave evidence that he was aware of instances where "other people's experience" is taken in the "*hope* that they do it similarly enough to use the measurement uncertainty figure" (emphasis added).

2226 Hibbert endorsed recommendations contained in a guide entitled "Use of Uncertainty in Compliance Assessment" ("the Eurachem/International Guide") prepared by a

joint working group comprising members of Eurachem,[1354] a European association of chemist and chemical societies, and members of the Co-operation on International Traceability in Analytical Chemistry. Hibbert considered that the Eurachem/International Guide represented "sound practice" in the field of chemistry. Specifically, Hibbert endorsed 4 recommendations:

(1) In order to decide whether or not to accept or reject a product, given a result and its uncertainty, there should be:

(a) A specification giving the upper or lower permitted limits, or both, of the characteristics (measurands) being controlled.

(b) A Decision Rule that describes how the measurement uncertainty will be taken into account with regard to accepting or rejecting a product according to its specification and the result of a measurement.

(2) The Decision Rule should have a well-documented method of unambiguously determining the location of the acceptance and rejection zones, ideally stating or using the minimum acceptable level of the probability that the measurand lies within the specification limits. It should also give the procedure for dealing with repeated measurements and outliers.

(3) Utilising the Decision Rule, the size of the acceptance or rejection zones may be determined by means of appropriate guard bands. The size of the guard band is calculated from the value of the measurement uncertainty and the minimum acceptable level of the probability that the measurand lies within the specification limits.

(4) A reference to the Decision Rule used should be included when

1354 For some time, Eurachem has developed and published "particularly useful guides" concerning the practice of analytical chemistry and are highly regarded in that field.

reporting on compliance.

(Together, "the Eurachem/International Standards".)

2227 Further, Hibbert set out 4 criteria for best practice in respect of "conformity assessment" involving a Decision Rule.[1355] There is a degree of overlap between these criteria and the Eurachem/International Standards, in particular, the fourth Eurachem/International Standard. The 4 criteria require that any reported result must state:

(1) The measurand and compliance requirement.

(2) The measured quantity value and its standard uncertainty[1356] or expanded uncertainty;[1357] that is, the estimated measurement uncertainty.[1358]

(3) The Decision Rule to be applied.

(4) The result of applying the Decision Rule to the information.

(Collectively, "the Conformity Assessment Criteria".)

2228 Finally, in relation to a correction for systematic error, Hibbert stated that any bias correction would need to be made uniformly and consistently. His evidence was that it should be the same and applied in the same way to all the results, in other words, through the use of the Bias Correction Standard.

X.9.3.3 Question 3: Does the Viterra Certificate of Analysis Procedure, in form and application, satisfy those standards?

2229 Hibbert's evidence made it plain that, both in form and application, the Viterra Certificate of Analysis Procedure did not satisfy these relevant standards.

1355 A conformity assessment is an "activity to determine whether specified requirements relating to a product, process, system, person or body are fulfilled".

1356 "Standard uncertainty" is measurement uncertainty expressed as a standard deviation.

1357 "Expanded uncertainty" is the "product of a combined standard measurement uncertainty and a factor larger than the number 1".

1358 Hibbert said best practice would provide for a report giving the measured result, as well as the standard deviation or expanded uncertainty.

Accordingly, it is not an example of a scientifically-justifiable Decision Rule.

2230 For the sake of clarity, it is necessary to say something at the outset about Hibbert's originally stated opinion, that the Viterra Certificate of Analysis Procedure *was* an example of a Decision Rule. This initially formed part of the Hibbert Report, but was not the subject of the Viterra Parties' application for leave to file and serve the Hibbert Report out of time. Accordingly, neither this opinion nor the basis upon which it was made was initially before the court. However, during cross-examination, in commencing a line of questioning concerning what a Decision Rule encompassed, it was put to Hibbert he had expressed this opinion in "the part [of the Hibbert Report] that has been crossed out". Obviously, at least prima facie, this created an issue; as a result of this approach to the cross-examination, the court has before it an expert opinion without the evidence establishing how that opinion was formed or how it was based on specialised knowledge.[1359] However, in light of the evidence given by Hibbert on this point, this difficulty need not be addressed.

2231 At a general level, the real issue was not just whether or not the Viterra Certificate of Analysis Procedure was a "Decision Rule", but whether in form *and application*, it was a *scientifically-justifiable* Decision Rule.[1360] Further, Hibbert's opinion as expressed in the Hibbert Report as originally served was based only on the form of the Viterra Certificate of Analysis Procedure. That opinion was given without, for example, Hibbert having been shown:

(1) Any documents relating to the Malt Proficiency Scheme, which scheme was said to be the basis of adjustments made under the Viterra Certificate of Analysis Procedure.

(2) Any Certificate of Analysis generated under the Viterra Certificate of Analysis Procedure.

1359 See *Evidence Act*, s 79(1). There was no re-examination on the issue.

1360 See pars 2213-2216, 2226(2) above.

Once Hibbert was shown, in cross-examination, examples of documents relating to the Malt Proficiency Scheme and the Viterra Certificate of Analysis Procedure, Hibbert swiftly, and very significantly, moderated his initial opinion (based on the limited information he was provided). Once Hibbert had concluded his evidence, it was apparent that the Viterra Certificate of Analysis Procedure was not, even in form, a procedure that remotely resembled a scientifically-justifiable Decision Rule. It departed from scientific best practice and applicable standards in many respects, and in some respects quite severely. Only some of them need to be mentioned.

2232 *First*, the Viterra Certificate of Analysis Procedure did not satisfy the No Discretion Standard. Rather than operating in a mandatory and binary fashion, the procedure adopted permissive language which allowed for discretion in making adjustments and approving shipments. Relevantly, the Viterra Certificate of Analysis Procedure provided that:

> Results that appear out of specification on the [Certificate of Analysis] *may* be adjusted by the Technical Services Manager (or their nominated proxy).[1361]
>
> (Emphasis added.)

It further provided that an adjustment "*may* be made up to" 2 standard deviations as required. Further still, it provided that results that remained out of specification after a maximum of 2 standard deviation adjustment could be *altered further* and released for shipment with approval of 2 or more general managers.[1362] Rather than operating in a mandatory and binary way, the Viterra Certificate of Analysis Procedure allowed for the application of an all-encompassing managerial discretion at several distinct stages.

2233 *Secondly*, the Viterra Certificate of Analysis Procedure's reliance on data from the Malt Proficiency Scheme was problematic. The Viterra Certificate of Analysis Procedure provided that any adjustment of out-of-specification results was to be based:

1361 See further fn 187 above.

1362 This last aspect of the Viterra Certificate of Analysis Procedure, the Viterra Parties accepted represented a managerial "discretion".

> on the *associated analytical error for that test parameter as defined in the [Malt Proficiency Scheme] program and may be made up to two [s]tandard [d]eviations, where required*. These changes will be approved by the Technical Services Manager and General Manager Technical when signing off the Certificates of Analysis.
>
> (Emphasis added.)

2234 As a preliminary matter, by using Malt Proficiency Scheme data as a *basis* for adjusting reported results, the Viterra Certificate of Analysis Procedure used the Malt Proficiency Scheme for a purpose for which it was not designed. As Hibbert accepted, the purpose of the Malt Proficiency Scheme was to assist participating laboratories in monitoring and improving measurement performance. No part of its purpose was to provide laboratories with a basis for adjusting measured results.

2235 Further, the Malt Proficiency Scheme data could not be justifiably used either to estimate measurement uncertainty, or to correct for systematic error.

2236 To elaborate, using the Malt Proficiency Scheme data would have contravened the proper basis for estimating measurement uncertainty. This is because it would have involved estimating measurement uncertainty on the basis of a dispersion of results obtained by different laboratories participating in the scheme, not, as that standard requires, on the basis of a *particular laboratory*'s result or, at the very least, an average of that laboratory's results.[1363]

2237 Alternatively, and proceeding on the basis that there was some proper justification for assuming that systematic errors at Joe White's laboratories bore some similarity to the published data (although there was no evidence to make any such assumption), Hibbert's evidence was that using the Malt Proficiency Scheme as a basis for correcting for systematic error would only have been justifiable if it was applied consistently and uniformly, for example, as a Bias Correction Standard. This was undoubtedly correct. The Viterra Certificate of Analysis Procedure did not apply the Malt Proficiency Scheme data in this way. Rather than being applied uniformly, the data (such as it was) was usually only applied in respect of out-of-specification results.[1364] Indeed, in

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1363 See par 2224 above.

1364 See pars 77-78 above and par 2240 below.

respect of the practice of adjusting only out-of-specification results, Hibbert stated, tellingly:

> … this is not a "scientific" – by the time we are making these adjustments for compliance I would say that it has gone outside the realm of the scientist. This appears to be some – this is a commercial kind of a decision, I think …

2238 Stewart gave evidence entirely consistent with Hibbert's position. When asked whether it was up to him to decide whether malt could be shipped even if a specification or specifications were outside 2 standard deviations, Stewart said it was not. Rather, he gave evidence that it was up to 2 general managers "and normally it would be a business decision and perhaps a financial decision as to whether it would be recalled or not". He confirmed that there were no rules about how the discretion was to be exercised and that the business or financial decision was made to serve Viterra Malt's business or financial interests. When asked to explain this answer, Stewart continued, "So it was no longer technical … [it] then became a decision for the business to make". Stewart then agreed with the proposition that, in these circumstances, Joe White was so far out of the ballpark as far as any scientific justification was concerned that the decision had become a decision entirely of commercial convenience. Stewart also gave evidence that where malt produced departed from a customer's specifications "but … was technically suitable", Joe White treated the variation as a commercial decision. At another point in his evidence, Stewart stated it was "a bit more of a business decision than more technical", requiring consideration of impact on the Joe White Business if the malt were not shipped.[1365]

2239 To put it bluntly, if the Viterra Certificate of Analysis Procedure was intended to be a scientifically sound approach, it was flawed to adjust predominantly only out-of-specification results, but generally make no adjustment for results that were apparently within specification. If there were a proper basis for any adjustment with respect to a particular analyte, then that adjustment needed to be made across the

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1365 See also par 1108 above.

board for the reported results to have any scientific rigour.[1366]

2240 Furthermore, even assuming that there was some scientific justification for using the Malt Proficiency Scheme data as the basis for adjusting results pursuant to the Viterra Certificate of Analysis Procedure, the Malt Proficiency Scheme data was not properly used as the basis for adjustments. There are several indicators that that was so.

2241 The internal "standard deviation" table which Joe White used to make adjustments was not periodically updated to reflect updates to the Malt Proficiency Scheme data.[1367] Hibbert, in cross-examination, stated that if Joe White were using the Malt Proficiency Scheme data as a basis for adjustment, he would expect to see Joe White's internal standard deviation table periodically updated to incorporate the results of each proficiency testing round.

2242 Further, that same internal standard deviation table contained figures for analytes for which the Malt Proficiency Scheme published no data, or figures for those analytes different from the corresponding figures in the Malt Proficiency Scheme. In cross-examination, Hibbert accepted that there were examples in Joe White's internal standard deviation table that did not match with the corresponding values in the Malt Proficiency Scheme data, and so, at least to that extent, Joe White's malt adjustments could not be said to be based on the Malt Proficiency Scheme data. The examples Hibbert was taken to were the values for moisture and diastatic power. There were 11 other analytes which appeared not to be based on the Malt Proficiency Scheme data.[1368]

2243 The Viterra Parties submitted that a degree of departure from the Malt Proficiency Scheme data was appropriate. This was put on the premise that the Viterra Certificate of Analysis Procedure was "based on", but not strictly beholden to, the Malt Proficiency Scheme data. It was contended that if it was "based on" the Malt Proficiency Scheme data that was enough, when combined with the form of the

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1366 Noting, for completeness, that if this approach were taken, it might mean that results within specification would be out of specification once such an adjustment was consistently implemented.

1367 See annexure A to these reasons.

1368 See also par 198 above.

Viterra Certificate of Analysis Procedure, to give the approach sufficient "scientific rigour".

2244 This submission did not withstand scrutiny.

2245 As a preliminary matter, the Viterra Certificate of Analysis Procedure explicitly mandated that the "associated analytical error" for a test parameter as "defined in the" Malt Proficiency Scheme be the basis for any adjustment. Further, the Malt Proficiency Scheme was pleaded at paragraph 30(e)(viii) of the Defence as the sole applicable and industry-accepted example of an "objective quantification" of the magnitude of measurement uncertainty for which a Decision Rule may account. Indeed, on its face the objective of paragraph 30(e) was to establish that the Viterra Certificate of Analysis Procedure met the description of a Decision Rule in part because it accounted for uncertainty by reference to the Malt Proficiency Scheme. In other words, that the "objective quantification of the magnitude of such [inherent] uncertainty"[1369] was said to be anchored in the Malt Proficiency Scheme data was an important plank of the posited scientific justification for the Viterra Certificate of Analysis Procedure. In those circumstances, to the extent the data contained relevant information it was problematic that Joe White did not consistently utilise the most current iteration of the relevant data.

2246 In substance, the submission lacked merit. Out-of-date Malt Proficiency Scheme data was used, and so for some analytes corresponding adjustments were in no way derived from Malt Proficiency Scheme data.[1370] Hibbert's evidence provided no basis for suggesting such an application of the Malt Proficiency Scheme data was scientifically rigorous; quite the contrary. Nor did the Viterra Parties identify any other evidence establishing a scientific rationale for departing from the up-to-date Malt Proficiency Scheme data in general, let alone only in respect of particular analytes.

2247 Accordingly, the manner in which the Malt Proficiency Scheme data was used, or not

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1369 This quote adopts the language used in par 30(e) of the Defence.

1370 See par 286 above and annexure A to these reasons.

used, as a basis for adjustments was not even remotely scientifically rigorous.

2248 *Thirdly*, the Viterra Certificate of Analysis Procedure in application contravened each of the Conformity Assessment Criteria, and the fourth Eurachem/International Standard. Hibbert, during the course of his cross-examination, was taken to an example of:[1371]

(1) A Sign-Out Report in respect of a particular shipment of malt. That report relevantly recorded, amongst other things, the following information in respect of certain parameters:

(a) Two sets of laboratory test measurement results taken at the plant at which the shipment was first tested and at Joe White's central laboratory in Adelaide.

(b) A customer specification.[1372]

(c) A "reported" test measurement result,[1373] which was either left unmarked, or struck-though and replaced by a pencilled figure. Where the "reported" test measurement result was outside the customer specification, that result was shaded, as well as struck-through and replaced with a pencilled figure.[1374]

(2) The Certificate of Analysis, corresponding to this particular Sign-Out Report, which was provided to the customer to whom that particular shipment of malt was supplied.[1375] It relevantly recorded, in respect of the parameters identified in the Sign-Out Report, a single "result" value

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1371 Before giving evidence in court, Hibbert had not been provided with a Certificate of Analysis by the Viterra Parties, despite asking if he could see an example of a Certificate of Analysis created in the conduct of the Joe White Business.

1372 A customer specification was provided for all but 1 of the "parameters", titled "Extract %-Coarse Grind-Dry Basis, Co".

1373 With 1 exception, the "reported" test measurement result corresponded with the test measurement result recorded at Joe White's central laboratory in Adelaide. Customers varied as to parameters to be reported upon.

1374 Stewart gave evidence that Sign-Out Reports were reviewed and authorised (including by him) for Certificate of Analysis production.

1375 Some customers required a pre-shipment Certificate of Analysis to be sent. This was a draft based on the theoretical blend that a customer could review prior to the malt being shipped: see par 79 above.

that corresponded to either the unmarked "reported" test measurement result or the pencilled figure. In contrast with the Sign-Out Report, it did not record any of the laboratory results or the specifications in respect of any parameter.

2249 Hibbert considered that collectively the Sign-Out Report and the Certificate of Analysis contravened each of the Conformity Assessment Criteria. To elaborate:

(1) The Certificate of Analysis did not satisfy the first Conformity Assessment Criterion, as the result reported to the customer did not state the measurand and the compliance requirement, being the specification.

(2) The Certificate of Analysis did not satisfy the second Conformity Assessment Criterion for 2 reasons. It did not give the "measured quantity value" or the "quantity value representing the measurement result"; namely, the laboratory results. In addition, it did not provide an estimate of measurement uncertainty, being either "standard uncertainty" or "expanded uncertainty", in respect of those results.

(3) Neither the Sign-Out Report nor the Certificate of Analysis satisfied the third Conformity Assessment Criterion because neither contained any statement of a Decision Rule.[1376]

(4) Neither the Sign-Out Report nor the Certificate of Analysis satisfied the fourth Conformity Assessment Criterion because neither stated the outcome of applying any Decision Rule. Absent any statement of a Decision Rule, it was entirely unclear whether the stated results in those documents were the outcome of a Decision Rule being applied.

2250 What is set out above concerned a single Sign-Out Report and its corresponding Certificate of Analysis. From an assessment of the other Sign-Out Reports and Certificates of Analysis in evidence, it was plain that Hibbert's observations

1376 This also must constitute a failure to satisfy the fourth Eurachem/International Standard.

concerning non-compliance were equally applicable to those additional documents. The Viterra Parties did not seek to introduce any Sign-Out Reports or Certificates of Analysis into evidence in order to attempt to demonstrate that Hibbert's observations did not apply. On the evidence available, it was plain that Hibbert's observations were applicable to the Sign-Out Reports and Certificates of Analysis produced by Joe White more generally.

2251 In relation to the Conformity Assessment Criteria, the Viterra Parties contended that a failure to satisfy those criteria was irrelevant because customers to whom the results were reported did not express any dissatisfaction with the figures they were provided. This submission was not to the point. This issue was not concerned with the satisfaction of customers. It was concerned with the satisfaction or dissatisfaction of standards of scientific practice. Whether or not Joe White's customers expressed displeasure with the fact that standards of scientific practice were not complied with did not alter or detract from the fact that they were not complied with.

2252 It follows that the Viterra Certificate of Analysis Procedure, both in form and as it was applied in practice, did not comply with the analytical chemistry standards that were identified by Hibbert.

X.9.4 Some further remarks

2253 For completeness, the Cargill Parties' submissions identified some respects in which paragraph 30(e) of the Defence departed from Hibbert's evidence in relation to this issue, including by mischaracterising or imprecisely deploying certain scientific concepts relevant to a Decision Rule.

2254 The most significant of these was that paragraph 30(e) appeared to conflate concepts of "error" and "uncertainty". This first occurred in paragraph 30(e)(i), which stated that:[1377]

> any laboratory test measurement of the properties of material such as malt is necessarily subject to *error and uncertainty*.

1377 This reflects question (1) at the start of issue 9.

(Emphasis added.)

2255 The pairing of "error and uncertainty" was replicated in other subparagraphs of paragraph 30(e), as set out above in identifying the questions for issue 9. The repeated pairing of "error and uncertainty" suggested that "error" and "uncertainty" were not, where paired, being treated as distinct concepts, but rather as a single or amalgamated concept: "error and uncertainty".

2256 Further, the reference to "error and uncertainty" in paragraph 30(e)(i) and (ii) necessarily informed the overall import of the paragraph: from the propositions expressed in subparagraphs (i) and (ii), the proposition expressed in subparagraph (iii) was derived; from it, in turn, the proposition expressed in subparagraph (iv) was said to follow.[1378] The definition of "decision rule" given in subparagraph (v) responded to, and recognised, the matters set out in those preceding 4 subparagraphs. It was this definition, informed by what was put in subparagraphs (vi) to (viii), which, in subparagraph (ix), the Viterra Certificate of Analysis Procedure was said to meet.[1379]

2257 The framing of paragraph 30(e)(i) and (ii) by reference to "error and uncertainty" was, therefore, significant. This framing was problematic for 2 reasons.

2258 *First*, the proposition in subparagraph (i) was, to the extent it related to "error", not supported by Hibbert's evidence. Hibbert's evidence was that it was only "uncertainty" to which laboratory test measurements were necessarily subject.[1380]

2259 That measurements were only necessarily subject to "uncertainty", and not necessarily subject to "error" was conceded by the Viterra Parties' senior counsel in closing address. That concession was appropriate.

2260 *Secondly*, the repeated pairing of "error" and "uncertainty" was inclined to mislead. It inadequately distinguished the 2 distinct concepts. Hibbert's evidence provided no basis to pair them, and consistently treated the 2 concepts as distinct. Indeed, the

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1378 See questions (1)-(4) of issue 9.
1379 See questions (5)-(9) of issue 9.
1380 Leaving aside systematic error: see pars 2235-2239 above.

Hibbert Report referred to a scientific publication in which it was stated that great care needed to be taken between the 2 terms, as the 2 concepts:[1381]

> are not synonyms, but represent completely different concepts; they should not be confused with one another or misused.

2261 One effect of repeatedly pairing error with uncertainty in the Defence was to obscure the relationship between them. To briefly repeat, error is not uncertainty, but only 1 of a number of possible causes of uncertainty. Systematic error may be corrected, via a Bias Correction Standard, but that correction is not a Decision Rule, or part of a Decision Rule, but rather an adjustment to an initial result which stands outside the application of a Decision Rule itself. Where a correction for systematic error is made, then the uncertainty of that correction must be incorporated into the measurement uncertainty for which the Decision Rule accounts.[1382] A single error, or a number of errors not giving rise to a systematic error, are also errors which may give rise to uncertainty, but they are not of a kind that may be dealt with by application of a Bias Correction Standard.

2262 This was not the only way in which the pleaded paragraph 30(e) was said to depart from, or overstate, Hibbert's evidence in relation to this question. Three further examples, which are not exhaustive, illustrate the point:

(1) Paragraph 30(e)(ii) of the Defence sought to identify the "main causes" of "error and uncertainty". However, the Hibbert Report did not identify "main causes", but rather identified particular "factors" from which uncertainty arises.[1383]

(2) Paragraph 30(e)(iii) provided that "any laboratory test measurement was only an estimate/approximation of the true value of the measurands … and merely implies a range of values which can

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1381 Joint Committee for Guides in Metrology: "JCGM 100. Evaluation of measurement data – Guide to the expression of uncertainty in measurement" BIPM (Sèvres, 2008), [3.2.2] n2.

1382 See par 2237 above.

1383 The particular factors Hibbert identified are those about which he was instructed to respond.

reasonably be attributed to the measurands". However, neither the Hibbert Report nor Hibbert's evidence provided any support for the proposition that a laboratory test measurement implies (merely or otherwise) a range of reasonably attributable values.[1384]

(3) Paragraph 30(e)(iv) provided that a supplier/producer must seek to ensure that any particular test measurement takes into account "error and uncertainty". That paragraph suggested, inaccurately, that "error and uncertainty" were to be accounted for collectively, or by a single set of measures. However, as noted above, the measures which take into account systematic error and the measures which account for uncertainty are different, and occur at different stages. Systematic error may be corrected by adjusting the initial result; uncertainty may be addressed by the application of a Decision Rule, which accounts for, amongst other things, measurement uncertainty incorporating the uncertainty of any error corrections.[1385]

2263 However these additional matters need not be separately addressed, as ultimately very little turns on them. This is because the answer to the previous question disposes of this issue. Put simply, whatever a Decision Rule is (expressed by reference to whichever scientific concepts), Hibbert's unequivocal evidence was that the Viterra Certificate of Analysis Procedure was *not* an example of one. With respect, that evidence was plainly correct. The Viterra Certificate of Analysis Procedure was not, nor was it even close to being, a scientifically-justifiable Decision Rule.[1386]

2264 Addressing this topic would not be complete without dealing with a fundamental difference between the application of the Viterra Certificate of Analysis Procedure with respect to 2 standard deviations and the logical and necessary consequence of any procedure which allowed for error or uncertainty, or both.

1384 Subject, of course, to the number of decimal places used in any numerical result; the more decimal places used the smaller the necessary uncertainty arising from rounding.

1385 See par 2261 above.

1386 See par 2229 above.

2265 If a test result were at the outer limits of 2 standard deviations because of, for example, variability in test equipment, the non-homogenous nature of malt, or some other factor or combination of factors, then under the Viterra Certificate of Analysis Procedure results could be reported as being within specification (which reporting was unqualified). However, it must follow as a matter of logic that the test result at the outer limits of 2 standard deviations could have in fact been out of specification well beyond 2 standard deviations. This was because the risk of an incorrect result must mean that the test result could be higher or lower than the true result. So much was accepted by the Viterra Parties' senior counsel in closing submissions.

2266 The Viterra Certificate of Analysis Procedure ignored this reality. It allowed for results to be reported within specification when the test result was within 2 standard deviations without making provision in any way for the possibility that the result was in fact well beyond 2 standard deviations. As Hertrich stated in his evidence, the Viterra Certificate of Analysis Procedure assumed that any variance was only one-directional (that is, towards the direction of the required specification), whereas variance is bi-directional. De Samblanx put it succinctly in giving evidence that the Viterra Certificate of Analysis Procedure involved correcting all the time at the convenience of Joe White.[1387]

X.9.5 Answers to specific questions

2267 This conclusion effectively disposes of the ultimate issue in this section. However, each question arising from the pleadings should be addressed.[1388]

2268 In light of the above, the questions posed in the heading to this issue should be answered as follows:

(1) Yes, except for the use of the words "error and".

1387 See par 1651 above.

1388 In taking this approach, the Cargill Parties' submissions concerning the relevance or otherwise of the questions will not be addressed. In light of the conclusion, it is unnecessary to respond to these submissions.

(2) Yes, except for the use of the phrase "the main",[1389] the words "error and", and if the word "are" is replaced with the word "include".

(3) Yes, provided the phrase "as a result" is understood to refer only to "uncertainty" and not to "error", and except for the phrase "and merely implies a range of values which can reasonably be attributed to the measurand".

(4) Yes, except for the use of the word "Accordingly", and provided it is understood that "error" and "uncertainty" are separately addressed and with the qualifications given by Hibbert concerning subjective judgment and his evidence more generally concerning a Decision Rule.[1390]

(5) Yes, subject to the previous answers and the terms of any contract between a supplier and its customer.

(6) Yes, subject to the qualifications given by Hibbert concerning subjective judgment[1391] and his evidence more generally concerning a Decision Rule.

(7) (a) Yes. (b) No.

(8) Unnecessary to answer.[1392]

(9) No.

X.10 Was it the fact that:

(1) Joe White routinely, and without informing customers:[1393]

(a) supplied malt to customers that did not comply with contractual requirements and specifications;

(b) supplied Certificates of Analysis to customers that misstated the results of analytical testing on the malt, so that the

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1389 See par 2262(1) above.
1390 See par 2219 above.
1391 Ibid.
1392 But see par 2822 below.
1393 This issue as defined in subparagraph (1) was a reference to the Viterra Practices: see par 1851 above.

Certificates of Analysis reported that the malt complied with contractual requirements and specifications when it did not?

(2) The Viterra Practices were partly recorded in and endorsed by the Viterra Policies (being the Viterra Certificate of Analysis Procedure and the Malt Blend Parameters Procedure)?

(3) Joe White's financial and operational performance for the financial year 2010 to part of the financial year 2013 was substantially underpinned by Joe White's practice of supplying malt to customers pursuant to the Viterra Practices and the Viterra Policies that did not comply with the relevant contracts?

(4) But for the Viterra Practices, Joe White could not produce and sell malt in the volumes and to the specifications required by customers and in the volumes and for the returns reflected in the Financial and Operational Information disclosed in the Information Memorandum and during the Due Diligence?[1394]

2269 For the reasons that follow, the answer to each of these questions is yes. Primarily, this issue was decided on the evidence given at trial by a number of persons involved in the operations of the Joe White Business at the relevant times. The findings made were corroborated by statistical analyses done in relation to the prevalence of the Reporting Practice and the Varieties Practice. No such analysis was done with respect to the Gibberellic Acid Practice as there was no relevant data maintained to enable it to be done.

X.10.1 Routinely supplying malt and providing Certificates of Analysis in accordance with the Operational Practices

2270 The word "routinely", in this context, must mean customarily or regularly. In other words, it would not follow that establishing an exception or some exceptions to a course of conduct would necessarily mean the course of conduct was not engaged in routinely. The case of the Cargill Parties was conducted on this basis.[1395]

2271 Generally speaking, customers were not informed about the Operational Practices. Although at times there was vague evidence about the possibility of some customers being informed about some relevant conduct, on the whole customers were not so

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1394 The matters identified in subparagraphs (1) to (4) were the matters identified in the Statement of Claim collectively, individually or in any combination as the Undisclosed Matters: see par 1851 above.

1395 The Viterra Parties submitted there was some lack of clarity of Cargill Australia's case because of the use of "routinely" to describe the extent of the Viterra Practices. There was no application to strike out this part of the Statement of Claim. Further, the use of a term such as routinely or customarily was far from new: see par 3400 below and the cases referred to in fn 2684 below.

informed. Indeed, Joe White went out of its way to ensure the Operational Practices were concealed. This was done in different ways, depending on the Operational Practice. Sometimes it involved a systematic and organised form of deception. Systems were designed and steps were put in place to ensure that neither customers nor auditors would be any the wiser of the procedures being implemented. On other occasions, it simply involved not telling a customer what was contained in a batch of malt when non-compliance knowingly occurred or when Joe White took no steps to ascertain whether or not it had occurred.

2272 For the purpose of answering the questions posed, it is convenient to deal with each of the Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice individually. However, this should be prefaced with a reference to Youil's statement on 23 October 2013, as the general manager of operations, in relation to the Operational Practices generally, that they had been acceptable for years and that their implementation was "[b]usiness as usual".[1396]

X.10.2 The Reporting Practice

X.10.2.1 The effect of implementing the Viterra Policies

2273 As clarified in the pleadings as they ultimately stood,[1397] there was no issue that the Joe White Business "was generally conducted" up until 31 October 2013 in accordance with the Viterra Certificate of Analysis Procedure and the Malt Blend Parameters Procedure. Contrary to the Viterra Parties' position, in the context of the evidence given at trial and the flaws with both the terms and implementation of the Viterra Policies, this admission carried with it that Joe White routinely supplied malt to customers that did not comply with contractual requirements and specifications.[1398]

2274 There was simply nothing in any of the customer contracts which permitted a system whereby Joe White could, without transparency (let alone with orchestrated secrecy), change test results to report the "result" of each affected parameter to be within

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1396 See par 1295 above. These statements were made in the context of discussing "these issues", which on the face of the note was a reference to issues concerning each of the Operational Practices. See also pars 1282, 1328 above.

1397 See par 1854 above.

1398 For the avoidance of doubt, the evidence demonstrated what was admitted.

specification when the test results indicated otherwise and when there was no proper analysis engaged in to justify the changes. Nor was there any right for Joe White to substitute parameters in accordance with the Malt Blend Parameters Procedure for the parameters the subject of the customers' specifications, which was done every operating day at every plant for those malt blend parameters listed.[1399]

2275 The evidence that showed that malt supplied by Joe White did not comply with contractual requirements and specifications was essentially in 2 forms: evidence from Joe White's employees in substance to that effect; and a statistical analysis of certain orders for the supply of malt. In relation to the first of these, although evidence of other witnesses was also relevant, the 3 critical witness were McIntyre, Testi and Stewart.

X.10.2.2 The lay evidence and conclusion

2276 At all relevant times, McIntyre was the person who changed the results on most of the Certificates of Analysis.[1400] She had no scientific or technical background or expertise relevant to this conduct. Accordingly, the attempt by the Viterra Parties to seek to scientifically justify the Viterra Certificate Analysis Procedure or the Malt Blend Parameters Procedure was, in practical terms, often beside the point.[1401] This position was not altered by the fact that Stewart would sign off on many, but not all,[1402] of the Certificates of Analysis. The simple fact was that, whenever the test results did not comply with customer specifications and pencilling occurred to record otherwise, usually the Sign-Out Reports and the Certificates of Analysis were not being prepared

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1399 See pars 235-242 above.

1400 See par 75 above.

1401 In the Viterra Parties' closing submissions, it was contended that "from all the evidence" there existed good reason for raw measurement results to be "corrected/adjusted, including to make them better reflect the *professional opinion* of the analyst" (emphasis added). Given McIntyre had no professional qualifications or background, this submission was of little substance. When this was raised with the Viterra Parties' senior counsel, the court was told it was a generalised statement and was not referring to a particular analyst. Reliance was also placed on changes being within 2 standard deviations to give weight to the submission: but see pars 2264-2266 above. Further, it was suggested the analyst being referred to was "others" within the organisation who were required to make a decision when a result was beyond 2 standard deviations from the required specification: but see pars 2237-2239 above which explain why there was no scientific basis for a decision in these circumstances. Thus, when "all the evidence" was considered this contention must be rejected.

1402 See par 81 above.

on a scientific or technically accurate basis. This was also borne out by Stewart's evidence that it was often the undisclosed and undefined assessment of how the malt would be expected to perform that determined whether it would be shipped.[1403]

2277 Further, McIntyre's evidence included details of occasions where results did not exist and the reporting of results was a complete fabrication.[1404] Her evidence that this was not done for key parameters only diminished the significance of this evidence slightly. The fact that Joe White's practices "frequently" involved completely false reporting spoke volumes about the approach taken to reporting to customers.

2278 The primary purpose of the changes to "almost every Sign-Out Report"[1405] and the reporting of the results in accordance with those changes was to be able to report to Joe White's customers that the malt supplied complied with the customers' specifications, or was sufficiently compliant to satisfy the customer, which would not have been the case if the actual test results had been reported. The fact that on occasions there may have been other reasons for making changes[1406] did not alter the position that routinely Joe White was supplying customers with malt that did not comply with specifications, and failed to disclose that when misstating the "result" in the Certificates of Analysis.

2279 In relation to Testi, she gave clear evidence of concealment and deception in relation to the Reporting Practice. Her evidence was that Joe White engaged in conduct to provide a perception of compliance with customers' specifications. Further, her evidence demonstrated that the extent to which malt was shipped which did not comply with customers' specifications was significant (at least from 2010 to 2012).[1407]

2280 Stewart was called by the Viterra Parties. No doubt this was done, at least in part, by reason of an appreciation of the state of the evidence to that time concerning the Operational Practices, and the need to have a witness involved in this conduct to try

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1403 See par 173 above.
1404 See par 78 above.
1405 See par 75 above.
1406 See, for example, pars 84-85 above; but also see pars 76-77, 86 above.
1407 See pars 242, 245, 279-280, 287-289, 407-409 above.

to justify meaningfully what had occurred. As explained at some length,[1408] Stewart himself effectively gave up on any attempt to justify some of the more egregious aspects of the Operational Practices.

2281 Further, Stewart's evidence demonstrated that any consciousness of the unsatisfactory nature of the Viterra Policies and the Reporting Practice, including the misstatement of results and the supply of malt that was out of specification but represented to be otherwise, was appreciated by him before Cargill took over control of Joe White.[1409] Furthermore, his evidence put it beyond argument that, at the very least in relation to reporting where the result was more than 2 standard deviations beyond the specification, there was no scientific or technical basis upon which such conduct could be justified.[1410]

2282 Stewart also gave evidence of preparing the Customer Review Spreadsheet. That document was unequivocal in recording that Joe White was unable to meet almost all of its customers' specifications, with the exception of 2 customers in relation to which they could be met "some of the time".[1411]

2283 Although the justification provided by Hughes in October 2013 for the Reporting Practice cannot be accepted, his reporting to Fitzgerald at that time as Joe White's chief executive officer confirmed that the adoption of the process for the preparation of Certificates of Analysis was routine.[1412] Indeed, the evidence made it plain that it was

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1408 See, for example, pars 158-161, 167-186, 197-201, 220-224, 226-227, 234, 252-254, 272, 284-288, 290, 407-415, 605, 1043-1046, 1106-1118, 1155, 1210-1232, 1264, 1297-1304, 1343, 1352-1353, 1373, 1387-1389, 1429-1436, 1438-1441, 1566-1568, 1572, 1574, 1602-1604, 1700, 1706, 1709, 1768, 1834 above.

1409 See, for example, 158-161, 174-175, (cf 176), 1352-1353 above.

1410 See par 2238 above.

1411 See par 1226 above. The Viterra Parties submitted that the information contained in this part of the Customer Review Spreadsheet "simply" reinforced the importance of commercial maltsters adopting a reporting policy that accounted for the "accepted 2 standard deviations of variance". There was not a hint of this consideration in the Customer Review Spreadsheet, or the Key Recommendations Memorandum by which Stewart circulated it: see par 1210 above. On the contrary, if that were the mindset of the Joe White executives at the time then presumably column P would have been entitled, or a further column would have been entitled, with words to the effect "Able to achieve specification, including by applying the standard deviation buffer". The title of column P implicitly acknowledged that Joe White was not achieving specification. Further, given the manner in which the "[standard deviation] buffer" was utilised, there was no technical or scientific basis for its implementation: see, for example, pars 198, 208, 216, 286, 2240-2249 above.

1412 See par 1316 above. See also par 1280 and the reference to Hughes stating Joe White did it all the time

Hughes' position that it was entirely acceptable to ship malt which was out of specification,[1413] which was a position accepted, at least in practice, by Stewart. Further, each of Hughes, Youil, Stewart and Wicks made a series of observations in October 2013 which also demonstrated the Reporting Practice was routine and was engaged in to meet the ongoing difficulties of complying with customer specifications.[1414]

2284 In my view, this evidence alone established this aspect of Cargill Australia's claim. Although much of the evidence was general, its substance was clear and unequivocal.

2285 The Viterra Parties submitted that the allegation that Joe White supplied Certificates of Analysis that misstated that malt complied with contractual requirements and specifications was a serious allegation as it effectively alleged that the Joe White staff were routinely and deliberately misrepresenting facts with the intention of deceiving customers. In such circumstances, they contended the court was required, in accordance with section 140(2) of the *Evidence Act* and the principles derived from *Briginshaw v Briginshaw*,[1415] to feel an actual persuasion of the occurrence or existence of the relevant facts before they can be found. I am so persuaded. Further, the relevant critical witnesses each sought and obtained certificates under section 128 of the *Evidence Act*,[1416] which demonstrated their own appreciation of the seriousness of the relevant matters about which they gave evidence.[1417]

2286 Furthermore, contrary to the Viterra Parties' submission, it was not necessary for Cargill Australia to prove the exact analytical specifications required by each customer in order to establish its case.[1418] In different circumstances, this might have been

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in every plant for all customers on an ongoing basis.

1413 See par 73 above.

1414 See pars 1106-1116, 1373(1), (2), (3), (4), (5), (7), (8), (9), (10), (23), (30) above.

1415 (1938) 60 CLR 336, 361.7-363.6 (Dixon J).

1416 See pars 178-180 above.

1417 See also pars 174, 1554-1555 above.

1418 For completeness, an allegation underlying this submission was sought to be made in the proposed amended defence by the Viterra Parties towards the end of the trial. After it became apparent from exchanges during argument that leave was not going to be granted, the Viterra Parties withdrew the amended application but maintained it was still open to them to make this submission in closing. At the time, I expressed the view that if an allegation of the nature that had been the subject of application for leave to amend were to be made, it needed to be the subject of a pleading. The Viterra Parties chose not to make any further application in this regard.

necessary. However, the clear evidence was that the effect of the changes made to Certificates of Analysis on many occasions, and routinely, had the result that parameters that would otherwise be out of specification were reported as being in specification.

X.10.2.3 Ability to rely upon the Laboratory Information System data

2287 Turning to another means by which the Cargill Parties sought either to establish or corroborate Cargill Australia's claim concerning the Reporting Practice, business records as recorded in the Laboratory Information System were relied upon in order to demonstrate the level and extent of the Reporting Practice. In seeking to rebut any such approach, the Viterra Parties submitted the data was not reliable and could not support any proper findings. On this matter, some general observations need to be made about the admissibility of business records.

2288 Under the hearsay rule, evidence of a previous representation is not admissible to prove an "asserted fact".[1419] A well-trodden exception to the hearsay rule is previous representations made or recorded in business records, which in the specified circumstances, result in the hearsay rule being inapplicable.[1420] Accordingly, if they are relevant,[1421] business records are ordinarily admissible. But even if that be the position, anyone seeking to oppose the tendering of business records may challenge the tender based on either the criteria in section 69 having not been met or, pursuant to section 135 of the *Evidence Act,* on the basis that the probative value of the evidence would be substantially outweighed by the danger that the evidence, relevantly, might be unfairly prejudicial to a party, or might be misleading or confusing.[1422]

2289 A large number of business records were tendered in this case. These included records containing information derived from the Laboratory Information System. The Viterra Parties made a number of specific challenges to the reliability of the data the Laboratory Information System contained. However, no application was made by the

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1419 *Evidence Act*, s 59.
1420 *Evidence Act,* s 69.
1421 *Evidence Act*, s 55.
1422 Further, there is the ability to limit the use that may be made of any admitted business records under s 136 of the *Evidence Act*.

Viterra Parties to seek to establish that section 69 had not been satisfied, or that the relevant evidence should be excluded under section 135 of the *Evidence Act*.

2290 Further, speaking generally, the fact that business records may contain some inaccuracies or be incomplete does not result in those records being inadmissible or not being given any weight. Rather, it is a matter for the trial judge to assess the probative value of the evidence bearing in mind the possibility that the business records in question, like any business records, may be inaccurate or incomplete.[1423] Even if some inaccuracies or lack of completeness were identified, it is a matter of assessing the nature, extent and materiality of such matters in determining whether or not they throw sufficient doubt upon the overall accuracy of the business records so as to be inadequate to substantiate the claim being made.[1424]

2291 The Viterra Parties relied on a number of matters in seeking to establish that the data contained in the Laboratory Information System was not reliable.

2292 *First,* they pointed to some of McIntyre's evidence concerning how information was entered. This included that the information the Laboratory Information System contained was "not necessarily all the time" the original source record of the contractual specifications and was a tool used in the production of malt of suitable quality. Further, if a customer did not have a specification for a particular parameter, a target would be entered as the value in the specification column. Also, a figure might be included which was a "tighter" target than the customer specification.[1425] Furthermore, there were instances where the specification recorded did not match the specification in the customer contract.

2293 McIntyre gave evidence that there may have been instances where the records within the Laboratory Information System recorded "specifications" which were not the

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1423 See *Capital Securities XV Pty Ltd v Calleja* [2018] NSWCA 26, [124] (Leeming JA, with whom Basten and Gleeson JJA agreed).

1424 *North Sydney Leagues Club Ltd v Synergy Protection Agency Pty Ltd* (2012) 83 NSWLR 710, 725 [76] (Beazley JA, with whom Macfarlan and Whealy JJA agreed).

1425 See fn 227 above, though it is noted that the sole chain of correspondence referred to by the Viterra Parties in their closing submissions on this point included an email to the customer confirming that Joe White would adopt the tighter range with respect to the relevant parameter, being colour.

same as the "true contractual specification". When the global proposition was put to McIntyre that data in the Laboratory Information System might not be reliable to calculate the overall extent of non-conformance with customer specifications, McIntyre responded that potentially it would not be 100 percent accurate. In addition, McIntyre gave evidence with respect to 1 customer with 4 breweries that a specification was only entered in once for the 4 breweries as they were all part of the same customer group and it was not possible under the Laboratory Information System to enter specifications for 1 of the breweries separate from the others comprising the customer.

2294 The simple collective response to these points was that, to the extent that it might have been said that any of them gave rise to a real issue, none comprised a systemic or fundamental problem with the information contained in the Laboratory Information System. Further, there was no attempt by the Viterra Parties to demonstrate that any of the matters raised existed in sufficient numbers to raise any material issue about the overall accuracy of the data. In a case where no expense has been spared in seeking to defend the claims made, there can be little doubt that if it could have been demonstrated that these issues existed in significant numbers, then it would have been brought to the court's attention. Furthermore, in a system containing so much information, it would be surprising if some inaccuracies could not have been identified. Moreover, Stewart's evidence was that when he required details of customer specifications in performing his role at Joe White, he obtained the details from the Laboratory Information System. This demonstrated that in the relevant period, the Laboratory Information System was considered a reliable source of information.

2295 As to some of the specific issues raised, the 2 alternatives for when a target was included meant that it was not possible for a result to be within a target and outside the specification. In any event, little turns on this issue in circumstances where the instructions given to the information technology manager (who analysed the data for

the purposes of this proceeding)[1426] were that, if the word "target" appeared in the specification field,[1427] it was to be extracted from the data being used to analyse compliance with specifications.

2296 With respect to the point raised about specifications in the Laboratory Information System differing from the "true contractual specification", this might be explained by the evidence given by McIntyre concerning changes that were made to specifications after the contract had been entered into. Further, her evidence, which I accept, was that she was thorough in maintaining the details of the customers' specifications in the Laboratory Information System.[1428] But even if subsequent changes to what had been contained in a contract were not the explanation, again the Viterra Parties did not establish that the relevant entries were of such a size or volume to throw sufficient doubt upon the overall accuracy of the data contained in the Laboratory Information System.

2297 *Secondly,* the Viterra Parties referred to evidence of potentially incorrect information regarding specifications that needed to be verified with customers. In this regard, a single document was referred to, being "Viterra" minutes of a management review meeting held on 27 September 2013. These minutes referred to an order for malt and the potential for either the customer or the Laboratory Information System to be incorrect with respect to a specification.

2298 Under cross-examination, McIntyre said she could not remember specifically whether this type of topic had arisen previously. The Viterra Parties submitted that the court ought infer that this type of topic arose on earlier occasions. Given there were no other minutes put forward to reflect that this issue had been raised on any other occasion, and there was no evidence from any other witness that it might have been, such an inference could not be reasonably drawn based on McIntyre's lack of recollection. Further, the minutes tendered did not establish the Laboratory Information System

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1426 See par 2311 below.

1427 See fn 227 above.

1428 See par 257 above. Her evidence in this regard was confined to customer specifications and did not touch upon barley varieties, in relation to which she gave different evidence about what was or was not recorded in the Laboratory Information System: see par 2429 below.

was incorrect, but equally entertained the real possibility that the customer's information was inaccurate.

2299 *Thirdly*, the Viterra Parties submitted that, even if specifications had been correctly transposed from contractual documents to the Laboratory Information System, it did not necessarily follow that Joe White was contractually required to meet those specifications. In support of this, reference was made to: (1) "best endeavours" obligations in some contracts (about which the Laboratory Information System made no distinction);[1429] (2) tolerance ranges for some specifications in some contracts (which were not recorded in the Laboratory Information System);[1430] (3) the contractual ability to provide malt that was out of specification subject to the provision of rebates (which was not recorded in the Laboratory Information System);[1431] and (4) deeming provisions in some contracts which required a customer to give notice that malt was out of specification within 30 days, otherwise it was deemed to be within specification (which was also not recorded in the Laboratory Information System).

2300 Yet again, no attempt was made by the Viterra Parties to analyse the extent to which these matters were relevant to the entries relied upon. This factor alone largely undermined any weight that might otherwise have been afforded to this submission.

2301 In any event, dealing with the points individually: (1) it was far from clear how the existence of a best endeavours clause would affect the accuracy or otherwise of the

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1429 The Viterra Parties' submissions referred to 3 contracts all entered into on 12 March 2008 with related companies of the Thai Brewery Group, which all expired on 31 March 2013. Although the reference to these contracts in the submissions was preceded by "for example", during McIntyre's cross-examination she was asked whether she could recall any other contracts containing best endeavours clauses and she answered that she could not. Further, only 1 other contract with a best endeavours clause was identified, being with Kirin for the period from 29 April 2011 to 29 April 2014. There was no proper basis to infer that the 4 contracts identified were representative of a broader category of customer contracts in circumstances where none of the other contracts before the court contained such a clause. The number of orders that fell into this category was 219 of the total of 4,389 orders, representing just under 5 percent.

1430 The Viterra Parties' submissions referred to 5 contracts. Three of these were precisely the same contracts referred to with respect to best endeavours clauses. The other 2 contracts were for a domestic customer, Coopers. The data from domestic contracts was not relied upon as part of the statistical analysis performed.

1431 Only the 2 Coopers' contracts referred to in the preceding footnote were relied upon by the Viterra Parties to illustrate this point; but for completeness see also the reference to a customer whose identity was not disclosed in fn 624 above.

data recording the specifications or the accuracy of the reporting (albeit, it might have affected whether or not there was a breach of contract in a particular case);[1432] (2) the existence of tolerance ranges might have meant that a comparison between test results and the data which suggested a supply of malt out of specification was in fact within the relevant tolerance range, but there was no evidence to suggest this was the case or, in any event, that the issue went beyond 159 orders (being less than 4 percent of the total of 4,389) in relation to the Thai Brewery Group for the period from 1 January 2010 to 31 October 2013;[1433] (3) the provision for a rebate would not have meant that Joe White was contractually entitled to supply malt out of specification (there was no evidence of any rebates being paid, and thus this would give rise to the inference that it was likely malt was being reported as being within specification though not necessarily in fact within specification in light of the Reporting Practice);[1434] and (4) a deeming provision would clearly have meant that, absent a complaint, malt supplied would be deemed to comply with contractual specifications, but it did not follow from that that malt was not supplied out of specification (and for a period of 30 days would not have exposed Joe White to a claim based on malt supplied in breach of contract).[1435]

2302 In summary, while there was some substance to the points made by the Viterra Parties, none of them, either individually or collectively, provided a basis for the court to conclude that the data contained in the Laboratory Information System with respect to customer specifications was anything other than generally accurate and of probative value.

2303 *Fourthly,* it was submitted that Cargill failed to rely on evidence available to it that, it

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1432 For completeness, there was no evidence to suggest what endeavours in fact had been used to supply the required barley varieties.

1433 In the Cargill Parties' closing submissions, 188 orders were referred to (representing approximately 4.3 percent of the total orders) based on information provided to the court on 5 September 2018. However, this information was superseded because of the consequences of a cyber attack and the provision of data from the Laboratory Information System by the Viterra Parties: see pars 2315-2316 below. On 15 August 2019, a revised table was provided by the Cargill Parties entitled "Joe White's contractual documents" which set out the contracts and numbers of orders relevant to the particular matters that had been raised by the Viterra Parties. This table was explained in court the following day.

1434 A total of 669 of the 4,359 orders related to contracts that had rebate or penalty clauses.

1435 A total of 277 of the 4,359 orders related to contracts that had deeming clauses.

was contended, was likely to be more reliable than the data in the Laboratory Information System. The Viterra Parties referred to evidence of McIntyre that a profile was created for each customer in the Administration System. They then noted that McIntyre did not disagree with a proposition put to her in cross-examination that the Administration System contained more detail about customer contracts than the Laboratory Information System.

2304 While this account of her evidence was accurate, she deposed that she believed some of the contracts were uploaded to the Administration System, but she was not sure because it was not her area of expertise. If any weight were to be given to such tentative evidence, it could only include a conclusion to the effect that the information concerning customer contracts on the Administration System might have been incomplete. Further, and in any event, the evidence of McIntyre demonstrated that she was diligent in her role of entering data into the Laboratory Information System. Furthermore, although it was properly accepted that the manual entry of test results into the Laboratory Information System meant it was possible that errors would be made,[1436] there was nothing to suggest that, if there were any such errors, they were significant in number. In the absence of any such evidence, there was no proper basis for the court to infer that the laboratory personnel did anything other than accurately record the test results.

2305 In conclusion, the court is satisfied the data contained in the Laboratory Information System comprised a repository of information that could be relied upon as accurately recording the affairs of the Joe White Business.

X.10.2.4 Further observations

2306 Before leaving this topic, there are 2 matters that should not be passed over in relation to the position previously adopted by the Viterra Parties.

2307 *First*, during the trial I sought clarification in relation to whether the Viterra Parties' position was that, in relation to the Cargill Parties seeking to prove their respective

1436 See par 262 above.

cases, they could not rely upon the data contained in the Laboratory Information System. The Viterra Parties' senior counsel[1437] replied that the data could be relied upon as a starting point as no one was disputing what the figures in the system were, but further stated that that was not sufficient to discharge the Cargill Parties' onus of proof. I then enquired as to whether the Viterra Parties' position was that the Cargill Parties could not rely upon the accuracy of what was contained in the Laboratory Information System, to which senior counsel replied that that was not the position. The court was informed that the Viterra Parties' position was that the Cargill Parties could rely upon the accuracy of the information as a starting point. In elaborating on what the Viterra Parties contended the Cargill Parties had to prove, it was stated that the Viterra Parties were not suggesting that the Cargill Parties could not rely upon the Laboratory Information System.

2308 However, the matter did not end there. The Viterra Parties' senior counsel then referred, as an example, to the absence of any evidence about the actual tests carried out which gave rise to the data, which it was said would have removed all doubt about the accuracy of the data. But when it was pointed out that such evidence did not exist anymore, the court was informed that this illustrated the problem the court was facing. After the manner in which section 69 of the *Evidence Act* operated was raised with senior counsel, the following exchange took place:

> Your Honour, I'm making this difficult. Can I say once and for all and then I'll remove that example. We are not saying that the data in the [Laboratory Information System] cannot be relied upon as a starting point. We are not saying that. We are not making a submission along those lines. … So my point is given the inferences that need to be drawn out of the reasons for the discrepancy, that is the reasons for the difference between that which was in the database and that which was represented in the Certificate of Analysis, given that discrepancy, the plaintiff has the onus of showing the reason for the discrepancy. That is, that it was not for correction of error, that it was not within 2 standard deviations, and it was not for the purpose of aligning the Joe White testing regime with the customers' testing regime. We say that's where the plaintiff has failed to establish its case …

Soon after, based on this exchange, the Cargill Parties informed the court that they understood nothing about the Laboratory Information System data was contested. No

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1437 This was not lead senior counsel.

exception was taken to the Cargill Parties' stated understanding by the Viterra Parties at that time. However, it would appear that the position ultimately adopted by the Viterra Parties did not align with what the court was told well before closing submissions commenced concerning the approach that would be taken.

2309 *Secondly,* the Sellers warranted in the Acquisition Agreement that Joe White's "Records" (which included the Laboratory Information System)[1438] were complete and up-to-date in all material respects.[1439] For what it is worth, it would seem the Viterra Parties' position in closing submissions ran counter to this Warranty, but no issue was made of this at trial.

X.10.3 Background to statistical analysis of data relating to Certificates of Analysis produced and to barley varieties used in malt

2310 The evidence drawn from the statistical analysis strongly corroborated the findings already made concerning the Reporting Practice.

2311 Liam Ryan ("Ryan"),[1440] a director at KordaMentha Forensic, was engaged by Cargill as a non-independent expert. Ryan was instructed to produce 2 separate sets of analysis using data from the Laboratory Information System. The first related to the Reporting Practice and the second was concerned with the Varieties Practice.

2312 Nicholas Abbot ("Abbot"),[1441] an information technology manager at Cargill Australia at the time he gave his evidence, was responsible for extracting the data from the Laboratory Information System that was used by Ryan for his analyses.

2313 The Laboratory Information System contained information about Joe White's customer orders for malt, including: the malt parameter specifications; results of

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1438 See par 1022 above.

1439 See par 1034 above, at cl 12(c).

1440 Ryan has been a director at KordaMetha Forensic since July 2018. Prior to his employment at KordaMetha he was a senior analyst at Deloitte Australia. He has a bachelor of commerce (accounting) and a bachelor of economics from La Trobe University.

1441 Abbot has been the information technology business relationship manager at Cargill Australia since 1 November 2013. Prior to the Acquisition, Abbot was employed by Joe White between September 2009 to 31 October 2013 as the malt senior system analyst: information technology – Australia/New Zealand.

testing; and test results reported to customers in the Certificates of Analysis. The Laboratory Information System also contained inventory information, including tonnage and the location of barley and malt, as well as information relating to blends, and varieties used in those blends.[1442]

2314 The process of extracting data from the Laboratory Information System could only be done by information technology personnel from Joe White or Cargill, and was done using compatible software connected to the database to write, and then run, queries. This process did not alter or change the underlying source data in the Laboratory Information System.

2315 As a result of a ransomware attack on 15 June 2017, Cargill lost access to the Laboratory Information System.[1443]

2316 On 6 September 2018, Abbot was provided with restored data from the Laboratory Information System.[1444] Abbot was instructed to extract 2 datasets from the restored data. The first extract contained data relating to Certificates of Analysis produced by Joe White ("the Parameters Data"); the second extract contained data relating to the barley varieties used by Joe White in specified malt orders ("the Barley Data").

2317 Ryan used these data extracts for his analyses. The first analysis ("the Parameters Analysis") required Ryan to arrange and analyse the Parameters Data over the period of 1 January 2010 to 31 October 2013. The second analysis ("the Barley Analysis") required Ryan to arrange and analyse the Barley Data over the same period.[1445]

2318 The Viterra Parties took issue with the Parameters Data and the Barley Data. The

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1442 See further pars 255-262 above.

1443 As part of the attack, Cargill's information technology systems, including the Laboratory Information System and the data within, together with backups of the data, were maliciously encrypted and therefore inaccessible. Abbot initially gave evidence in mid August 2018, based on data which had been extracted before the ransomware attack. There were challenges as to the admissibility of this data and related evidence in light of Cargill's loss of the underlying data base.

1444 The data had been restored by McGrathNicol from a back-up tape not previously discovered. It was produced by Viterra at the direction of the court.

1445 On 26 September 2018, Gilbert + Tobin addressed a letter to Ryan, setting 1 January 2010 to 31 October as the relevant period for the Parameters Analysis. On 5 October 2018 Gilbert + Tobin addressed a letter to Ryan, setting 1 January 2010 to 31 October 2013 as the relevant period for the Barley Analysis.

Viterra Parties submitted that the extracts were selective and, for reasons they submitted were not adequately explained, they only contained Joe White's export orders of pale malt and pilsner malt, and they did not include domestic sales[1446] and non-pale or non-pilsner sales. Further, the dataset was about a third of the size of an earlier dataset put forward by the Cargill Parties to particularise Cargill Australia's claim.[1447]

2319 The Cargill Parties noted that the Viterra Parties did not challenge the accuracy of Ryan's work. Further, the Cargill Parties highlighted the fact that the Viterra Parties did not perform their own analysis of the data Ryan analysed or of the entirety of the raw data available to them from the Laboratory Information System. This was notwithstanding the Viterra Parties' objections regarding the analyses conducted by Ryan and an invitation from the court to provide a report.[1448]

X.10.4 Parameters Analysis

X.10.4.1 Instructions

2320 In September 2018, Ryan was instructed to address the following questions:

> What percentage of all Certificates of Analysis in the relevant period (if any) contained one or more parameter test results reported on the Certificate of Analysis (Reported) that:
>
> (a) did not match the test results recorded internally by Joe White (ie, the Recorded and the Reported results do not match);
>
> (b) did not match the Recorded test result, and:

1446 Domestic sales represented around 22 percent of Joe White's sales for the 2012 financial year.

1447 In contrast with the Parameters Data and Barley Data, which were contained in approximately 87,000 rows of a spreadsheet, the 2014 spreadsheet submitted by the Cargill Parties contained in excess of 230,000 rows of data.

1448 During the course of Ryan's cross-examination in November 2018, the Viterra Parties were informed by me that if they wanted to make something of the data, then they should provide the court with a report. Later the same day, I told the Viterra Parties that, in addition to the provision of a statement of agreed facts by the parties as directed, if the Viterra Parties wanted to put forward anything further based on the available data, including by enlisting the assistance of Ryan (who agreed to assist), then they could do so.

(i) were Reported on the Certificate of Analysis as being within the customer's Specification; but

(ii) the Recorded test result was not within the customer's Specification?

2321 To address the above questions, Ryan was provided with a data spreadsheet extracted from the Laboratory Information System, comprising the Parameters Data, which purported to contain: the malt parameters specified by customers; the test results recorded internally by Joe White; and the test results reported in the Certificates of Analysis throughout the relevant period. The spreadsheet contained 87,351 rows of data,[1449] corresponding to 4,359 order numbers.[1450]

2322 Ryan was given instructions with assumptions to follow while conducting his analysis, relevantly:

> *Non-numeric entries*
>
> A. Some of the parameters have specifications that are non-numeric, but the test result recorded by [Joe White] has a numeric value… For the purpose of comparing a non-numeric Specification with a numeric Recorded test result, you should make the following assumptions:
>
> …
>
> (b) For all parameters where the Specification is "NIL", a Recorded or Reported test result of "0" or "0.0" should be treated as within the Specification for that parameter.
>
> …
>
> *Null or blank test results*
>
> E. Some parameters record a NULL or blank entry in the Recorded column, but a specific number in the Specification and/or the Reported column.
>
> F. For those parameters, you should treat the NULL or blank entry as containing (a) a test result that is within the customer Specification; and (b) a test result that does not match the Reported column.

1449 Not including the header row.

1450 The documents tendered by the Cargill Parties as contractual documents which related to Ryan's analyses related to 3,656 of these 4,359 orders, representing approximately 84 percent of the total orders. For the remaining 703 orders, there were no written contracts tendered.

Decimal places

G. Some of the parameter test results for a specific order in the Recorded and Reported columns are not expressed in the same numeric format, but otherwise appear to be the same number. For example, row 3520 (when sorted by order number) contains the parameter 'Soluble Nitrogen %, Dry Basis'. The Recorded entry is 0.7216. The Reported entry is 0.72. It appears that the numbers are the same but the Recorded test result has been entered or displays four decimal places, and the Reported test result has been entered or displays two decimal places.

H. You should treat such test results in the following way:

(a) if the results in the Recorded or Reported columns have a different number of decimal places, but otherwise, save for fair rounding or the reduction of decimal places appear to be the same number, those results should be treated as matching.

(b) highlight (or otherwise identify) all rows in your spreadsheet which contain test results that are not expressed in the same numeric format but otherwise appear to be the same.

(c) in your summary, state what percentage of all Certificates of Analysis in the relevant period (if any) contained test results that included rows highlighted in this way.

…

Duplicate test results

K. For some orders, test results were conducted for the same parameter more than once.

L. You should treat these results in the following way:

(a) where there are duplicate test results within a single order, and one of the duplicate test results matches the customer Specification and the Reported result, you should treat the test results for that parameter as a match and disregard the non-matching test result/s for the purposes of calculating if the Recorded and Reported results match or are within Specification.

…

X.10.4.2 Findings

2323 The facts derived from Ryan's analysis were agreed upon by both parties and are attached as annexure D to these reasons. The relevant agreed facts included:

1. Of the 4,359 Certificates of Analysis included in the Parameters Data, 98.88% of those Certificates of Analysis (or 4,310) had one or more

parameters the subject of an Adjustment (ie the Recorded Analytical Test Result and Reported Analytical Result did not match).

…

3. Of the 4,359 Certificates of Analysis included in the Parameters Data, 88.05% of those Certificates of Analysis (or 3,838 orders) had one or more parameter results Reported that was the subject of an Adjustment that brought a Recorded Analytical Test Result that was outside Specification to a Reported Analytical Result that was within Specification.[1451]

…

5. 87.2% of all individual Recorded Analytical Test Results [being 87,351 results contained in the 4,359 Certificates of Analysis] contained in the Parameters Data are recorded as being within Specification or otherwise had a blank entry in the Recorded Analytical Test Result column (Column I).

….

8. 37.1% of all Adjustments recorded in the Parameters Data were such that the Recorded Analytical Test Result was outside Specification but the Reported Analytical Result was within Specification.

…

X.10.4.3 The Viterra Parties' submissions

2324 Essentially, the Viterra Parties' position was two-fold. It was submitted that the Cargill Parties did not prove that the malt supplied by Joe White routinely failed to meet customers' specifications, because: (1) there was insufficient evidence to prove the specifications; and (2) there was insufficient evidence to prove the failure to meet alleged specifications.

2325 Accordingly, it was submitted that the Cargill Parties failed to prove that Joe White routinely misstated the results to ensure Certificates of Analysis were within specification.

X.10.4.3.1 Insufficient evidence of specifications

2326 Turning to the first issue, the Viterra Parties submitted that the Cargill Parties did not prove that the Laboratory Information System reliably captured all of the customers' specifications and therefore did not establish that the specifications used in the Parameters Analysis were the specifications required by the customer, for 4

1451 88.05 percent equated to 1,210,608 tonnes, or 89.1 percent of the total tonnes for the 4,359 orders (agreed fact 4).

reasons.[1452]

2327 *First*, as already mentioned, the Parameters Data was extracted from the Laboratory Information System. There was evidence from Joe White's employees that the Laboratory Information System did not always record the specification in accordance with the customers' contracts.[1453]

2328 *Secondly*, concerns were raised at a management meeting in September 2013,[1454] that some of the specifications in the Laboratory Information System might have been incorrect.

2329 *Thirdly*, the Laboratory Information System did not capture some of the nuances in contractual obligations between Joe White and its customers.[1455] Therefore, it was submitted that there was insufficient evidence to establish that the Parameters Data contained the contractually required specifications.

2330 *Fourthly*, it was contended the Cargill Parties relied on Laboratory Information System data, as opposed to more detailed data that was available to them.[1456]

2331 Based on these submissions, the Viterra Parties submitted that the court should infer that the best evidence would not have assisted the Cargill Parties' case.

X.10.4.3.2 Insufficient evidence of failure to meet specifications

2332 Turning to the second issue, the Viterra Parties submitted that the Parameters Analysis did not prove a failure by Joe White to meet customer specifications, for the following reasons.

2333 *First*, it was contended that the assumptions underpinning the Parameters Analysis

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1452 There was considerable overlap between these submissions and the Viterra Parties' submissions concerning the reliability of the Laboratory Information System data.

1453 The Viterra Parties relied on the fact that, under cross-examination, McIntyre gave evidence of various instances where values recorded in the Laboratory Information System were not the same as the customers' contractual specifications: see par 2293 above.

1454 The Viterra Parties submitted that the court could infer that this type of topic arose on earlier occasions in addition to the meeting in September: see par 2297 above.

1455 See par 2299 above.

1456 In cross-examination, McIntyre did not disagree that the Administration System, which recorded customer details, and was available to Joe White contained more detail: see par 2303 above.

submitted by the Cargill Parties were flawed. The Parameters Analysis was based on 2 assumptions: (1) the results recorded in Laboratory Information System were the actual and objective properties for that parameter; and (2) any difference, regardless of size, between the recorded result and the reported result for a particular parameter, meant that the Certificate of Analysis misreported the properties of malt with respect to that parameter.

2334 The Viterra Parties submitted that the mere fact that a test result was outside an alleged customer specification did not necessarily imply that the malt was actually outside the customer specification. Due to variability in malt, in order to determine if malt was outside customer specifications, it was necessary to take into account standard deviations.[1457] Accordingly, the Viterra Parties submitted that the above assumptions should be rejected as they failed to take into account variability in test results or the need to sometimes adjust results.

2335 *Secondly*, the Viterra Parties questioned the accuracy of results recorded in the Laboratory Information System. Specifically, the Parameters Data included statistical outliers and possible errors that they contended should have been excluded as they had not been verified.[1458] Further, in cross-examination Testi acknowledged the possibility of errors in the Laboratory Information System, and the absence of a discretion when entering data with respect to outliers or unexpected results.

2336 *Thirdly*, there was evidence that Joe White adjusted recorded test results to align the reported results with what Joe White expected its customers to achieve when they tested the malt. The Viterra Parties contended that adjustments to test results for this purpose were not improper and did not amount to misreporting.[1459]

1457 In cross-examination, De Samblanx agreed that in order to determine whether a shipment was more likely than not to be within specification, based on the test results recorded in the Laboratory Information System, it would be necessary to look at the extent of deviation from the specification: see pars 1652-1653 above. Further, evidence was led by the Viterra Parties that it is generally accepted that a result within 2 standard deviations was considered statistically within specification.

1458 Verification of the data would involve using corroborating data to establish the accuracy of the outliers.

1459 The Viterra Parties submitted that adjusting results to reflect anticipated customer results was not improper because: (1) it recognised that customers were conducting tests and would reject malt

2337 The Viterra Parties acknowledged that 98.88 percent of orders had been subject to adjustment and 88.05 percent of orders contained parameters recorded as outside specification but reported as within specification.

2338 However, the Viterra Parties emphasised that 62.9 percent of all individual parameter adjustments did not have the effect of adjusting a recorded result to bring it within specification. Further, they submitted that the court could not be satisfied that the purpose of adjusting the remaining 37.1 percent was to report malt within specification which was out of specification, as opposed to simply being an "occasional" adjustment to reflect the results that Joe White expected its customers to achieve in their testing.

2339 *Fourthly*, 87.2 percent (or, depending on approach, 79.6 percent)[1460] of all original individual test results were already within customer specification before any adjustments were applied and therefore, it was submitted that the adjustments alleged were not routine behaviour.

2340 *Fifthly*, the Viterra Parties put forward that the lack of evidence of customer complaints contradicted the Cargill Parties' allegations of routine non-compliance and should lead to the inference that the delivered malt met customer specifications.

X.10.4.3.3 Insufficient evidence of misstatement of test results

2341 In light of the above, the Viterra Parties submitted that the Cargill Parties' failure to prove both the customer specifications and the failure to meet those specifications should lead the court to conclude that the Cargill Parties did not establish that Joe White was routinely misstating test results, by reporting that malt was within customer specifications, when it was not.

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produced that was outside specification; (2) Joe White's procedure was aimed at producing malt that satisfied customer testing processes; and (3) those adjustments would have the effect of making the results more relevant to the customer.

1460 See item 5 of annexure D. The instructions for the Parameters Analysis were to exclude entries that did not contain original test results, assuming that those entries would have returned results that were not within specification. Under these instructions, 79.6 percent of original tests were within customer specification prior to any adjustment. Alternatively, if these entries were included, assuming that they would have returned results within specification, 87.2 percent of original tests were within customer specification prior to any adjustments.

2342 Further, the Viterra Parties submitted that the Cargill Parties failed to lead evidence in relation to what Joe White's obligations were with respect to the Certificates of Analysis. Accordingly, it should be inferred that Joe White's customers did not expect the Certificate of Analysis to be a record of raw test results.

2343 Furthermore, the Viterra Parties submitted that in light of expert evidence to the contrary,[1461] the evidence of subjective concerns of Joe White's staff did not assist the Cargill Parties' case.[1462]

2344 Moreover, similar to paragraph 2340 above, the Viterra Parties put forward that in circumstances where a customer has not complained, it must be inferred that the malt was fit for that customer's purposes and therefore specifications were met, at least to the customer's satisfaction.

2345 Finally, it was submitted, that to the extent that there was evidence of customer complaints, any discounts or compensation provided to customers would have been reflected in the financial records that were disclosed to the Cargill Parties.[1463]

X.10.4.4 The Cargill's Parties' submissions

2346 The Cargill Parties made submissions about business records generally. As the question of whether the data in the Laboratory Information System could be relied upon has already been decided in the Cargill Parties' favour,[1464] it is unnecessary to address these.

X.10.4.4.1 Variability of results

2347 The Cargill Parties submitted that the Parameters Analysis appropriately treated small differences between customer specifications and results as non-conformance because even small variances from customer specifications could have had a great impact on the quality of malt.[1465] Further, regardless of the materiality of the adjustments, any adjustments absent disclosure deprived Joe White's customers of the

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1461 Compare issues 9 above and 13 below.
1462 See par 180 above.
1463 The Viterra Parties denied that any compensation was paid.
1464 See pars 2287-2309 above.
1465 The uncontested evidence of Testi was that variance from particular specifications for parameters such as moisture or wort betaglucan could have quite serious repercussions.

opportunity to make informed decisions regarding the formulation of the end product. Furthermore, the Parameters Analysis did not treat all small differences as non-conformance. Ryan's instructions included treating small differences as matching where such differences arose from an inconsistent use of decimal places in the data.[1466]

X.10.4.4.2 Recorded results within specification

2348 The Cargill Parties submitted that the Viterra Parties' reliance on the fact that 87.2 percent of individual test results were within specification before an adjustment was applied was misconceived.[1467] It was submitted that the appropriate way to consider the data was on an order by order basis because a single falsified result within an order amounted to a misrepresentation that tainted the whole of the Certificate of Analysis.

2349 In contrast with the Viterra Parties' conclusions from the Parameters Analysis, the Cargill Parties submitted that 98.8 percent of all Certificates of Analysis contained 1 or more parameter results which reported results that did not match recorded results. The practical effect of this was that Joe White was providing adjusted Certificates of Analysis in almost all instances.

X.10.4.4.3 Adjustments made to bring a result within specification

2350 The Cargill Parties submitted that the Viterra Parties' proposition that only 12.6 percent of individual test results had the effect of bringing a result from outside specification to a result within specification was disingenuous.[1468] When the 12.6 percent was broken down, it represented 10,971 individual parameters spread over 3,838 separate orders and covered 53 different customers.

2351 Similar to paragraph 2348 above, the Cargill Parties rejected the Viterra Parties' reframing of the Parameters Analysis at an individual test level, submitting that the relevant consideration was that 88.05 percent of all Certificates of Analysis reported 1 or more parameters as being within specification where the recorded results were

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1466 See par 2322 above.

1467 See par 2339 above.

1468 The figure of 12.6 percent was put to Ryan during his cross-examination, in which Ryan agreed that it was only about 12.6 percent of the time that a parameter with a recorded result out of specification was adjusted so that the reported result was in specification.

outside specification. Further, the Cargill Parties did not agree with the Viterra Parties' emphasis on the fact that only 37.1 percent of parameters that were adjusted had the effect of bringing a result from outside specification to within specification, and contended the submission missed the point. Moreover, the Cargill Parties rejected the Viterra Parties' proposition that the inverse meant that 62.9 percent of adjustments did not have the effect of bringing a result recorded outside specification to within specification given that the figure of 62.9 percent did not account for blank results.

2352 The Cargill Parties submitted that beyond the 37.1 percent, there were further instances of Joe White adjusting results:

(1) At times a recorded result would be outside specification and an adjustment would have the effect of bringing it closer to specification, albeit, the result would remain outside specification.

(2) At times a recorded result that was already within specification would be adjusted to bring it closer to the customer's designated specification or closer to the pre-shipment result.

(3) McIntyre gave evidence that there were instances where Joe White adjusted a parameter that was not necessarily outside specification, in order to bolster the believability of an interrelated misreported parameter.[1469]

2353 The Cargill Parties submitted that the fact that some adjustments were not made for the purposes of bringing a result within specification should not excuse the practice of reporting false results to customers.

X.10.4.4.4 Duplicate test results

2354 The Cargill Parties submitted that little weight should be given to any issues regarding duplicate results as Ryan had been instructed to exclude duplicates in most

1469 See pars 77-78 above.

circumstances,[1470] and there were very few orders containing duplicates in the Parameters Data.[1471]

X.10.4.4.5 Significance of contractual compliance

2355 The Cargill Parties submitted that Certificates of Analysis were representations by Joe White to customers about the properties of the malt it provided and sometimes the barley variety or varieties used in the blend.

2356 The Cargill Parties rejected the Viterra Parties' submission that Joe White's customers were not concerned with strict compliance, on the basis that the evidence did not support this contention. Whilst Stewart originally gave evidence that customers "had no problem with the malt they were sent", in cross-examination, he subsequently retreated from this position, acknowledging the importance of specifications to customers.[1472] Further, the Cargill Parties put evidence before Stewart of customer complaints regarding discrepancies in the specifications reported in the Certificates of Analysis and the customers' internal testing.[1473]

2357 The Cargill Parties submitted that Stewart accepted that a Certificate of Analysis contained a statement to the customer that the malt complied with the specifications in their contracts. Further, it was submitted that Stewart agreed that pencilling results would amount to deception, irrespective of the range of deviation. Furthermore, it was submitted that Stewart conceded that he was uncomfortable with sending incorrect Certificates of Analysis to customers. Accordingly, it was submitted that customer specifications were important and Stewart understood this.[1474]

2358 In addition to Stewart's evidence, further evidence of the importance of contractual compliance to brewers was adduced. Such evidence included statements from

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1470 See par 2322 above.
1471 76 orders contained duplicate test results.
1472 See, for example, par 1834 above.
1473 In August 2010 Boon Rawd, and in November 2010 Oriental Brewery, raised issues about the difference between their internal test results and those reported on their respective Certificates of Analysis: see par 155 and fn 670 above.
1474 See generally pars 168-177, 407-415 above.

industry experts,[1475] and evidence of customer complaints from the period after Cargill Australia acquired Joe White.[1476] It was submitted that customer complaints received in the period after Joe White ceased adjusting results and started to disclose to customers its inability to meet requirements demonstrated that compliance with contractual specifications was important to customers.

2359 Before addressing these submissions, it is convenient to refer to further work performed by Ryan subsequently.

X.10.5 Deviation Analysis

X.10.5.1 Instructions

2360 In June 2019, Ryan was instructed to undertake a further analysis to ascertain the extent to which the adjustments identified in the Parameters Analysis were within or beyond 2 standard deviations of customers' specifications ("the Deviation Analysis").[1477] To perform this analysis, Ryan was supplied with a table entitled "MAPS Standard Deviation" listing the standard deviation for a range of parameters.

2361 Ryan was instructed to rely on the following relevant assumptions in conducting his analysis:

> 3. For each parameter in Column G, if that parameter appears on the list provided at (c) above[1478] and using the standard deviation table, identify the figure that represents **two standard deviations** for each parameter in the standard deviation table.
> 4. If there is a parameter listed in Column G and it is listed on the table provided at (c) above with a standard deviation of "0", please assume the deviation is zero for your analysis.
> 5. If there is a parameter listed in Column G which does not appear on the table provided at (c) above then for the purpose of this analysis please do not include

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1475 Evidence was given by industry experts Hertrich and French: see issue 13 below. See also par 18 above.

1476 For example, Heineken made numerous complaints in the period between November 2013 and March 2014 (and beyond) about Joe White's inability to meet specifications: see, for example, par 1572 above. Additional examples demonstrating the importance of compliance to customers were adduced, including correspondence from Boon Rawd, Oriental Brewery, SABECO and Sapporo.

1477 On 21 June 2019, Gilbert + Tobin sent a letter to Ryan, setting 18 February 2011 (the date the Viterra Certificate of Analysis Procedure was introduced) to 31 October 2013 (the date of Completion) as the relevant period for the Deviation Analysis.

1478 This was a reference to a document prepared by Gilbert + Tobin which linked the names of the analytical parameters in the standard deviation table with the names of the analytical parameters in column G.

that parameter in your analysis and answers to the questions below.

(Emphasis in original.)

X.10.5.2 Findings

2362 The relevant agreed facts drawn from this analysis were:[1479]

> 29. Of the 3,070 Certificates of Analysis included in the Parameters Data during the Relevant Period,[1480] 42.90% of those Certificates of Analysis (or 1,317) had one or more Affected Results (ie the Recorded Analytical Test Result was outside Specification by more than two Standard Deviations and the Reported Analytical Result was within Specification).
>
> 30. The 1,317 Certificates of Analysis included in the Parameters Data during the Relevant Period which had one or more Affected Results equate to 508,338 tonnes or 52.01% of the total tonnage for the 3,070 orders during the Relevant Period.
>
> 31. The 3,070 Certificates of Analysis included in the Parameters Data during the Relevant Period comprise 70.43% of the 4,359 Certificates of Analysis included in the Parameters Data.
>
> 32. The 3,070 Certificates of Analysis included in the Parameters Data during the Relevant Period comprise 71.94% of the total tonnage included in the Parameters Data.
>
> …
>
> 34. 3.52% (or 2,132) of the 60,645 individual entries contained in the Parameters Data during the Relevant Period were Affected Results (including parameters that [Ryan] was instructed to exclude).
>
> …
>
> 39. The sum of the number of entries in Items 36-38 above, being the total number of Affected Results for those three parameters during the Relevant Period,[1481] is 894, comprising 41.93% of the total number of Affected Results during the Relevant Period at Items 34 and 35.

(Original footnotes omitted.)

X.10.5.3 The Viterra Parties' submissions

2363 The Viterra Parties did not accept that the Deviation Analysis demonstrated Joe White routinely supplied malt that did not comply with customer specifications.

2364 They maintained that it was not "wrongful" to report test results as within specification where the recorded test results were outside specification by more than

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1479 See annexure D for full list of agreed facts.

1480 See fn 1477 above.

1481 The 3 parameters were "1,000 Corn Weight g Dry Basis", "Soluble Protein %, Dry Basis, Congress" and "Total Protein %, Dry Basis": see further fn 1484 below.

2 standard deviations ("Plus 2 Affected Results"). They submitted that, even if Plus 2 Affected Results were wrongful, the frequency of the practice did not suggest that a bona fide purchaser would have necessarily walked away from the Acquisition.

2365 The Viterra Parties further submitted that the Deviation Analysis was based on instructions that maximised the frequency of results displaying adjustments beyond 2 standard deviations, by unfairly assuming a standard deviation of 0 for particular parameters.[1482]

2366 Further, it was submitted that the occurrence of a test result being adjusted beyond 2 standard deviations, to be brought within specification, was less than 5 percent. In accordance with the principles of materiality set by the Accounting Standards Board, this might be presumed to be non-material, unless there was evidence, or convincing argument, to the contrary.

X.10.5.3.1 Frequency of Plus 2 Affected Results

2367 The Viterra Parties proposed that the data should be considered at an individual parameter result level, rather than at a Certificate of Analysis level. As the findings showed, if the data was viewed at the Certificate of Analysis level (contrary to the Viterra Parties' contention), the results demonstrated that 1,317, or 42.90 percent, of the 3,070 Certificates of Analysis contained 1 or more Plus 2 Affected Results.

2368 The proposed alternative was to view the data in respect of the 60,645 individual tests; then 3.52 percent were Plus 2 Affected Results.[1483] If this approach were accepted, then the Viterra Parties submitted that it did not amount to establishing that Joe White routinely adjusted results, and therefore demonstrated that Joe White's financial and operational performance was not substantially underpinned by the Operational Practices.

2369 Further, it was submitted the mere fact that adjustments were occurring did not

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1482 See par 2361 above, assumption 4.

1483 If the parameters that Ryan had been instructed to exclude, by reason of the letters of instruction dated 18 June 2019 and 21 June 2019, were excluded from the total measurements, the proportion of Plus 2 Affected Results changed to 4.01 percent: see annexure D to these reasons, item 35. This exercise was conducted in the relevant spreadsheet by the court book operator during the trial at the direction of the Viterra Parties.

necessarily lead to the conclusion that the adjustments were false or incorrect. Adjustments greater than 2 standard deviations could have been made to correct for error, including for the purpose of managing variance between Joe White test results and customer test results.

X.10.5.3.2 Treatment of individual parameters

2370 The Viterra Parties submitted that the instructions given to Ryan were unsatisfactory, contending that the Cargill Parties had artificially cut the Parameters Data to best support their case.

2371 To illustrate this they referred, on the 1 hand, to 41.93 percent of the 2,132 Plus 2 Affected Results being in respect of 3 parameters.[1484] Ryan's instructions were to apply a standard deviation of 0 to these 3 parameters. Therefore, any adjustment made, no matter how small, to a test for 1 of these parameters resulted in that test being classified as a Plus 2 Affected Result.

2372 On the other hand, an analysis of many of the "commercially significant" parameters revealed that the proportion of Plus 2 Affected Results was low. For example only 1.1 percent of moisture tests were Plus 2 Affected Results.

X.10.5.3.3 Standard deviation of 0

2373 The Viterra Parties submitted that no evidence was provided explaining the allocation of a standard deviation of 0 for specific parameters.[1485]

2374 Further, in some instances where a parameter was assigned a standard deviation of 0, it had interrelated parameters that were assigned non-0 standard deviations. Given the relationship between interrelated parameters, it would be expected that the proportion of Plus 2 Affected Results would be similar. Thus, it was submitted Plus 2 Affected Results for protein ought to have been similar to the related parameters of moisture and the Kolbach Index.[1486] The Deviation Analysis showed variation between the proportions of Plus 2 Affected Results in interrelated parameters. The

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1484 Of the 2,132 Plus 2 Affected Results, 197 were for 1000 corn weight g, dry basis; 204 were for soluble protein %, dry basis, congress; and 492 were for total protein %, dry basis.

1485 See par 2361 above, assumption 4.

1486 See fn 671 above.

Viterra Parties submitted that this outcome suggested that there was an incongruency between the parameters with a standard deviation of 0 and the expected results.

2375 Furthermore, standard deviations are a quantification of measurement uncertainty. It was submitted that all parameters have a degree of measurement uncertainty, so all parameters should have a standard deviation that is not 0.

2376 Moreover, the Viterra Parties submitted that some customer contracts included tolerance ranges with reference to standard deviations for the protein parameter, which was treated as 0 in Ryan's analysis.

2377 By excluding the parameters which were given a standard deviation of 0, the agreed facts show the Deviation Analysis results would change, as follows:

> 44. … 25.31% of Certificates of Analysis included in the Parameters Data during the Relevant Period had one or more [Plus 2] Affected Results …
>
> 45. … 1.66% (or 1,007) of the 60,645 individual entries contained in the Parameters Data during the Relevant Period were [Plus 2] Affected Results …

2378 The Viterra Parties therefore submitted that the more appropriate figure for consideration was that 1.66 percent of the total measurements were Plus 2 Affected Results.[1487]

X.10.5.3.4 Inferences as a result of not adducing other evidence

2379 The Viterra Parties submitted that the Cargill Parties could have relied on other evidence to prove the extent to which Plus 2 Affected Results occurred.

2380 In cross-examination, Ryan acknowledged that he had previously considered the impact of standard deviation data in 2017. The spreadsheet Ryan used in 2017 was "similar" to a much larger dataset submitted by the Cargill Parties in 2014.[1488] The Viterra Parties submitted the court should infer from this that the original data would

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1487 If the parameters that Ryan had been instructed to exclude and the parameters that had been allocated a standard deviation of zero were excluded from the total measurements, the proportion of Plus 2 Affected Results changed to 2.57 percent: see annexure D to these reasons, item 46. This exercise was conducted by the court book operator at the direction of the Viterra Parties.

1488 See fn 1447 above.

have produced less favourable results for the Cargill Parties.

2381 Further, Joe White kept a record of non-conforming shipment forms.[1489] These forms were attached to the Certificate of Analysis (for Joe White's internal record-keeping purposes only)[1490] when there were adjustments of more than 2 standard deviations.[1491] It was submitted that the court should infer that an analysis of these forms would not have been of assistance to the Cargill Parties.

X.10.5.4 The Cargill Parties' submissions

2382 The Cargill Parties submitted (as has been found)[1492] that the Viterra Certificate of Analysis Procedure did not contain a Decision Rule, but even if it did, it did not justify Joe White's routine adjustments of results in Certificates of Analysis without informing customers. Further, the Cargill Parties submitted (which has also been found)[1493] that Joe White did not consistently or accurately apply the standard deviations published in the Malt Proficiency Scheme, and therefore was not applying a Decision Rule based on the Malt Proficiency Scheme. And furthermore, they submitted that, even if Joe White was applying a Decision Rule on such a basis, between 25 to 42 percent of Certificates of Analysis contained Plus 2 Affected Results and accordingly, were not made pursuant to this alleged Decision Rule. Moreover, it was submitted if a parameter was not the subject of the Malt Proficiency Scheme it was not possible for the Decision Rule to apply as there could be no applicable standard deviation.

X.10.5.4.1 Malt Proficiency Scheme

2383 The Cargill Parties submitted for 2 different reasons it could be established that the internal standard deviation figures used by Joe White did not accurately or consistently reflect the monthly Malt Proficiency Scheme reports. *First*, between 1 January 2010 and 18 February 2011, there was no internal procedure or standard deviation table used by Joe White and therefore, it was submitted that there was no

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1489 See par 407 above.
1490 See fn 190 above.
1491 See example at par 410 above.
1492 See par 2263 above.
1493 See pars 286, 2246 above.

Decision Rule in place and thus no justification for any adjustments throughout that period. *Secondly*, the Cargill Parties relied on the fact that, when an internal standard deviation table was circulated,[1494] it was not updated after its creation to reflect the monthly Malt Proficiency Scheme reports.[1495]

2384 Even if the figures had been appropriately updated, the Cargill Parties submitted that that would not have remedied the situation. They contended that the use of the Malt Proficiency Scheme data itself was inappropriate because the scheme was established for participating members to gauge and consider their own laboratory's performance against other participating laboratories in respect of a given test in a given date range. It was therefore submitted that the Malt Proficiency Scheme data did not provide Joe White with a basis for adjusting results.[1496]

2385 In addition, the Cargill Parties submitted that the defence pleaded based on a Decision Rule should also fail on the basis that the standard deviations from the Malt Proficiency Scheme were not applied by Joe White. It was submitted that the choice to select the standard deviation for proficiency assessment, over other options, should have been explained.[1497]

X.10.5.4.2 Standard deviation of 0

2386 The Cargill Parties submitted that the use of a standard deviation of 0 for particular parameters in the Deviation Analysis[1498] was justified on the basis that these parameters were not included in the Malt Proficiency Scheme, which was relied on by the Viterra Parties as the grounds for Joe White reporting results within 2 standard deviations.

2387 The Cargill Parties submitted that Joe White used data from the Malt Proficiency Scheme to identify the standard deviation applicable and made adjustments to its

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1494 On 18 February 2011, Stewart circulated an internal standard deviation table to staff via email: see par 208 above.

1495 In September 2012, Sheehy sent an updated version to staff via email, which the Cargill Parties submitted was identical but for the addition of the words "As at 5th September 2012 based on MAPS round 186": see par 286 above.

1496 Compare Stewart's evidence: par 222 above. See also pars 2234-2247 above.

1497 See par 216 above.

1498 See par 2361 above, assumption 4.

results pursuant to that purported Decision Rule. Consequently, it was submitted that in the absence of a standard deviation for a parameter in the Malt Proficiency Scheme, Joe White would not have had a standard deviation to apply and, therefore, could not adjust that particular parameter pursuant to any Decision Rule.

2388 Further, the Cargill Parties submitted that Joe White was aware that there were no Malt Proficiency Scheme standard deviation values for some parameters given that there had been correspondence about such parameters between Stewart, Sheehy and Moller.[1499]

2389 Furthermore, the Cargill Parties pointed to an instance where adjustments were permitted by Joe White if Stewart gave written or verbal approval without any reference to the Malt Proficiency Scheme or any apparent objective criteria.[1500]

2390 As such, the Cargill Parties submitted that any adjustments made to parameters which were not in the Malt Proficiency Scheme would not have been pursuant to a Decision Rule, thus their allocation of a standard deviation of 0 in the Deviation Analysis was appropriate.

2391 Moreover, the Cargill Parties referred to the instruction to Ryan to exclude parameters, in favour of the Viterra Parties, in circumstances where it was unclear if a parameter was within the Malt Proficiency Scheme, due to difficulties in matching inconsistent naming conventions used between the Laboratory Information System and the Malt Proficiency Scheme.[1501]

X.10.5.4.3 Results of the Deviation Analysis

2392 By reference to the portion of malt orders that were shipped before the Viterra Certificate of Analysis Procedure became operative on 18 February 2011, the Cargill

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1499 An email in November 2010 from Sheehy to Stewart and Moller noted that some parameters were not part of the Malt Proficiency Scheme: see fn 204 above.

1500 In an email concerning coloured malts, Sheehy informed Stewart, McIntyre and others that a non-conforming shipment form was not required for a non-conforming shipment to San Miguel but written or verbal approval was required from Stewart if anything was "deviating significantly from the customer specification": see par 407 above.

1501 See par 2361 above.

Parties submitted that adjustments made before this time could not have been pursuant to a Decision Rule. It was contended this necessarily meant that there could be no justification for adjustments to parameter results for approximately 30 percent of the orders.[1502]

2393 The Cargill Parties further submitted it was appropriate to consider the number of Certificates of Analysis affected, rather than the proportion of parameters with Plus 2 Affected Results. On this basis they contended the facts demonstrated that, of the Certificates of Analysis issued during the period when the Viterra Certificate of Analysis Procedure was operative, 42.9 percent of orders and 52.01 percent of total tonnes shipped contained at least 1 Plus 2 Affected Result.[1503]

2394 The Cargill Parties submitted that the Viterra Parties' focus on parameters rather than orders was an attempt to minimise the scale of the Operational Practices. Again, it was submitted that the data should be viewed in light of the 42.9 percent of orders that contained Plus 2 Affected Results, which were received by 93.5 percent of customers.

2395 The Cargill Parties submitted there was no proper basis to exclude the parameters that had been given a standard deviation of 0 in the Deviation Analysis, which would change the findings from 42.9 percent to 25.31 percent of orders containing at least 1 Plus 2 Affected Result.[1504]

2396 The Cargill Parties submitted the Viterra Parties had not put forward an industry accepted objective quantification of measurement uncertainty for the parameters which had been allocated a standard deviation of 0. In the absence of such, it was submitted any adjustments to these parameters could not have been made pursuant to the purported Decision Rule.

2397 Further, the Cargill Parties contended that, even if the court accepted that it was

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1502 The Cargill Parties relied upon the fact that only 70.43 percent of orders contained in the Parameters Data were issued during the period in which the Viterra Certificate of Analysis Procedure was operative. See par 2362 above, agreed fact 31.

1503 Ibid, agreed facts 29 and 30.

1504 See par 2377 above.

appropriate to exclude the parameters allocated a standard deviation of 0, 25.31 percent was still a substantial proportion of orders.

X.10.5.4.4 Materiality

2398 The Cargill Parties submitted that it would be erroneous for Ryan to have considered materiality under the Australian Accounting Standards when performing his analysis. It was submitted that the standards relied on by the Viterra Parties were applicable to the preparation of financial reports only and there was no evidence that it was appropriate or proper to apply them in any other context. Further, it was not put to Ryan in cross-examination that the standards were relevant or applicable to his analysis.

2399 Even if the standards were applied, it was submitted that the percentage of misstated results found in the Deviation Analysis, both with or excluding the parameters allocated a standard deviation of 0, was greater than the materiality threshold, so that non-conformance was material.

X.10.6 Conclusions on Parameters Analysis and Deviation Analysis

2400 For the reasons stated,[1505] I am satisfied that the probative value and reliability of the data contained in the Laboratory Information System was such that it was able to be relied upon for the purpose of the analyses conducted.

2401 As is apparent from what is set out above, the relevant facts were not materially in dispute. The decision as to which conclusions ought to be drawn essentially amounts to determining the appropriate analysis of the facts as agreed.

2402 In my view, it is appropriate to commence the analysis by considering the Deviation Analysis. This is because on no proper view of the evidence could it be found that changing test results that were more than 2 standard deviations from the required specification was legitimate, justifiable or based upon any Decision Rule.[1506] Although

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1505 See pars 2287-2309 above.

1506 In making this observation, the evidence of Stewart that some laboratories were 3 or 4 standard deviations off has not been ignored: see fn 194 above. There was no evidence to connect this very

the Viterra Parties did not concede this point, the evidence of both Stewart and Hibbert was clear, unequivocal and plainly correct.[1507]

2403 The fundamental difference in the submissions was whether the Plus 2 Affected Results ought to be considered in the context of the total number of parameters the subject of the analysis, or whether each Certificate of Analysis which included a Plus 2 Affected Result ought to be considered in the context of the total number of Certificates of Analysis.

2404 Of course, both must be considered but the Cargill Parties' submissions were far more compelling as to the relevant touchstone in determining the significance of the data. To misstate a single result in a Certificate of Analysis was to misstate the composition of the malt. In other words, if a Certificate of Analysis stated a parameter was within specification when that parameter was a Plus 2 Affected Result, the fact that other parameters were accurately recorded and stated, alternatively less materially inaccurately recorded and stated, did not alter the fact that the Certificate of Analysis misstated the results of the analytical testing of the malt.

2405 Another critical difference between the parties was whether or not the Deviation Analysis ought to include or exclude those parameters that Ryan was instructed to give a standard deviation of 0. Even if it were assumed for the purpose of this discussion that the analysis ought to exclude these parameters, a proportion of over a quarter of Certificates of Analysis having 1 or more Plus 2 Affected Results would still strongly corroborate the finding already made that Joe White routinely misstated test results.

2406 Based on this finding, it is not strictly necessary to determine whether or not these parameters ought be excluded. However, if it were necessary to decide, in my view the parameters given a standard deviation of 0 ought not be excluded. This is because

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general statement to any adjustments to any of the Certificates of Analysis that were altered when results were beyond 2 standard deviations. A like observation may be made with respect to other very general attempts to justify the Operational Practices.

1507 See pars 2237-2239 above.

the rationale proffered by the Viterra Parties to seek to justify the extent to which there could be procedural pencilling of the test results was by reference to the Malt Proficiency Scheme.[1508] Absent any figure for any standard deviation of a parameter, there could have been no proper scientific or technical basis to alter the test results.[1509]

2407 Further, although it must be accepted that a level of uncertainty must always exist as a matter of practicality and logic, that circumstance did not provide a basis for inserting some unjustified figure to represent a standard deviation or 2 standard deviations or more. Any such figure would be entirely speculative. A similar observation may be made with respect to interrelated parameters. As for tolerance ranges, as has already been explained,[1510] the applicability of this issue was minimal.

2408 A further matter to support this conclusion was the situation that existed before 18 February 2011. Up until then, the Viterra Certificate of Analysis Procedure was not in place and, to use the words of Stewart, changes were made using an arbitrary approach.[1511] As Ryan's analysis used data dating back to 1 January 2010, it must follow that there could be no Decision Rule applicable to Certificates of Analysis issued before 18 February 2011 (as none existed). This applied to approximately 30 percent of the Certificates of Analysis containing a parameter with 1 or more Plus 2 Affected Results.[1512]

2409 The Viterra Parties' submissions as to the materiality or otherwise of particular parameters were not to the point. In most circumstances,[1513] the specifications were

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1508 See par 2245 above.

1509 This conclusion was not affected by the evidence concerning different results in different customer laboratories. That evidence did not go to whether or not it was permissible to alter the particular parameters in question based on some generally accepted level of deviation. Further, there was nothing in the evidence to connect the possibility that results may have been altered to accord with anticipated results of the customer and any of the relevant parameters or their accompanying "standard deviations". Although such a connection must have been theoretically possible, in the absence of any probative evidence upon which to find such a connection (the Viterra Parties did not point to any specific evidence to suggest the connection), the finding made above on the balance of probabilities was not undermined by this possibility.

1510 See par 2301(2) above.

1511 See par 175 above.

1512 It must be noted that the period back to 1 January 2010 did not include the entirety of the 2010 financial year, which ended on 31 October 2010.

1513 There was evidence that Joe White provided Certificates of Analysis even when a customer did not require it.

being provided by Joe White because the customer required it to do so. The fact that some parameters may be perceived to be more or less important (either to Joe White or others) did not alter the requirement imposed on Joe White not to misstate what it was reporting to its customers and to conceal that fact.

2410 The conclusions set out above proceed on the basis that the Deviation Analysis was the appropriate analysis to consider. No doubt, the Cargill Parties had Ryan prepare the Deviation Analysis to meet the argument put by the Viterra Parties that any change to a test result that was within 2 standard deviations of the required specification was legitimate. However, the Cargill Parties also relied upon the broader analysis performed by Ryan, being the Parameters Analysis.

2411 It should be said for completeness that, in light of the findings made concerning the serious deficiencies with the Viterra Certificate Analysis Procedure (including the loosely-defined 2 standard deviation approach it prescribed and the imperfect manner in which it was implemented),[1514] the Cargill Parties were justified in relying upon the Parameters Analysis. Considering the matter on the basis of orders rather than individual parameters,[1515] if the Parameters Analysis were utilised, it established that nearly 99 percent of Certificates of Analysis contained a parameter where the test result did not match the reported result, of which approximately 88 percent had 1 or more results that were reported as being within specification when the test result was actually out of specification.[1516]

2412 Obviously, if this were the approach adopted, as I think it should be, it would strongly support a finding that Joe White routinely misstated the results of analytical testing on the malt supplied from the beginning of 2010 until 31 October 2013.

2413 In relation to the Viterra Parties' submission that there were other ways for Cargill Australia to prove this part of its case, it did not advance their position. The Cargill Parties relied upon the evidence of witnesses called at the trial to prove Cargill

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1514 See, for example, the references in fn 1408 above.
1515 For the reasons discussed in par 2404 above.
1516 See par 2323 above.

Australia's claim regardless of any statistical analysis presented by Ryan. Further, there was no onus on Cargill Australia to prove its case more than once. It is a matter for a party as to how it chooses to prove its case. Of course, inferences might be drawn if certain evidence available is not relied upon. However, once the data from the Laboratory Information System was successfully tendered, the obvious means of Cargill Australia proving its claim was to rely upon such data. Effectively, Cargill Australia established this part of its claim relying upon 2 distinct approaches. There was no obligation upon it to put yet further evidence before the court in order to seek to establish even further means of proving its case.[1517]

2414 In light of the findings made, it is unnecessary to consider the applicability of the principles of materiality set by the Australian Accounting Standards Board. However, it must be noted that the relevant principles include a statement that materiality judgments can only be properly made by those who have the facts and that the percentages suggested for quantitative thresholds with respect to materiality were only provided as a guidance.[1518] Although it is unnecessary to make any finding, it should be noted that on the facts of this case where the test results were materially altered to report results being in specification when they were not, it was far from clear that a proportion of 5 percent of Certificates of Analysis, or for that matter results for individual parameters, would be considered immaterial.

X.10.7 The Varieties Practice

2415 The determination of this issue is relatively straightforward. Based on the Viterra Parties' admission, there was ultimately no issue that Joe White supplied the incorrect variety of barley on occasions without the approval of its customers.[1519] The real issue was whether it happened at a level to establish that it had occurred routinely during

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1517 For completeness, for the same reason no inference adverse to Cargill Australia has been drawn on the narrowing of the data relied upon: see par 2318 above. In addition to this reason, the Viterra Parties had all of the larger dataset provided in 2014 available to them, but chose not to identify any material matter that arose from the alternate source of information: see also fn 1448 above.

1518 Australian Accounting Standards Board, *Accounting Standard AASB 1031 Materiality*, July 2004, 8-9 [15].

1519 See also fn 782 above.

the relevant period.

2416 Again, McIntyre was a critical witness. She gave uncontroverted evidence of a standard practice of reporting the barley variety or varieties required by the customer regardless of whether or not the required varieties were used.[1520] Further, the interviews conducted with some of the Joe White executives in October 2013 confirmed the existence of the Varieties Practice. Their accounts disclosed Joe White used barley varieties inconsistent with customer contracts on a significant level,[1521] and that there was an awareness that Joe White was breaching customers' contracts without informing them.[1522]

2417 Further, a review of Joe White's ability to fully meet customer requirements in October 2013 revealed not only an inability to do so, but that varieties of barley were being supplied to customers on a routine basis in breach of contract.[1523] This conclusion as to what the Customer Review Spreadsheet indicated on its face was not seriously disputed by the Viterra Parties; rather they sought to attack the reliability of the information it contained. The attack was not successful.[1524]

2418 The Viterra Parties submitted that, if the document was to be considered reliable, the issue was confined to a small number of customers and was therefore unlikely to have had a significant impact upon the Joe White Business. This submission did not reflect the evidence.[1525] Further, it was entirely contrary to Stewart's assessment at the time, which was that 6 months "for most" (and 12 months for "others") was required before Joe White would be in a position to achieve barley variety compliance.[1526] He gave unchallenged evidence that a 6 month transition period in which procurement and planning could take place was appropriate because an immediate change without

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1520 See par 82 above.
1521 See pars 1281, 1286, 1373(10), (11), (16), (17), (18), (19), (20), (21), (22), (23), (24), (26) above.
1522 See, for example, par 1299 above.
1523 See pars 1211-1214, 1216, 1218, 1220-1223, 1429-1438 above.
1524 See pars 1430-1437 above.
1525 See pars 1220-1222 above.
1526 See par 1212 above; an assessment with which Hughes and Wicks expressly (and Youil implicitly) agreed: see par 1218 above. See also pars 1117-1118, 1126-1127 above.

advance preparation would have been disruptive to customer relationships and hard to manage.[1527] Wicks put it more bluntly. As Joe White's commercial general manager, he told Fitzgerald in late October 2013 that to attempt to supply barley varieties from 1 November 2013 in accordance with customer contracts would be commercial suicide and Joe White's brand would be decimated.[1528]

2419 Another document created by Stewart in October 2013 demonstrated that there were significant levels of non-compliance the previous month in the supply of malt with required barley varieties.[1529] There was nothing to suggest that the week chosen at random to demonstrate the magnitude of the issue to Fitzgerald was anything out of the ordinary.[1530] Other than to suggest some ambiguity existed on the face of the document, the Viterra Parties did not seek to challenge the accuracy of the information it contained. Even if it were accepted (contrary to my view)[1531] that there was some ambiguity, on any reading of the document it showed substantial non-compliance by Joe White with respect to required barley varieties. The fact that this was the position was confirmed by Stewart immediately after Cargill took control of Joe White.[1532]

2420 Although the significance of the existence of Hindmarsh barley in Joe White's inventory loomed larger in the conduct of this case than it should have, on this issue it did have some significance. Hindmarsh was never an approved malting variety, but was used on a continual and regular basis by Joe White up to 31 October 2013.[1533] This was a deliberate strategy for Joe White, which strategy had cost benefits and included an objective to rid itself of non-malting barley by gradually blending it with other barley over time.[1534] The data from the Laboratory Information System showed

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1527 See also par 1768 above.
1528 See par 1307 above.
1529 See par 1387 above.
1530 See par 1335 above.
1531 See fn 835 above.
1532 See pars 1565-1566 above.
1533 In the Viterra Parties' closing written submissions it was stated that it was disclosed to Cargill that Joe White regularly purchased Hindmarsh: see par 2702 below. The Viterra Parties' senior counsel acknowledged that it followed from this that Joe White regularly used Hindmarsh in the production of malt.
1534 See par 130 above.

that Hindmarsh was used in 188 orders between 7 June 2010 and 31 October 2013 in supplying 32 customers. After November 2010, Joe White supplied malt made with 12,322 tonnes of Hindmarsh. In the 3 months leading up to Completion of the Acquisition Agreement, Joe White used more than 3,700 tonnes of Hindmarsh. In the absence of any evidence to suggest that any customer approved its malt being made with non-approved malting varieties,[1535] the use of this variety clearly fell within the description of the Varieties Practice.

2421 Further, the agreed position of the industry experts was that barley varieties not accredited as a malting variety should not be added to a blend without consultation with and agreement by the customer. Indeed, the experts specifically addressed the issue of Hindmarsh and the fact that it was not accredited and agreed that it should not have been used unless a customer had previously approved the use of a specific feed barley variety. In short, there was no evidence to suggest any justification for the unauthorised use of Hindmarsh as part of the Varieties Practice.

2422 A further matter raised by the Viterra Parties was the evidence concerning the barley standards published by Grain Trade Australia, which standards required that all malt grade barley varieties have a minimum varietal purity of 95 percent.[1536] The standards recognised that a load of barley may not consist of 100 percent of a specific variety and may be contaminated by the presence of another variety. There was also evidence from French that there was an unavoidable inclusion of admixture and that most breweries have a "maximum" tolerance of 5 percent of other varieties of malt. Based on these matters, the Viterra Parties submitted that the identification of barley varieties other than the required barley variety must be expected.

2423 These matters were not to the point. *First*, the standards are concerned with barley being delivered, not malt,[1537] and there was no evidence that Joe White recorded in its internal records anything other than the barley variety that was ordered by Joe White

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1535 The evidence available suggested the opposite was the case in October 2013 (see par 1213 above), but direct evidence was lacking in relation to the position otherwise. That said, none of the customer contracts tendered expressly approved of the use of Hindmarsh.

1536 Jones gave evidence that barley was received by Joe White in accordance with this standard.

1537 Though, of course, the composition of the malt will be dictated by the barley used.

and purported to have been delivered to it. To be clear, Joe White made no allowance in its records for the fact that the barley may have only been 95 percent pure. *Secondly*, and further to the first point, the issue concerned the use of barley varieties actually recorded in Joe White's system as different varieties to the required varieties (or, if not knowingly misreporting the varieties, then simply writing down the variety or varieties specified by the customer without regard to Joe White's records and the varieties said to have been used).

2424 In short, this evidence relied upon by the Viterra Parties demonstrated that even if Joe White chose to use the correct varieties on all occasions, there was a likelihood that some small level of contamination from other barley varieties would have occurred. But this did not address the practice of Joe White choosing to use the incorrect variety or varieties and misstating or otherwise not disclosing the actual barley varieties that had been used. If anything, the existence of up to 5 percent impurity of barley varieties delivered had the potential to exacerbate the nature of the problem when barley varieties were blended as there was a likelihood that the amount of unauthorised barley used could be even greater than the percentage represented in Joe White's records.

2425 Before leaving this topic, it must be observed that the use of incorrect barley varieties was not because of some lax or sloppy work practices which meant that barley variety requirements were sometimes not met. Instead, the evidence reflected a brazen approach at times to the issue of non-compliance on occasions.[1538]

X.10.8 Barley Analysis

2426 The Cargill Parties also relied upon data in the Laboratory Information System to establish that the Varieties Practice was routinely engaged in by Joe White.

X.10.8.1 Instructions

2427 The Cargill Parties sought to have data in the Laboratory Information System analysed in order to compare the barley varieties specified by customers with barley varieties

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1538 See, for example, pars 252-254, 1335-1336 above.

supplied. This data recorded the barley varieties used by Joe White in providing malt for customers as well as the barley varieties reported in the Certificates of Analysis. To this end, in October 2018 Ryan was instructed to address various matters concerning the accuracy and consistency of the information. The task he was instructed to undertake for each unique order was to calculate and identify, amongst other things: (1) whether all barley varieties reported on a Certificate of Analysis were a customer-required barley variety for the customer in question; (2) whether all barley varieties used were customer-required varieties; (3) whether all barley varieties used were reported in the Certificate of Analysis; (4) orders where at least 1 barley variety was a required barley variety for a particular customer and at least 1 variety was reported in the Certificate of Analysis; and (5) the total unique orders that fell within (4), but (a) at least 1 variety used did not match any variety reported in the Certificate of Analysis, and/or (b) at least 1 variety used did not match any of that customer's required barley varieties. Further, Ryan was instructed to prepare:[1539]

a. The total number of unique orders;[1540]

b. The total number of unique orders with at least one barley variety reported on the Certificate of Analysis;

c. The total number of unique orders with no barley variety reported on the Certificate of Analysis;

d. The total number of unique orders with at least one customer required barley variety;

e. The total number of unique orders with no customer required barley variety;

f. The total number of unique orders with at least one barley variety used in the blend;

g. The total number of unique orders with no barley variety used in the blend.

Ryan was then asked to prepare a summary of the total orders, and to identify, by

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1539 Original instructions were contained in a letter from Gilbert + Tobin, sent to Ryan on 5 October 2018. On 9 October 2018, Gilbert + Tobin emailed Ryan to correct schedule E of the letter dated 5 October 2018. On 10 October 2018, Gilbert + Tobin again emailed Ryan to correct a cross-referencing error in paragraph 24 of the letter dated 5 October 2018. On 12 October 2018, Gilbert + Tobin sent an email to Ryan, attaching a letter, providing further instructions regarding the treatment of certain orders.

1540 Unique orders were obtained by removing duplicate order numbers.

both number and percentage, the results of his analysis in accordance with subparagraphs (a), (b), (c), (f) and (g) above.

2428 To address the above questions, Ryan was provided with the Barley Data, containing the barley varieties used to manufacture malt for customer orders and the varieties reported in Certificates of Analysis from 1 January 2010 to 31 October 2013. The 2 spreadsheets contained 52,970 rows of data corresponding to 4,352 unique order numbers.[1541]

2429 By way of background, the Cargill Parties referred to many customer contracts which contained terms specifying the barley varieties required to be used when making malt for that customer. McIntyre's evidence was that these were not always recorded in the Laboratory Information System. Accordingly, the barley varieties contained in contractual specifications were collated and given to Ryan for the purpose of the Barley Analysis.

2430 Some customers specified more than 1 barley variety and many orders were produced using more than 1 barley variety. Further, not every Certificate of Analysis reported a barley variety.[1542] Furthermore, not every customer order specified a barley variety.[1543] Moreover, it was not necessarily the case that the orders with no contractual barley requirements were the same as the orders where the Certificate of Analysis did not report a barley variety.[1544]

X.10.8.2 Findings

2431 The relevant agreed facts drawn from this analysis were:[1545]

> 10. Of the 2,753 unique orders with at least one Reported Variety on the Certificate of Analysis and at least one Customer Required Barley Variety, there were 2,695 (97.89%) orders where all Reported Varieties on a Certificate of Analysis were a Customer Required Barley Variety.
>
> 11. Of the 4,171 unique orders with at least one barley variety used in the

1541 The letter dated 5 October 2018 stated that there were 4,353 unique order numbers in the spreadsheet. However, 2 of the unique order numbers were duplicate orders.

1542 2,788 of the 4,352 orders were accompanied by a Certificate of Analysis that reported a barley variety.

1543 4,172 of the 4,352 orders specified at least 1 barley variety.

1544 2,753 of the 4,352 orders both specified a required barley variety and were accompanied by a Certificate of Analysis.

1545 For all agreed facts found, see annexure D to these reasons.

blend and at least one Customer Required Barley Variety, 3,236 or 77.58% of those orders, were orders where not all the barley varieties used in the blend were Customer Required Barley Varieties.

12. Of the 2,788 unique orders with at least one barley variety used in the blend and at least one Reported Variety on the Certificate of Analysis, there were 2,457 (88.13%) orders where not all barley varieties used on (sic) the blend were Reported Varieties on the Certificate of Analysis.[1546]

13. Of the 2,753 unique orders with:

- at least one barley variety used in the blend,
- at least one Reported Variety on the Certificate of Analysis; and
- at least one Customer Required Barley Variety,

there were 2,429 (88.23%) unique orders which had:

- at least one barley variety used in the blend that did not match any Reported Variety on the Certificate of Analysis; and/or
- at least one barley variety used in the blend that did not match any of that Customer's Required Barley Variety.

…

21. 56.34% of the Malt Blend Components recorded in the Barley Data have a Production Issue Quantity of "10" tonnes or less.[1547]

…

24. 50% of the orders recorded in the Parameters Data are for malt supplies of less than 225 tonnes, and 50% are for malt supplies of more than 225 tonnes.

X.10.8.3 The Viterra Parties' submissions

2432 The Viterra Parties submitted that the Cargill Parties failed to prove that the malt supplied by Joe White routinely failed to meet customer barley variety requirements for 2 key reasons: (1) the barley variety requirements were not all as alleged by the Cargill Parties; and (2) there was insufficient evidence of routine failure to meet the alleged barley variety requirements.

X.10.8.3.1 The barley variety requirements

2433 The Viterra Parties submitted that the barley varieties used in the Barley Analysis were not always proven to be barley variety requirements specified by Joe White's customers. They referred to some evidence given by Jones that Joe White's customers

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1546 That is, the Certificate of Analysis reported the variety or varieties used inaccurately (regardless of what a supply contract may have stipulated).

1547 It was also reported that 45.2% of the malt blend components recorded in the Barley Data had a production issue quantity of 5 tonnes or less.

did not specify the grades of barley required. But as the Viterra Parties acknowledged, the grade of barley was a different issue to the variety of barley. The passage referred to also noted some but not all customers specified the required barley variety. This was common ground.

2434 Very helpfully, the Viterra Parties prepared a table (being schedule A to their written submissions) in which they provided their responses to Cargill Australia's narrative summary for barley varieties for Joe White customers who specified barley varieties.[1548] The Viterra Parties' table of 71 pages identified what was agreed and provided detailed responses to the matters they disputed. What follows provides only a very brief summary of the issues raised.

2435 The Viterra Parties submitted there were 8 circumstances when there was no contractual obligation to supply barley varieties, but they were treated by the Barley Analysis as barley variety specifications.

2436 *First,* some customers only specified "preferred varieties" of barley, which did not necessarily impose a contractual requirement on Joe White.

2437 *Secondly*, some contracts allowed for delivery of non-specified barley in particular circumstances and only required Joe White to use its best endeavours to use the specified variety.

2438 *Thirdly*, some customers merely requested a barley variety at a point in time, which did not necessarily amount to a contractual obligation.

2439 *Fourthly*, some customers accepted particular varieties at a point in time, which did not imply that those were the only varieties permitted by the customer, nor did that give rise to a contractual obligation.

2440 The Viterra Parties submitted the 2 preceding issues they had identified concerning barley varieties at a point in time affected a vast number of orders.

1548 This summary was schedule E to the Statement of Claim.

2441 *Fifthly*, miscellaneous documents relied on by the Cargill Parties did not reflect any agreement between Joe White and customers regarding barley varieties to be used.

2442 *Sixthly*, the Cargill Parties ignored that some contracts expressly allowed small quantities of other varieties in the malt.

2443 *Seventhly*, the Cargill Parties ignored the possibility of variations to contractual specifications.

2444 *Eighthly*, the Cargill Parties failed to adduce evidence linking particular contracts or documents with orders in the Barley Analysis.

X.10.8.3.2 Evidence of failure to meet alleged barley variety requirements

2445 As for the second key reason, the Viterra Parties contended that the Barley Analysis did not prove a failure by Joe White to meet barley variety requirements.

2446 It was submitted that the Cargill Parties did not adduce lay evidence that established a finding that barley variety specifications were not met.[1549] In the alleged absence of lay evidence, the Viterra Parties submitted that the Barley Analysis did not establish that barley variety specifications were not met for the following reasons.

2447 *First*, the Barley Analysis was based on inaccurate instructions that would have had an impact on the results.[1550]

1549 The Viterra Parties submitted the court ought to reject the evidence from Stewart that Joe White used unspecified varieties on the basis that Stewart had a limited knowledge of customer contracts, and did not give evidence in relation to the frequency of such a practice. Accordingly, it was submitted his account of Joe White using non-approved varieties did not constitute "conclusive" evidence of non-compliance with customer requirements. It was suggested that the appropriate witness to give evidence on the matter was Wicks, who was not called to give evidence. In seeking to diminish the significance of Stewart's evidence on this topic, the Viterra Parties did not address the fact that it was Stewart who was asked to prepare the Customer Review Spreadsheet in October 2013 when the issue of non-approved barley varieties was being addressed (see par 1211 above), or the fact that the information he compiled as recorded in the Key Recommendations Memorandum was agreed to by Hughes and Wicks: see par 1218 above.

1550 Examples cited by the Viterra Parties of suggested errors in the instructions included issues regarding Asia Pacific Breweries, which affected 36 percent of the orders in the dataset. Further, there was no evidence establishing all approved, preferred or required barley varieties for the period up to 1 November 2011. For the period following 1 November 2011, the Cargill Parties relied upon lists of the Heineken group's "preferred varieties" as requirements. In addition, Thai Beverages had a contractual obligation for Joe White to use "best endeavours" to supply the barley variety specified, however, this was treated as a strict requirement in the Barley Analysis.

2448 *Secondly*, the Barley Analysis treated an order as non-compliant with customer variety requirements regardless of the quantity of the non-compliant variety.

2449 It was submitted that the Barley Analysis did not account for the phenomenon of "funnelling", where small parts of malt from the previous batch in a particular silo would form part of the new batch in that same silo.[1551] Ryan was given no instructions in relation to funnelling and agreed under cross-examination that the Barley Analysis included accounting for any amount of non-approved Barley Variety as non-conforming no matter how small the quantity.[1552]

2450 It was further submitted that the fact that, for example, 50 percent of all orders were for malt supplies of more than 225 tonnes and 56.34 percent of malt blend components had a quantity of 10 tonnes or less, this demonstrated that the Barley Data recorded small quantities of malt that were part of larger orders.[1553]

2451 The Viterra Parties also relied on evidence of the unavoidable presence of small quantities of malt produced from other barley varieties.[1554]

2452 The Viterra Parties contended that small quantities of a non-approved variety would not have amounted to non-compliance with the barley varieties specified by Joe White's customers. They further submitted that customers would not have been concerned with small quantities of non-approved malt and would not have considered that it amounted to non-compliance with specification. Accordingly, it was submitted in these circumstances customers would not expect the presence of such varieties to be reported on their Certificates of Analysis.

X.10.8.4 The Cargill Parties' submissions

2453 The Cargill Parties submitted the Barley Analysis demonstrated that at all material times Joe White had a practice of routinely and systematically making malt for

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1551 See pars 265-269 above.

1552 By way of example, an order for 193.18 tonnes was recorded as non-conforming because it contained 0.6919 tonnes of a non-approved variety.

1553 See annexure D to these reasons, items 20-25, for a full list of agreed quantities of malt blend components.

1554 See pars 2422-2423 above.

customers by using barley varieties that were not contractually specified.

X.10.8.4.1 Viterra's "no contractual obligation" submissions

2454 The Cargill Parties provided a detailed response to the 71 page table prepared by the Viterra Parties in relation to barley varieties as schedule A to their written submissions.[1555] By adding an extra column to the table, and inserting their responses the document became a 96 page document. Again, what follows only provides a very brief summary of the issues raised.

2455 *First,* the Cargill Parties took issue with the Viterra Parties' submission that there was no contractual requirement to provide "preferred varieties" in relation to Heineken.[1556] The Cargill Parties relied on evidence of a traffic light colouring system used to mark "preferred varieties", "no preference" varieties and "not permitted" varieties for Heineken orders. In addition to not permitted varieties being banned from use, there were restrictions on the use of no preference varieties, as they could not be used without upfront approval from Heineken. The necessary implication of which was submitted to be that the varieties labelled as "preferred varieties" were contractually required varieties unless Heineken expressly agreed to the contrary.

2456 *Secondly,* the Cargill Parties submitted that in contracts where best endeavour clauses existed, read in context those clauses did not relieve Joe White of the obligation to use contractually specified barley varieties or to accurately report what was in the Certificate of Analysis.[1557]

2457 *Thirdly,* the Cargill Parties disputed that the evidence they had relied upon only

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1555 See par 2434 above.

1556 The majority of the preferred varieties argument related to Heineken. There was also reference to the preferred varieties of SAB Miller The Cargill Parties submitted that the preferred varieties argument only impacted 1 order for SAB Miller and therefore the materiality of the argument in relation to that customer was low.

1557 The Viterra Parties' submissions were made in relation to the best endeavours clauses contained in Thai Beverages contracts. The Cargill Parties relied on evidence of a clause in a Thai Beverages contract that contained a best endeavours obligation, and also stated that "[t]he variety of malting barleys being supplied should be stated on the 'Certificate of Analysis' (COA) for each consignment. Where variety blends are to be supplied in order to meet specification the variety percentage mix ratio should be stated on the [Certificate of Analysis]". Therefore, it was submitted that Joe White was not relieved of an obligation to accurately report barley varieties in the Certificate of Analysis.

showed varieties were used at particular points in time. Further, they took issue with the submission that there were a "vast number of orders" where reference to a variety at a point in time was incorrectly considered by the Cargill Parties as a contractual obligation.[1558]

2458 *Fourthly,* the Cargill Parties similarly took issue with the substantive submission,[1559] together with the contention that there were a "vast number of orders", where acceptance at a point in time was incorrectly considered by the Cargill Parties as a contractual obligation.[1560]

2459 *Fifthly,* the Cargill Parties challenged the submission that the Cargill Parties had relied on miscellaneous documents which provided no indication of an agreement as to the use of barley. The Cargill Parties contended that the Viterra Parties' submission should fail on the basis that they did not provide the court with the number of orders affected by the miscellaneous documents. Notwithstanding this, the Cargill Parties responded to this submission noting there was only a handful of instances where the Viterra Parties alleged that this had occurred.[1561]

2460 *Sixthly,* the Cargill Parties took issue with the Viterra Parties' submission that the Cargill Parties treated small quantities of non-approved barley varieties as a breach when small amounts of those varieties were permitted by the contracts. The Cargill Parties submitted that on the evidence Joe White was breaching contract terms which permitted a "small or a little" amount of non-conforming malt.[1562]

1558 The Cargill Parties dealt with the Viterra Parties' submissions on an individual entry basis, submitting that there were "less rather than more" occurrences where the Viterra Parties had alleged that such mischaracterisation had occurred. While not accepting the mischaracterisation had occurred, by reference to schedule A of the Viterra Parties' closing submissions, the Cargill Parties referred to their responses in part A [2(a)]-[2(b)], part B [3],[8], part D [7], part E [7], [14], [18], part F [5], part G [11]-[13], part I [5],[11],[18], part K [1]-[2], part M [1] (X2), [10], part O, [10] to demonstrate the limited impact of this point.

1559 See par 2439 above.

1560 The Cargill Parties relied on the same evidence for the third and fourth submissions: see fn 1558 above.

1561 Again, by reference to schedule A to the Viterra Parties' closing submissions, the Cargill Parties referred to the same documents identified by the Viterra Parties at part H [19], part M [6], part P [8(ii)].

1562 The Cargill Parties submitted that there were only 2 relevant customers to draw to the court's attention. An Asahi contract contained a clause that stated that "[l]ittle of the following should be contained in the malt, a malt variety which is not listed in the specification." Of the 8 orders for Asahi, the quantity

2461 *Seventhly,* the Cargill Parties submitted that it was unfair of the Viterra Parties to seek to make something of the fact that the Cargill Parties had ignored the possibility of variation to approved varieties unless a specific document had been identified to confirm it. It was submitted that, in circumstances where the records that the Cargill Parties relied upon were inherited from the Viterra Parties, any inadequacy of such records was not the fault of the Cargill Parties. Further, it was submitted that the Viterra Parties had not produced documents evidencing variations. Furthermore, the Cargill Parties submitted that their approach was to err in favour of the Viterra Parties when there was any uncertainty regarding contractual requirements of barley varieties. Moreover, it was submitted that the Viterra Parties had not submitted any impact, nor numbers, nor examples to substantiate their submission.

2462 *Eighthly,* the Cargill Parties rejected the submission that there was any linkage problem between the data extracted from the Laboratory Information System and the contracts. It was submitted that evidence from Jones and McIntyre established that the orders started in the Administration System and then were completed in the Laboratory Information System.[1563] Therefore, it was submitted that tendering additional information from the Administration System as a record of customer contracts was unnecessary.

X.10.8.4.2 Funnelling

2463 In response to the Viterra Parties' submissions that the Barley Analysis did not account for funnelling,[1564] the Cargill Parties submitted that any potential funnelling did not detract from the fact that Joe White had a practice of deliberately misreporting barley

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of a non-approved barley variety used was between 38.57 percent and 51.66 percent. The other customer was Oriental Brewery.

1563 Referring to evidence from Jones and McIntyre, the Cargill Parties submitted that malt contracts were often long term, details of new customer contracts were entered into the Administration System and when new orders were placed under these contracts the pre-shipment team created a new sale which was populated by the Administration System and an order number was automatically generated by the Administration System. When an order was generated, it was pushed from the Administration System to the Laboratory Information System. Thereafter, the order remained in the Laboratory Information System and the details of the order were generated by the system or entered into the system.

1564 See pars 256, 265-269 above.

varieties.

2464 The Cargill Parties submitted that the practice of misreporting was evident given the fact that 77.58 percent of orders contained at least 1 variety that was not a customer required variety. Further, 88.23 percent of all orders with a barley variety reported in the Certificate of Analysis and a customer required variety listed, contained at least 1 barley variety used that did not match the reported variety or any of the customer's required varieties.[1565]

2465 The Cargill Parties submitted in the circumstances it was highly unlikely that funnelling had any significant effect on the figures above. A proposition put to Ryan by the Viterra Parties during cross-examination was referred to[1566] in submitting that funnelling only occurred in limited instances where a batch was almost drained and where that silo contained batches made from different barley varieties.

2466 Further, using the Barley Data, the Cargill Parties extracted the orders where there were 2 or more barley varieties, those being, it was submitted, the orders in which funnelling could have occurred. The Cargill Parties further excluded instances where the customer had not specified a barley variety. Of the remaining 29,711 individual batches of malt, 65 percent used a non-conforming variety. The Cargill Parties submitted this was a highly significant proportion.

2467 Based on this, the Cargill Parties submitted that it was more probable that the use of non-conforming barley varieties was a consequence of Joe White's practice of using the incorrect barley as opposed to funnelling.

2468 Notwithstanding, the Cargill Parties submitted that even if funnelling was caught in the Laboratory Information System, the Viterra Parties did not provide evidence to demonstrate the quantifiable effect of funnelling on customer orders. They also

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1565 See par 2431 above.

1566 The proposition, based on McIntyre's evidence, was that when a batch was getting towards the bottom of a silo, some of the product sitting at the top of the silo (not forming part of the same batch) might pass through and mix with the batch at the bottom: see par 267 above.

referred to the "paucity" of evidence on this issue.[1567]

X.10.8.4.3 Recording of small non-conformances

2469 The Cargill Parties responded to the Viterra Parties' submissions about the treatment of small quantities of non-conforming malt by submitting the following.

2470 *First*, it was submitted that a single example offered by the Viterra Parties of a batch of non-conforming barley with a small production issue quantity used in an order was not able to assist the court to draw any reliable conclusions about the dataset as a whole.

2471 *Secondly*, the facts regarding the individual batches which contained small production issue quantities[1568] did not support the Viterra Parties' proposition that any non-approved barley varieties that were recorded as having been used in a batch, no matter how small, were treated as non-conformance in the Barley Analysis. It was submitted that the facts merely conveyed that some individual batches of malt which made up an order had small production quantities.

2472 It was submitted that the Viterra Parties did not adduce evidence from which the court could reasonably infer that any significant number of orders contained only a small number of non-conforming individual batches of malt. Nor had any evidence been adduced from which the court could reasonably infer that any significant number of orders contained a small number of non-conforming batches which comprised a relatively small production issue quantity.

1567 The Cargill Parties submitted that the 2 witnesses that addressed this matter were Jones and McIntyre. While Jones gave evidence that he was aware of the phenomenon, he said he never observed it directly and was unable to say whether use of varieties of less than 1 tonne in different batches was because of funnelling as he was not aware of the issue in enough detail to comment. Equally, when the topic of funnelling was raised with McIntyre she said it was not her area of expertise, though she gave evidence she had an understanding of the basics: see par 267 above. The Cargill Parties' submissions did not refer to Stewart's evidence on the topic (see par 268 above), but presumably that was because it was not adopted by the Viterra Parties when cross-examining Ryan approximately 6 weeks after Stewart had given this evidence. Rather, the Viterra Parties relied on McIntyre's evidence of how funnelling occurred in putting various propositions to Ryan: see fn 1566 above. Further, in the Viterra Parties' closing submissions on funnelling they also relied on McIntyre's evidence.

1568 See annexure D to these reasons, items 20-25, for a full list of agreed quantities of malt blend components.

2473 *Thirdly*, the Cargill Parties relied on the Barley Analysis to demonstrate that only 14.2 percent of the orders analysed contained only 1 batch of malt that contained a non-conforming variety.[1569] It was submitted that the majority of orders, more than 60 percent,[1570] contained 2 or more batches of malt which were comprised of non-conforming barley varieties.

X.10.9 Discussion and conclusions on Barley Analysis

2474 For reasons already explained,[1571] the evidence (without taking into account the evidence the subject of statistical analysis) established that Joe White routinely, and without informing customers, supplied malt contrary to the requirements of customers who specified the barley variety to be supplied. However, given the substantial body of material devoted to the Barley Analysis, it is appropriate to make findings regarding this part of the case.

2475 Reaching a conclusion on this particular matter has not been without its difficulties. Not all the underlying contracts were available to be tendered. Although the Cargill Parties were able to explain this and submitted it was not their fault (because the Viterra Parties, as the previous owners of the Joe White Business, were the source of the documentation), that did not avoid the simple proposition that it was for Cargill Australia to prove its case despite any absence of documents. Further, I have been mindful to ensure that the firm view I have formed on the evidence more generally with respect to the Varieties Practice has not affected the analysis of the evidence strictly related to the Barley Analysis.

2476 Furthermore, although a number of points made by the Viterra Parties plainly had merit, assessing the weight that ought to be given to some of the Viterra Parties' submissions has not been readily apparent when considering the validity of the Barley Analysis as a whole. In relation to numerous points, no attempt was made by the

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1569 619 orders contained only 1 batch with a non-conforming variety, which Cargill divided by a total of 4,352 unique orders.

1570 2,617 orders contained 2 or more batches with a non-conforming variety, which Cargill divided by a total of 4,352 unique orders.

1571 See pars 2415-2425 above.

Viterra Parties to demonstrate how prevalent a particular issue was. Although, of course, the onus was on Cargill Australia to establish its case, in circumstances where Ryan was available and expressly agreed to conduct any further analysis the Viterra Parties might have sought to have undertaken,[1572] the absence of any attempt by them to ascertain or even approximate the extent of a particular issue must be taken into account in determining whether certain points made had the effect of undermining or seriously putting in issue the validity of the exercise undertaken in relation to the Barley Analysis.

2477 Turning to the substance of the matter, there were some points raised by the Viterra Parties that were more apparent than real. The first matter raised concerning "preferred varieties" focused on that wording rather than the substance of the Heineken contracts. The meaning of the term in the context of the relevant contracts was such that the preferred varieties were the required varieties unless Heineken agreed otherwise. As all but 1 order under this category fell into this contractual regime, the remaining order for SAB Miller could be of no consequence given the total number of orders the subject of the analysis.[1573]

2478 Further, the contracts requiring best endeavours did not relieve Joe White from its obligation to provide the specified barley variety if it was or ought to have been available, nor from its obligation to accurately report the barley varieties used. This point has been largely dealt with above in the context of considering the appropriateness of using data from the Laboratory Information System.[1574]

2479 Furthermore, the submission concerning possible variations lacked merit. Of course, it would be possible that variations to contracts occurred that were not the subject of evidence, but the case must be determined on the balance of probabilities on the evidence before the court. Given a number of Joe White employees were the subject of cross-examination, including by counsel instructed by the Third Party Individuals, little weight can properly be given to the mere possibility that there were a significant

1572 See fn 1448 above.
1573 See fn 1556 above.
1574 See par 2301 above.

number of material variations beyond those the subject of evidence.

2480 Finally, the Viterra Parties' submissions concerning the linking of the data in the Laboratory Information System to contractual details has already been rejected.[1575] That leaves the third, fourth, fifth and sixth points.[1576]

2481 Addressing the third, fourth and sixth points together, it is necessary to consider each of the differing arrangements between Joe White and its respective customers in order to determine whether or not Cargill Australia has established that those customers had required barley varieties as assumed by Ryan in the Barley Analysis.

2482 The first customers identified by the Viterra Parties were those associated with Asia Pacific Breweries.[1577] The Viterra Parties submitted the emails relied upon by Cargill Australia were evidence only of all varieties that were being used, rather than specifying required varieties. The emails were exchanged in 2009 and did not unequivocally state that the 2 varieties referred to, Gairdner and Stirling, were required varieties.[1578] The Cargill Parties relied upon these 2 varieties being referred to as varieties Joe White currently supplied to Asia Pacific Breweries, coupled with an expressed intention by Stewart to submit a strategy for 2 new barley varieties. Further, in a later email, copied to Hughes and others, Stewart referred to the need to be vigilant with Asia Pacific Breweries concerning barley varieties. In that same email, Stewart noted that Stirling was in short supply and that Gairdner could be used exclusively, but directed that none of Baudin, Hamelin, Vlamingh or Buloke varieties were to be used.

2483 Furthermore, the Customer Review Spreadsheet showed, as at October 2013, there were only 3 approved varieties for Asia Pacific Breweries, being Gairdner, Stirling and

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1575 See pars 2292-2296 above.

1576 See pars 2438-2442 above.

1577 The Viterra Parties sought to raise an issue about the identity of companies within the group, but this has already been addressed: see fn 1008 above.

1578 The Viterra Parties also referred to a "Strategic Alliance Contract" signed on 24 November 2008 by Asia Pacific Breweries Ltd and Joe White provided for a 4 year term commencing 1 April 2010, which did not specify barley varieties.

Sloop.[1579]

2484 The Barley Analysis showed that Baudin was used for 165 orders, Hamelin was used for 31 orders, Vlamingh was used for 124 orders and Buloke was used for 229 orders. In addition, Hindmarsh was used for 12 orders.

2485 In my view, the evidence demonstrated that Asia Pacific Breweries had strict requirements concerning barley varieties. Further, the documents showed that Joe White fully appreciated this to be the position. No other possible explanation was proffered for Stewart directing that certain varieties were not permitted. On the best evidence, it was most likely that Asia Pacific Breweries' requirements were not adhered to in the manner set out in the previous paragraph.[1580]

2486 Next, the Viterra Parties noted that the email relied upon by Cargill Australia concerning Asahi (forming part of an email chain from January 2009) referred to the varieties of Gairdner and Baudin in the context of the use of gibberellic acid and did not indicate these varieties were actual requirements. In response, the Cargill Parties submitted the email demonstrated these 2 varieties were the required varieties because the customer had these 2 specific varieties malted in its possession in order to test the results of malt provided by Joe White. In addition, the Cargill Parties referred to the Customer Review Spreadsheet recording that, as at October 2013, these 2 varieties were the only approved varieties for Asahi.

2487 In my view, the emails referred to alone would not have established that Gairdner and Baudin were required varieties. However, the contents of those emails read in conjunction with the Customer Review Spreadsheet prepared a number of years later, together with the absence of any evidence of permitted use of other varieties,[1581] strongly suggested that these varieties were the required varieties throughout the

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1579 But see also par 3665 below.

1580 On 1 view of the evidence, it was possible that Baudin and Vlamingh were preferred varieties: see par 3665 below.

1581 See par 2488 below.

relevant period.[1582] I so find.

2488 Also with respect to Asahi, the sixth point was enlivened. A contract was entered into with Joe White on 12 March 2010 that referred to a standard list specification annexed, but the standard list that was annexed did not identify any barley varieties. The contract contained a clause stating : "Little of the following should be contained in the malt: A malt variety which is not listed in the specification". The Viterra Parties submitted this clause also permitted the use of non-specified barley varieties.

2489 The Cargill Parties referred to subsequent correspondence related to purchase orders, but that correspondence also did not list required barley varieties.

2490 The Cargill Parties submitted there was no need for a list of the required barley varieties in the March 2010 contract because the arrangement concerning required barley varieties was already in place. Further, they submitted that even if (contrary to their principal contention) this clause permitted use of other varieties, it did not permit what had occurred, namely numerous orders being fulfilled with malt that contained substantial amounts of the barley variety Flagship (ranging between 33.35 and 51.66 percent).[1583]

2491 The Cargill Parties' position should be accepted. In addition to the Customer Review Spreadsheet indicating that as at October 2013 only Baudin and Gairdner were approved and the absence of evidence to suggest that that position had ever changed, no explanation was proffered by any party as to why Joe White grossly misreported the barley varieties being used. It is difficult to conceive of a plausible reason why this would have been done if there was no limitation on the malting barley varieties that could have been used in production. The obvious inference to be drawn was either that it was done to conceal that the required barley variety had not been used and a non-approved variety had been used instead, or no proper enquiries were made

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1582 It should not go without comment that the email chain included an email from Stuart to the customer which stated that Joe White understood Asahi's strict policy relating to the addition of gibberellic acid and that Joe White was extremely embarrassed that it may have "inadvertently" supplied malt with an additional amount of gibberellic acid.

1583 The 8 orders in question were for volumes of malt ranging between 270 and 502 tonnes.

about the varieties used and the barley variety required by the contract was simply entered.[1584] Either inference supported the conclusion that there were varieties contractually required and that that requirement was being reported as being met when it was not being adhered to. Moreover, the quantities of Flagship supplied in the orders identified could not be described as "little"; to supply in such quantities (without any disclosure) was in breach of contract, and materially so.

2492 Next, the Viterra Parties challenged the contractual position with respect to Sapporo. There were only 31 orders the subject of the Barley Analysis referable to this customer. Further, none of those orders were accompanied by a Certificate of Analysis that misreported the variety used in the blend. Accordingly, whether or not Cargill Australia proved this aspect of the case (and, based on the matters raised by the Viterra Parties, I am not satisfied that it did), it did not affect the outcome of the Barley Analysis. Accordingly, it need not be considered further.

2493 Next, there were no contractual documents for the period 1 January 2011 to 31 March 2012 for Cargill Japan Ltd ("Cargill Japan").[1585] Cargill Australia assumed Gairdner was the required barley variety based on supply documentation that was available before and after this period, which specified Gairdner as the required variety. Further, they relied upon the Customer Review Spreadsheet which showed the only approved variety for Cargill Japan in October 2013 was Gairdner.

2494 Obviously, Cargill Australia could not produce Joe White documents that did not come into its possession upon the Acquisition. The absence of the contract having been explained on this basis, and the requirements of the supply of malt both before and after the existence of any contract covering the 15 month period, when considered in conjunction with the details contained in the Customer Review Spreadsheet, provided a solid basis for inferring that Gairdner was the required barley variety for Cargill Japan during this period. I so find.

1584 See McIntyre's evidence on this second possible inference at par 82 above.

1585 There was no issue raised at trial as to whether documents of Cargill Japan were in the power, possession or control of Cargill, Inc or Cargill Australia for the purposes of discovery obligations.

2495 Next, an issue arose with respect to Hite.[1586] The issue was similar to that addressed with respect to Cargill Japan. Contractual documents from February 2010 to January 2011 and from February 2011 to January 2012 specified Gairdner, and Gairdner or Buloke, respectively.[1587] Further, with respect to the first of these 2 periods, it appeared from correspondence that from 23 April 2010 this customer also approved Buloke as a required variety.[1588]

2496 Further, on 29 May 2012 emails were exchanged between Stewart and Hite in which it was stated that a shipment of malt using Buloke would be accepted, but it was requested that Gairdner be used for future orders. Stewart acceded to this request on the basis that Buloke would only be used in the future if Joe White gained permission. Finally, the Cargill Parties submitted that there was no evidence that Buloke or any other variety was approved after 29 May 2012, but this submission appeared to overlook the fact that the Customer Review Spreadsheet recorded both Gairdner and Buloke as approved varieties in October 2013. However, when such approval occurred was unclear. On 24 January 2013, a purchase order from Hite specified only Gairdner be used.

2497 The substantive dispute was confined to the period between 1 February 2012 and 23 January 2013 in relation to which no relevant documents were available to be

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1586 The company in question was called Hitejinro, created as a result of the merger of Hite Brewery Co Ltd and Jinro Ltd, but was referred to in Joe White's records as Hite.

1587 With respect to the first of these, the Viterra Parties sought to make something of the fact that Hite had not signed the "Contract sheet". There was simply nothing in this point. The contract was signed by Wicks on behalf of Joe White and malt was supplied pursuant to it. Further, with respect to the second of these contracts, the Viterra Parties noted that the "Offer Sheet" had not been signed by Joe White. Again, the absence of such a signature did not halt the supply of malt by Joe White and there was no evidence of any counter-offer. In these circumstances, the only sensible inference was that the document as signed by the customer and in the possession of Joe White comprised the contract of supply.

1588 The Viterra Parties submitted it ought to be inferred that Buloke was approved from the commencement of the contract period rather than 23 April 2010, and that Hite had agreed to use varieties other than Gairdner from 26 November 2009 (when Gairdner was first identified in the contract sheet as the required variety). However, there was nothing in the relevant email to suggest that this was the position. If anything were to be inferred from the contents of the email on this issue, it was that Buloke was being tried for the first time.

tendered.[1589] Consistent with the reasoning given with respect to Cargill Japan,[1590] I find that Hite had required barley varieties limited to Gairdner and Buloke.

2498 Next, given the extent of the issues raised, it is necessary to consider the position of Nestlé from 2006 to 2013.

2499 On 31 July 2006, Nestlé provided a product specification to Joe White as the "approved supplier" for the period from "01/08/06– / / "; in other words, the period was open-ended. In identifying the barley variety as "30% Gairdner/70% Stirling", it was stated in the product specification that, amongst other things, the specific barley variety was to be selected following discussion. The clause continued: "Any changes of supply of each and every barley [variety] other than the approved variety listed below require prior approval and production trial".

2500 On 13 October 2009, Joe White's offer to supply malt to Nestlé was accepted. The offer was contained in an email which stated that both the terms and specifications, and the variety and specifications, were to be "as per current contract". Earlier in the email chain, Nestlé sought to clarify that the same malt would be delivered which was identified as "2 row Australian variety", to which Joe White responded that it would deliver the same varieties and production methods in accordance with the then current deliveries. Nowhere in the email chain were the actual varieties being used expressly identified.

2501 On 27 August 2010, a "2011 contract" for the sale of 2,000 tonnes of malt (to be shipped in the second half of 2010) was confirmed. The single page document stated the specification was to be "As per Nestlé Jurong Specification", and a description of the malt was "2 Row Australian Barley Brewing Malt". The parties were agreed that Jurong was the regional base within which the Nestlé's factory was located.

1589 In addition, the Viterra Parties also sought to raise an issue about whether a purchase order dated 24 January 2013 related to orders listed as the purchase order did not specify any delivery days and there was no evidence that Joe White agreed to supply the malt. Equally, there was no evidence to suggest that business with respect to Hite did not continue in the ordinary course during this period. In short, there was no basis to draw the inference that Joe White declined to supply the malt ordered.

1590 See pars 2493-2494 above.

2502 There were no other documents relevant to the issue of what, if any, barley varieties were required by Nestlé for deliveries from 1 August 2006 to 31 December 2010.

2503 On 24 March 2010, another "2011 contract", this time for the sale of 10,000 tonnes of malt (to be shipped over the 2011 calendar year), was confirmed. The details in relation to the specification and description were the same as those set out in the 27 August 2010 document.

2504 On 27 May 2011, a "2011/2012 contract" for a further 10,000 tonnes of malt (to be shipped from September 2011 to March 2012) was confirmed. Again, the details with respect to the specification and the description were the same.

2505 On 12 August 2011, another "2011/2012 contract" for 7,000 tonnes of malt (to be shipped from January 2012 to June 2012) was confirmed. Yet again, the same specification and description details were given.

2506 In addition to these contractual documents, the Cargill Parties tendered an email sent on 23 June 2011 by Nestlé to Stewart. That email recorded that, with respect to 2 shipments in that month, the barley varieties Gairdner (60 percent) and Stirling (40 percent) had been used. Each shipment was referred to by a number, and the email stated that Nestlé preferred the malt in the second shipment over the first shipment.

2507 Another email chain, in early 2012 and commenced by Nestlé, was concerned with the quality of malt to be supplied from the Sydney plant. In responding to the query, Stewart stated that Joe White was in the process of putting together a crop report for the 2011/2012 harvest. He suggested a malting-information session should be conducted in the upcoming months and enquired as to whether Nestlé was aware of how a second trial for Buloke had performed. He stated that Joe White had good volumes of Buloke barley and would be able to start supplying that variety if Nestlé desired. The response from Nestlé was that the performance of Buloke overall was better than the combination of 60 percent Gairdner and 40 percent Stirling. It was stated that the trials had yielded desirable results. After a number of further emails, it was agreed on 2 February 2012 that Nestlé would try 60 percent Buloke and 40

percent Gairdner "for a start".

2508 Finally, a purchasing specification issued by Nestlé, stated to be valid from 20 July 2012 (with no end date), was relied upon. The general description of the malted barley referred to 2 row and 6 row barley. Although particular barley varieties were not identified on the face of this document, it contained the following term:

> The specific barley variety is to be selected following discussion with the Maltster, Client and Nestec, to optimise the quality of the malted barley allowing for seasonal and varietal variability. Any changes of supply of each and every barley variety requires prior approval by Nestlé.

2509 No witness was taken to any of these documents in order to identify surrounding circumstances that might have shed light on their meaning or significance. The Viterra Parties submitted that the email of 23 June 2011 indicated nothing beyond the 2 varieties used. Similarly, they submitted that the emails exchanged in early 2012 demonstrated no more than the varieties that were used at that time, and were not evidence of barley varieties required throughout the entire period. In relation to the contractual documents, the Viterra Parties submitted the barley varieties were not identified,[1591] or were identified as something other than Gairdner and Stirling;[1592] and, in relation to the last of them, submitted it was not apparent that the specification applied to the orders particularised in the Barley Analysis.

2510 In my view, these documents demonstrated that Nestlé stipulated that barley varieties needed to be expressly approved before they could be used in malt supplied by Joe White. Further, it was apparent from this documentation, together with the Customer Review Spreadsheet which stipulated that the only approved varieties for Nestlé as at October 2013 were Buloke, Gairdner and Stirling, that up until February 2012 only Gairdner and Stirling were said to be used (and therefore were the only varieties approved); and after February 2012 Buloke was also the subject of approval and use. There was nothing in the evidence to suggest that "2 row Australian barley"[1593] was referring to some other variety of barley, or that such a term embraced barley varieties

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1591 Including that there was no evidence of the "Nestlé Jurong Specification".

1592 This submission related to the references to "2 row" barley.

1593 Or for the limited period for which it applied, "6 row".

generally.

2511 The next customer relevant to this issue was Phoenix. The Cargill Parties relied on an email dated 25 August 2006 which referred to a trial of Gairdner and the desire that that variety would be approved over Schooner. Subsequent emails in 2009, 2011 and 2012 referred to either "known specification" or "same variety with same conditions as current contract" or "[specifications] as per current contract", without expressly specifying any particular variety. The assumption was made that Schooner was the only approved variety.

2512 The Customer Review Spreadsheet listed Schooner as the only approved variety. In circumstances where the first and last relevant documents both identified Schooner as the approved variety and the other documents made it clear that a specific variety was required, in the absence of any evidence to suggest any other variety was approved, the obvious inference was that Schooner was the required variety throughout. I so find.

2513 The next customers were collectively referred to as "San Miguel". In August 2005, Joe White and San Miguel entered into a "preferred supplier alliance"[1594] for a 5 year period commencing on 1 January 2007 "after the expiration of the previous agreement",[1595] with an option to a further 5 years. Pursuant to this, Joe White agreed to supply "high-quality malt to [San Miguel Corporation] for brewing and coloured malts".

2514 Further, it provided that specifications could be amended from time to time by mutual agreement having regard to brewing requirements, barley crop condition and the introduction of new barley varieties. Furthermore, Joe White agreed to give priority to San Miguel in the event of, amongst other things, a change in barley varieties. The document did not specify which barley variety or varieties were required by San

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1594 The document recorded that it did not purport to be a definitive document but existed to provide a basis for the ongoing commercial relationship.

1595 The document recorded that Joe White had been a long-term supplier to San Miguel for a period of over 50 years.

Miguel.

2515 In 2007, Joe White and San Miguel Corporation agreed to "assign" the agreements between them to the "spin-off of the beer division", San Miguel Brewery. It was recorded that from 1 October 2007 San Miguel Brewery would be the counterparty "for all intents and purposes". The letter recording the agreement sought Joe White's consent to the "assignment" to San Miguel Brewery. Three months after the letter was sent, Wicks provided his signature on behalf of Joe White consenting to the "assignment".[1596]

2516 The Cargill Parties submitted that a spreadsheet purporting to record San Miguel's specifications from March 2007 (which recorded the varieties required as Stirling/Gairdner) was a specification document issued by San Miguel. The basis upon which this submission was put was not explained. On the face of the document, it could not be correct. The metadata indicated that it was created by McIntyre, and not until 12 December 2014.

2517 In July 2010, an email chain referred to Sloop having replaced Stirling and the shipment in question being a "36% Sloop/64% Gairdner" mix whereas San Miguel "*mostly* receive[d] a Stirling/Gairdner mix" (emphasis added).

2518 In June 2011, the contract with San Miguel was extended to supply 55,000 tonnes of malt in 2012. Around a year later, a further extension to take the contract to 2013 was agreed to.

2519 Based on these documents, it was assumed for the Barley Analysis, relying on the "Specification Document dated March 2007", that for the period from 1 January 2010 to 6 July 2010 Stirling and Gairdner were the required varieties, and that from this time until 31 March 2013 Stirling, Gairdner and Sloop were the required varieties. This

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1596 The Viterra Parties noted the position adopted by the Third Party Individuals that the letter did not evidence the "assignment" itself. Of course, given that the agreement recorded that San Miguel Brewery Inc was to take over both the benefit and the burden of the existing agreement, what was agreed to was not an assignment but a novation. Further, there was no requirement for the novation to be in writing beyond what was recorded in the letter, if, after that time, the parties acted in accordance with what had been agreed.

assumption was flawed on its face as there was no specification document dated March 2007.[1597]

2520 Dealing with the period after 31 March 2013, the Cargill Parties referred to a document issued by San Miguel Brewery which expressly provided that the requirements included using Stirling, Gairdner and Sloop. The Viterra Parties did not accept these were required varieties because there was no evidence of when the document was provided by San Miguel, and the evidence of it first materialising was in an email circulated within Joe White on 5 November 2013, being after Completion. In response to this, the Cargill Parties referred to a later email dated 12 March 2014 from San Miguel attaching the material specifications for the next period that stated the approved varieties were Gairdner, Stirling, Sloop and Baudin (which did not align with the Customer Review Spreadsheet, which stated that as at October 2013, the varieties were Gairdner and Stirling, with Buloke pending). The Cargill Parties submitted that because the material specifications were sent to Joe White in response to a request by Joe White for the current specifications, they assumed they were updated at some time (without being able to specify when).

2521 As may be seen from what is set out above, there were numerous inconsistencies and gaps in the documents put forward with respect to San Miguel. With the exception of the position in October 2013 as recorded in the Customer Review Spreadsheet it was not possible to conclude with any certainty at any particular point in time which barley varieties were the required barley varieties. In these circumstances, Cargill Australia has not established the assumptions made by Ryan in relation to San Miguel.

2522 Finally, the position of Thai Duyen Trading and Transpo ("Thai Duyen") must be considered. On 20 July 2010, a sales contract between Thai Duyen and Joe White contained specifications which included the barley varieties Baudin, Gairdner and Schooner. The covering email attached the "signed copy of the contract". The subject of that email included "Extra 500Mt Australia Malt". Without any other corroborating evidence, the Viterra Parties submitted this subject heading implied there was a

1597 See par 2516 above.

previous contract for the relevant period which may have been subject to different terms and conditions. This submission was entirely speculative, and did not address the contents of the covering email.

2523 In addition, the Viterra Parties referred to an email dated 22 November 2013 from Wicks to McIntyre and others which referred to a "special" contract with Thai Duyen for 500 tonnes pursuant to which no specific variety was required. It was submitted this indicated that orders were "sometimes" received that did not require a variety. There was no evidence put forward by the Viterra Parties of this occurring on any other occasion. Further, McIntyre was cross-examined on the details of this email chain, which included an email from her in which she directed that if anyone heard of another contract "like this", then they should let her know. She accepted it was possible other such contracts could exist, but it was not put to her that they did, and nor did she give evidence to that effect.

2524 On 8 March 2011, a further sales contract between Joe White and Thai Duyen was entered into, which also stipulated that Baudin, Gairdner and Schooner were the specified varieties. This contract covered the period from April to December 2011. However, there were no contractual documents to cover the period from 1 January 2012 to 31 March 2013. Subsequently, a sales contract, again requiring the same barley varieties, provided the terms for malt delivered between April 2013 and December 2013. Based on the required barley varieties both before and after the period for which there was no contractual documents, Cargill Australia proceeded on the basis that Thai Duyen had required barley varieties of Baudin, Gairdner and Schooner from January 2012 to March 2013.

2525 Yet another sales contract was entered into between the parties on 17 May 2013, again stipulating the same barley varieties for the period up to December 2013. In relation to each of these contracts, the Viterra Parties referred to the 22 November 2013 email from Wicks and submitted that the barley varieties specified in these contracts were not established to be the required barley varieties.

2526 Although there was clearly evidence of 1 contract for 500 tonnes where a barley variety was not specified, and it was in the realm of possibility that there may have been another such contract, on the balance of probabilities I find that the weight of the evidence indicated that the required varieties of Thai Duyen were Baudin, Gairdner and Schooner.[1598] An apparent exception to such a requirement did not establish that these varieties were not otherwise required as specified.

2527 In summary, with respect to the third, fourth and sixth points, Cargill Australia has established the basis of the assumptions made by Ryan, with 2 exceptions. In relation to Sapporo, there was no misreporting and the Barley Analysis was not materially affected. The position with San Miguel was different, as it was assumed that varieties were misreported. However, only 29 orders (out of a total of 4,359 orders) were covered by the San Miguel contracts during the relevant date range of 5 February 2010 to 28 August 2013. Accordingly, excluding this small number of orders from the results was also not material.

2528 Finally, turning to the fifth point raised in relation to some miscellaneous documents,[1599] a limited number of documents need to be considered.

2529 The first document concerned an email dated 18 March 2010 from an agent of Kirin, Meidiya Company Ltd.[1600] Based on this email, it was assumed that there were 9 required barley varieties. The email asked for confirmation from Joe White in relation to a "Provisional Spec for 2009". It was stated that the specifications were the same as the 2008 crop specifications. The attachment was also marked provisional and, amongst other specifications, listed the 9 varieties of barley. The Viterra Parties submitted that not only was the document provisional, but there was no evidence that it reflected the final version or was otherwise agreed to by Joe White. They further submitted that the proposed specifications related only to the 2009 crop and the Barley Analysis did not indicate which crops were used for each order. They also adopted

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1598 For completeness, it is noted that the Customer Review Spreadsheet only referred to Gairdner as an approved variety as at October 2013.

1599 See par 2441 above.

1600 In relation to Kirin for the period from 22 January 2010 to 30 January 2010, there were no documents which specified barley varieties and accordingly this period was not included in the Barley Analysis.

the position of the Third Party Individuals, namely that there were no contractual documents identified that established any requirement to comply with this provisional document.

2530 In response, the Cargill Parties submitted that there was no evidence that Joe White sought to negotiate alternative barley varieties or that the provisional specification was otherwise altered. Further, they submitted that it was irrelevant that the Barley Analysis did not specify what crops were used for each order in circumstances where later specifications, which were not provisional and governed the 2011 year, also identified the same 9 varieties.

2531 In my view, the appropriate inference to draw was that the 9 barley varieties specified were required barley varieties. Malt was supplied by Joe White during the relevant period and there were no documents put before the court to suggest that this occurred pursuant to any other arrangement. The continuity of the varieties specified throughout the successive periods without any exception or further explanation over a number of years strongly suggested an acceptance by Joe White of the requirements of the customer.[1601] Further, in circumstances where the barley varieties did not change, it was of little moment that crop years were not identified in the Barley Analysis.

2532 The second document was the spreadsheet concerning San Miguel. For the reasons already stated, this document did not establish the required varieties as had been assumed.[1602]

2533 The third and final document relied upon by the Viterra Parties on this point was a document headed "Sales Contract" dated 31 March 2011 between Thai Tan Trading and Transport and Joe White, which specified Gairdner, Buloke and Baudin. This and 2 other "Sales Contract" documents were forwarded under cover of an email which referred to them and noted some adjustments had been made by Thai Tan Trading

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1601 The documents in question were not tendered until 7 September 2018. Accordingly, no inference is drawn from the fact that Joe White employees (who gave their evidence before the tender) were not cross-examined about this issue.

1602 See pars 2516, 2519 above.

and Transport. The covering email asked that the contracts be signed and the originals returned to the sender as soon as possible. All 3 of these documents need to be considered.

2534 The Viterra Parties submitted that there was no evidence that the sales contracts were signed or otherwise accepted by Joe White. Further, they referred to the last part of clause 3 of each document which referred to Gairdner, Baudin and Schooner, rather than Gairdner, Baudin and Buloke.

2535 There was no dispute that Joe White supplied this customer throughout the relevant period. In the absence of any other documents or other relevant evidence, the reasonable inference to draw was that the malt supplied was in fact supplied pursuant to these contracts (whether they were signed or not). However, given the uncertainty with respect to whether or not Schooner was also an approved variety, to the extent that it was assumed using Schooner was contrary to the customer's specifications, those orders needed to be excluded. It was common ground that this only amounted to 3 orders.

2536 Finally, it must be noted that the Viterra Parties' submissions did not purport to be exhaustive in identifying these 3 documents, as their identification was preceded by the words "for example". However, the Viterra Parties did not identify any further documents after the Cargill Parties submitted the point raised was very confined.

2537 In conclusion, the Cargill Parties have been largely successful in establishing the underlying assumptions made by Ryan with respect to the Barley Analysis were appropriate. Although some of the Viterra Parties' submissions have been accepted, the extent of that success has been minimal and the orders that ought to have been excluded as a result, both individually and collectively, were not so material as to undermine the conclusions reached as a result of the analysis.[1603]

2538 In relation to the Viterra Parties' remaining submissions concerned with suggesting

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1603 There was a total of 32 orders that ought to have been excluded because of the Viterra Parties' successful submissions: see pars 2527, 2535 above. When these were considered in the context of 4,359 orders, they had very little impact on the overall results.

there was insufficient evidence of a failure to meet the alleged variety requirements, in substance most of the matters raised were a regurgitation of submissions already made. These have been addressed. Accordingly, they need not be considered individually, with the exception of the submissions concerned with non-compliance because of small amounts of non-approved barley varieties being included in a blend, coupled with the related topic of funnelling.

2539 The first observation to make in relation to this aspect of the case is that there was no issue that the data demonstrated that non-approved barley varieties were frequently used in batches of malt, which occurrences were recorded in the Laboratory Information System but were not reported to the customers.

2540 Further, for the position adopted by the Viterra Parties to be accepted, it would also have to be accepted that customers who specified required varieties would not have been concerned about, and therefore would not have treated as a breach of contract (or perhaps a breach about which they were willing to refrain from acting upon), the undisclosed supply of non-approved barley varieties in small quantities. In my view, this has not been established. Of the many contracts tendered, only 2 contracts were identified as permitting "little" or "MAX 5%" of a non-specified variety.[1604] The existence of such permissive terms in 2 supply contracts, but not in others, suggested that there was no customary position in relation to whether or not non-approved barley varieties were permitted to be used when a customer specified particular barley varieties and did not agree to any exceptions.

2541 This position was not affected by the barley standards published by Grain Trade Australia.[1605] The possibility of impurities in a particular barley variety (the details of which would not be known to the maltster, or ultimately the customer) was a separate issue to knowingly including amounts, no matter how small, of barley varieties that did not come within the customers' specifications.[1606]

1604 See pars 2488-2490 above. The other customer which allowed small amounts of barley varieties other than the specified varieties (ie "MAX 5%") was Oriental Brewery.

1605 See par 2422 above.

1606 See par 2423 above.

2542 Furthermore, the evidence of McIntyre to the effect that funnelling only occurred when a batch was nearing complete withdrawal from the bottom of a silo cannot be ignored.[1607] In short, there was no evidence that funnelling occurred at such a level so as to affect a large number of orders. Needless to say, when the batches included Hindmarsh, funnelling was no explanation for the unauthorised use of a non-malting variety.

2543 In conclusion, for the reasons set out above, the Cargill Parties have established that the assumptions made by Ryan for the purposes of the Barley Analysis (with some minor, non-material exceptions) were soundly based. Further, the results of the Barley Analysis demonstrated the extensive use of the Varieties Practice in the operation of the Joe White Business, or, at the very least, strongly corroborated the finding already made as to the Varieties Practice being engaged in routinely as part of the Joe White Business.

X.10.10 The Gibberellic Acid Practice

2544 The evidence showed that Joe White routinely used gibberellic acid when such use was prohibited. Whether it was used 20 percent of the time when it should not have been used,[1608] or some other proportion, the clear account given by Hughes as the chief executive officer of Joe White was that it happened routinely in all plants when it should not have.[1609] The evidence more generally demonstrated that the Gibberellic Acid Practice occurred routinely at all relevant times right up until 31 October 2013.[1610]

2545 The Viterra Parties submitted that the evidence did not establish this for 2 reasons: (1) the number of customer contracts that contained the prohibition was small; (2) the evidence was insufficient to prove a routine practice.

2546 Cargill Australia alleged that San Miguel, Asahi, Sapporo, SAB Miller, Kirin, Cargill Japan and Asia Pacific Breweries prohibited the adding of gibberellic acid. The Viterra

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1607 See par 267 above.
1608 See pars 1308, 1373(29) above.
1609 See pars 1282, 1373(27) above.
1610 See pars 170, 272, 1129-1130, 1215, 1224-1225, 1254, 1258, 1263-1264, 1282, 1287, 1293, 1301-1302, 1308, (cf 1317-1318), 1373(27), (28), (29), (30), (31), (32), 1555-1556 above.

Parties only took issue with this in relation to San Miguel and, to a lesser extent, Sapporo.

2547 No witness gave evidence that San Miguel prohibited the use of gibberellic acid. In identifying customers that usually had such a requirement, Stewart made no reference to San Miguel.[1611] In seeking to establish such a requirement, Cargill Australia relied upon contractual documents, which included a general requirement that:

> Additives such as formaldehyde, potassium bromate, exogenous enzymes such as betaGlucanase, etc and sugar extracts such as glucose are not permitted.

2548 The Viterra Parties submitted that, although this clause was not exhaustive as to the prohibited additives, it would be expected that gibberellic acid would have been referred to if it was prohibited because of the high prevalence of its use within the industry. Further, they relied upon the fact that the Cargill Parties did not put to Stewart during his cross-examination that San Miguel prohibited the use of gibberellic acid. Furthermore, it was noted that after Completion, no dispensation was sought from San Miguel in relation to the use of gibberellic acid.[1612]

2549 In addition to these matters, the column in the Customer Review Spreadsheet concerned with whether or not a customer had an additive-free requirement noted that San Miguel did not have any such requirement.

2550 In the circumstances, in light of the lack of specificity of the contractual clause relied upon by Cargill Australia, coupled with the additional matters referred to above, I am not satisfied that at the relevant times San Miguel prohibited the use of gibberellic acid.

2551 As for Sapporo, the Viterra Parties referred to the particulars of the allegation in the Statement of Claim and that the express contractual term relied upon required that barley used meet Japanese regulations of agricultural chemical residues of barley. It

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1611 See par 41 above.

1612 On 7 November 2013, Stewart provided an update of customer actions which included seeking dispensation for the use of gibberellic acid from Asia Pacific Breweries and Sapporo, but in relation to San Miguel only raised issues regarding barley varieties.

was submitted that there was no evidence that this relevantly prohibited gibberellic acid. They also relied upon the Customer Review Spreadsheet referring to "Sapporo 8,000mT" prohibiting the use of gibberellic acid, rather than Sapporo generally.

2552 Notwithstanding these matters, the evidence more generally indicated that Sapporo prohibited gibberellic acid. Even assuming the Customer Review Spreadsheet was unclear (which in my view it was not), Stewart's evidence was that all Japanese brewers Joe White supplied prohibited the use of gibberellic acid, including Sapporo. Further, after Completion Joe White was required to get dispensation from Sapporo in order to be able to supply malt with added gibberellic acid.[1613]

2553 In conclusion, Cargill Australia established that each of the customers it identified as prohibiting gibberellic acid in fact did so, except with respect to San Miguel.

2554 The Viterra Parties also contended that there was limited evidence of non-compliance with the gibberellic acid prohibitions. They referred to Stewart's evidence, including that most Joe White customers permitted the use of gibberellic acid, which use was common in the Australian malting industry. In addition, they referred to his evidence of approval by Wicks or Stuart being sought before a prohibited-use shipment could occur.[1614]

2555 Further, it was submitted that the Customer Review Spreadsheet demonstrated that

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1613 Ibid. See also par 41 above. An email chain, spanning from 5 November 2013 until 20 February 2014, demonstrated a number of things including that in November 2013 Joe White required dispensation from Sapporo to use gibberellic acid, which was granted on that occasion. The email chain also showed that: Joe White could not meet Sapporo's specifications without the use of gibberellic acid; delays arose as a result; Sapporo's representative understood that Joe White had indicated it could manage malt within specification and meet the shipping schedules; Sapporo indicated it would not accept malt out of specification; shipment lots were put off by Sapporo; due to "barley quality restraints" Joe White advised that a shipment was postponed; "despite [Joe White's] best efforts" even with the addition of gibberellic acid the barley variety being used could not meet Sapporo's specifications and quality requirements with 3 options given, being Sapporo accept out-of-specification malt or negotiate a derogation on quality until April 2014 or urgently start a new trial of barley varieties Buloke and Scope; a malt lot was rejected and cancelled in January 2014 with malt supplied from France covering the reduced supply; by February 2014 Joe White was using new crop barley which was still low in vigour resulting in glucan being higher than specification; and Sapporo rejecting malt because it could not meet specification.

1614 See fn 794 above.

there were only 2 customers "at that time" affected by this issue.[1615] Similarly, they referred to Stewart's memorandum dated 24 October 2013 stating that the requirement to go additive free would give rise to an estimated loss of production in the order of 14,000 tonnes or 2.5 percent of total production.[1616] They submitted that these matters, together with the small number of documents relied upon and the absence of cross-examination of Stewart on the issue, had the consequence of Cargill Australia falling well short of proving a routine practice from January 2010 to October 2013 with respect to the Gibberellic Acid Practice.

2556 Joe White did not keep records of when it used gibberellic acid contrary to a customer's instruction. Therefore there was no basis for the Cargill Parties to have an analysis conducted like that done for the other practices comprising the Operational Practices. However, the Customer Review Spreadsheet shed considerable light on the prohibited use of gibberellic acid.[1617] Further, according to Hughes' notes of what was said on 15 October 2013, Joe White's position as at that time was that it was necessary to use gibberellic acid for customers that did not authorise it and that this was managed very carefully.[1618]

2557 Finally, in making these submissions, the Viterra Parties did not seek to address the statements made by the Joe White executives on 23 October 2013, as recorded in Lindner's notes. As those notes have been found to be reliable, these submissions were no answer to the clear statements made by those executives at that time.[1619] Further, the Defence included an allegation that invited the court to find that most international brewers did not allow the use of exogeneous gibberellic acid.[1620] There was no attempt to reconcile this positive allegation by the Viterra Parties with the

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1615 Eden was asked to make the assumption that there were only 2 customers ("Sapporo and some part of [Asia Pacific Breweries]") when cross-examined on the topic of gibberellic acid. This assumption was not reflected by the facts.

1616 See par 1388 above.

1617 See par 1224 above.

1618 See par 1130 above.

1619 See, for example, pars 1282, 1287, 1293, 1301-1302, 1308, 1373(27), (29) above.

1620 This allegation was made in the context of alleging what Cargill knew or suspected before it entered into the Acquisition Agreement: see also par 819 above.

submission that only 2 customers were affected.[1621]

X.10.11 The recording and endorsing of the Reporting Practice

2558 As is apparent from what is set out above on this issue, there was no question that the Reporting Practice was recorded in and endorsed by the Viterra Certificate of Analysis Procedure and the Malt Blend Parameters Procedure. However, neither these documents nor any other Viterra or Joe White policy document recorded or endorsed the Varieties Practice or the Gibberellic Acid Practice.

2559 In relation to the Reporting Practice, the Viterra Parties submitted that there was nothing in the Viterra Policies concerning any routine conduct or practice. In making this submission, the earlier submissions concerning the alleged justifications were essentially repeated and the matter was taken no further. The short answer to this submission was that, from February 2011, the Viterra Policies were required to be adopted at all times, which necessarily made the Reporting Practice itself routine.[1622]

X.10.12 The substantial underpinning of Joe White's financial and operational performance by the Operational Practices and the supply of malt to customers that did not comply with their contracts

X.10.12.1 Some preliminary matters

2560 The Viterra Parties submitted that even if, contrary to their submissions, the Operational Practices were engaged in routinely, Cargill Australia failed to prove that they substantially underpinned Joe White's financial and operational performance for the 2010 financial year to part of the 2013 financial year. They submitted that the "paucity" of the evidence adduced was remarkable. In that regard, they referred to the fact that neither Argent nor Hughes was called to give evidence on this point.

2561 In relation to Argent, they submitted he could have given evidence of the particular

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1621 See also par 2592 below as an example of the dealings done after 1 November 2013 in relation to gibberellic acid, which went beyond having to make arrangements with only 2 customers arising out of the Gibberellic Acid Practices.

1622 See, for example, pars 206, 210, 224, 271, 283 above.

factors that impacted Joe White's financial performance during the relevant period. The difficulty with this submission was there was no evidence to suggest Argent ever knew about the Operational Practices, let alone the extent to which they were implemented.[1623] In circumstances where Hughes chose to direct the Viterra Policies not be disclosed to customers and auditors, it seemed highly likely that Argent, as the financial controller, was not aware of them. In this regard, it was significant that in October 2013, when the existence of the Operational Practices became an issue, Argent was not 1 of the executives approached to explain the nature, extent or impact of the relevant conduct. In the absence of any evidence to suggest that Argent knew of the Viterra Policies before Completion, there was no basis to draw an inference that he was aware of them at any time before the Cargill 22 October Letter.[1624]

1623 In the Third Party Claim, the Viterra Parties alleged Argent's knowledge of the Viterra Practices was to be inferred from the fact that he was the financial controller of Joe White and that he was copied on an email sent by Hughes on 16 January 2013 (see par 375 above) that referred to Hindmarsh, which was not an approved barley variety.

1624 The Viterra Parties submitted that, as the "chief financial officer", Argent was the 1 person in the entire world that would be able to explain how elements of the accounts were made up and that it should not be accepted that he would not have been able to give evidence about the particular factors that impacted Joe White's financial results during the relevant period. The Viterra Parties said they relied upon the fact that Argent took on the task of verifying the figures that were contained in the Information Memorandum, as well as his contractual obligations more generally. When it was put to the Viterra Parties' senior counsel that the financial records of Joe White would not have disclosed the Viterra Policies or necessarily prompted Argent to ask questions about what procedures were adopted operationally in making each of the sales, the response was that the Viterra Parties did not know if this had occurred. Further, it was submitted that the "chief financial officer" should review the customer contracts. The difficulty with the Viterra Parties' position was that they were unable to point to anything which would have given Argent any notice of the existence of the Viterra Policies (or the Viterra Practices) in any such review. In circumstances where operational management positively decided to keep the Viterra Policies secret, and took steps to ensure that anyone reviewing Pulse or the Records System would not be put on notice that the Viterra Policies were actually being implemented in producing malt, there was simply no basis to infer that Argent knew about them, or that he failed in his duties for not knowing about them. For completeness, there was no evidence that Argent was kept across all the detail of the Malt Cost Reduction Transformation Project, but even if he was (or ought to have known of the detail), there was nothing on the face of the relevant documents which would have indicated to him (a person not familiar with the intricacies of malt production) that Joe White would not be complying with customers' contractual requirements and specifications. Further, the email sent by Hughes on 16 January 2013 (see par 375 above) did not amount to disclosure of the Viterra Practices or put Argent on notice that they existed. They were not referred to, and a mere reference to Hindmarsh in an attachment did not suggest non-compliance with customers' contracts or their specifications. Furthermore, Argent was not the chief financial officer; he was the financial controller of Viterra Ltd for Australia and New Zealand. There was no evidence that there was a position of chief financial officer of Joe White. In 2013, Rees was the chief financial officer of Viterra Ltd, having succeeded Ward Ast. Interestingly, in relation to Rees' knowledge, the Viterra Parties submitted that because Rees was chief financial officer and concerned with the relevant financial information, attribution of knowledge should be limited to this area for which Rees had responsibility.

2562 For reasons already given,[1625] in relation to Hughes no inference of the type suggested by the Viterra Parties will be drawn. If anything, in light of Stewart's evidence about Hughes telling him it was necessary to engage in such conduct because of the difficulty of complying with customers' specifications,[1626] if any inference were to be drawn the more likely inference would be that Hughes' evidence would have been that the Reporting Practice (at the very least) was an essential part of Joe White's operational and financial performance.

2563 In this context, the Viterra Parties made submissions in relation to the absence of any Joe White customers giving evidence. There is nothing further that needs to be added to what has already been said on this topic.[1627]

X.10.12.2 Linking the Operational Practices to the underpinning of the Joe White Business

2564 The Cargill Parties relied upon a substantial number of matters in responding to this issue. As most of the evidence they referred to is contained in the narrative set out above, it is only necessary to provide a summary of the various matters raised.

2565 The Cargill Parties referred to the high production and sales levels of Joe White before the Acquisition,[1628] and contrasted them with the less impressive levels achieved after the Acquisition when the Operational Practices were no longer conducted.[1629]

2566 Next, they referred to the Barley Analysis to demonstrate the number of Certificates of Analysis affected by the Varieties Practice and the number of orders that were the subject of incorrect barley varieties.[1630] The Cargill Parties also relied upon the more general evidence of McIntyre, Testi and Stewart in seeking to demonstrate the dependency of the Joe White Business on the Operational Practices.[1631]

2567 Next, they submitted that the Joe White Business was able to achieve efficiencies it

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1625 See pars 1970, 2126 above.
1626 See pars 73, 168 above.
1627 See pars 2134-2141 above.
1628 See pars 531-532 above.
1629 See, for example, pars 1715-1721 above.
1630 See pars 2427-2431 above.
1631 See pars 74-86, 92-95, 159-161, 174-176 above.

otherwise would not have been able to obtain because it was able to ship malt that did not comply with customer requirements and specifications and, absent the Operational Practices, would have faced delays and disruptions. They contended that so much was demonstrated by what occurred after the Acquisition.[1632] In this regard, these efficiencies were achieved in part by the deliberate use of gibberellic acid when it was prohibited, which reduced production times by a full day.[1633]

2568 Also in relation to production, the Cargill Parties submitted Joe White was able to use cheaper barley, either because it used a greater level of off-grade barley or varieties other than the required barley,[1634] which allowed margins to be maximised. This was to be contrasted with operations after the Acquisition when, at times, premiums needed to be paid in order to secure the required barley.[1635]

2569 Next, it was submitted that Joe White was able to preserve customer perceptions of receiving high-quality malt that met customer specifications when in truth routinely the malt supplied did not; which again was exposed almost immediately after the Acquisition and beyond.[1636]

2570 The Cargill Parties submitted that the concealment of the Operational Practices meant the Joe White Business was not the subject of complaints, claims for discounts or rebates or rejections that it otherwise would have been if the true mode of operations had been disclosed.

2571 Next, the Cargill Parties referred to the positions adopted by the Joe White executives after the Cargill 22 October Letter had been sent. They submitted that what the executives reported made it plain that the Operational Practices substantially

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1632 See, for example, pars 1574-1575, 1580, 1585, 1601-1606, 1622-1625, 1640, 1656-1661, 1677, 1682, 1706-1713, 1718-1719, 1728, 1739-1741, 1744-1745, 1747, 1785, 1793, 1797-1798 above. For completeness, also see pars 1596-1598, 1662, 1666-1669, 1675 above.

1633 See, for example, pars 1131, 1505, 1519, 1703, 1781 above.

1634 In this regard, reference was made to the changes made to the supply chain as part of the Malt Cost Reduction Transformation Project to enable the increased use of off-grade barley: see pars 135-141 above.

1635 See pars 1574, 1785 above.

1636 See, for example, pars 1580, 1797, 1813, 1827 above.

underpinned the Joe White Business and that it would not be able to perform at the same level if the Operational Practices immediately ceased.[1637]

2572 With respect to the impact of the cessation of the Operational Practices, the Cargill Parties also referred to the dynamic that up until the Acquisition approximately 90 percent of the Joe White Business came from 10 customers.[1638] Of those customers, it was noted that Asia Pacific Breweries, Oriental Brewery, SAB Miller, Boon Rawd, Hite, San Miguel, Beer Thai, SABECO and Nestlé were all adversely affected by the inability of Joe White to produce malt that complied with their specifications.[1639]

X.10.12.3 Addressing the Viterra Parties' contrary contentions

2573 The Viterra Parties put a series of submissions as to why they contended the financial and operational performance of Joe White was not substantially underpinned by the Operational Practices. To the extent that their submissions referred to general matters already considered above, they will not be repeated.

2574 The Viterra Parties referred to the fact that the use of off-grade barley did not equate to using barley varieties different to those required by customers or permitting barley to be supplied out of specification, and referred to some evidence that Joe White may have been capable of supplying compliant malt despite the use of off-grade barley. The only evidence identified was that of Jones, who gave evidence that it was his understanding that malt might be produced within specification depending on the quality of the off-grade, before noting he was giving evidence about something that was not within his role at Joe White.

2575 During closing submissions, the Viterra Parties were invited to provide any other relevant evidence on this point, but none was forthcoming. Further, the submission did not address the evidence of Stewart that the use of more off-grade barley would potentially decrease the quality of the malt, might limit Joe White's ability to meet its

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1637 See, in particular, the items the subject of emphasis in annexure C to these reasons. See also pars 1210-1232, 1387-1389, 1567 above.

1638 See par 506 above.

1639 It was further noted that other customers, including Sapporo, Lotte, Orion Breweries, Phoenix and Long Fong Import Export Co Ltd were affected.

customers' requirements and would give rise to more pencilling of results because of the use of substandard barley.[1640] Further, his evidence was that the Malt Cost Reduction Transformation Project did in fact result in an increase in adjustments to Sign-Out Reports and the use of varieties not approved by customers.[1641]

2576 Suffice to say on this point, while it was plain that using limited amounts of off-grade barley did not necessarily mean that any particular batch of malt produced would be out of specification, the entrenched requirement of using substantial amounts of off-grade barley did adversely affect the ability of Joe White to produce malt in accordance with customer requirements and specifications.

2577 Next, the Viterra Parties observed that the Malt Cost Reduction Transformation Project still required Joe White to produce malt within "quality guidelines".[1642] To adopt an old saying, whilst it could not be said that Viterra was asking Joe White to produce "a silk purse from a sow's ear", the mere fact that there was a stated requirement to meet a certain standard could not take the matter very far if the underlying instructions meant such a requirement was not reasonably practicable on a consistent basis.

2578 Next, the Viterra Parties submitted the evidence did not establish that the Malt Cost Reduction Transformation Project had the effect of materially increasing the proportion of off-grade barley used by Joe White. They relied upon the evidence of Jones that only a small percentage of barley Viterra supplied to Joe White was off-grade. However, what Jones considered was a "small" percentage was not explored with him. Further, it was common ground that Joe White used, and Cargill was informed of the use of, up to 30 percent of off-grade barley in 2013.[1643] On any view, a utilisation rate of up to 30 percent could not be described as insignificant.

2579 With respect to the last point, the Viterra Parties also submitted that the Malt Cost

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1640 See pars 145-146 above.

1641 See par 234 above.

1642 In fact, what the presentation given in May 2010 stated was that it was still a requirement to maintain quality to meet customer expectation: see par 131 above.

1643 See par 926 above.

Reduction Transformation Project did not actually deliver any material positive financial results to Joe White or Viterra.[1644] Assuming this to be correct,[1645] it could not alter the fact that Joe White was required to use off-grade barley on a systematic basis.

2580 Next, it was submitted the views expressed by the Joe White executives in October 2013 were assessments made and opinions expressed which were confined to the state of affairs at that point in time and were not referable to the period commencing January 2010. So much was correct insofar as the views were confined to how the Joe White Business was performing at that time. However, many of the comments were not so confined and were far more general as to the predicaments Joe White faced and the manner in which it dealt with them.[1646] Further, there was nothing to suggest that the manner in which the Joe White Business was being conducted in October 2013 differed materially from the way in which it was conducted after the introduction of the Malt Cost Reduction Transformation Project in 2010.[1647] If anything, Stewart's evidence was that in 2010 and early 2011, before the introduction of the Viterra Certificate of Analysis Procedure, the Joe White Business was conducted in a more arbitrary way with respect to reporting on compliance with customers' specifications.[1648]

2581 Next, the Viterra Parties submitted that to the extent the Joe White executives expressed views in October 2013 concerning estimated cost savings through using particular barley varieties, the responses were "often" either expressly confined to the use of lower-grade barley rather than non-approved varieties, or otherwise unclear. In this regard, reference was made to the estimate of $1.5 million per year in higher costs if the correct barley varieties were used.[1649] In oral closing submissions, the Viterra Parties appeared to step back slightly from this submission.[1650] In any event,

1644 See fn 121 above.
1645 Compare pars 187, 250 above.
1646 See annexure C to these reasons.
1647 See also par 1233 above.
1648 See pars 175, 197 above.
1649 See par 1281 above.
1650 See fn 783 above.

there was no reason to assume that Hughes, as a chief executive officer who was very hands-on,[1651] would not be able to give a reasonably accurate estimate as to the costs involved. Further, as this submission effectively acknowledged, some of the comments of the Joe White executives were very clear and directly acknowledged the use of non-approved varieties and the potential harm to the performance of the Joe White Business if only approved varieties were allowed to be used.[1652]

2582 Next, and further to the previous point, it was submitted that even if the position adopted by the executives in October 2013 concerning barley varieties was reliable, it was a short-term issue. There were obvious responses to this. *First*, the estimate of the period required to address the issue was 6 months for most customers and 12 months for others.[1653] In a business supplying product, it would be inappropriate to characterise disruption of 6 to 12 months, with any flow-on effects that such disruption may cause, as an insignificant issue. *Secondly,* as at October 2013, 6 months was only an estimate, and Joe White had not obtained approval of new varieties from all major customers, nor had all necessary trials been undertaken. *Thirdly,* it was far from clear how customers would react when informed that they were being supplied with the wrong barley varieties. *Fourthly*, the customers affected were major customers. In short, there was no certainty that it was a "short-term issue" that could be resolved without any ongoing repercussions for the Joe White Business. The loss of only 1 customer could have had very substantial consequences for the performance and profitability of the Joe White Business.

2583 Next, the Viterra Parties submitted that anything that occurred after 1 November 2013 was irrelevant because Cargill adopted its own procedures and policies in the conduct of the Joe White Business. It was submitted that, as the court was concerned with the operation and performance of the Joe White Business from January 2010 until October 2013, activities outside that timeframe were either irrelevant or should be given very little weight. On this basis, it was submitted that the court should not take into

1651 See par 47 above.
1652 See section E of annexure C to these reasons.
1653 See par 1212 above.

account levels of derogations, reduced production utilisation rates, reduced production and sales volumes, internal assessments by Joe White executives or Cargill executives regarding the causes of declines in performance, internal assessments regarding additional capital expenditure required to operate a full production capacity, or reductions in Unadjusted Earnings.

2584 This submission cannot be accepted. For example, the reaction of customers, upon learning of the Operational Practices and the inability of Joe White to supply malt within specification, immediately after 1 November 2013 was highly probative of how they would have reacted immediately before 1 November 2013. As time materially moved on, the relevant facts after 1 November 2013 must be carefully considered and assessed in order to determine what weight ought to be given to them. However, speaking generally, in the absence of any evidence to suggest customers would have reacted differently before 1 November 2013, some weight ought to be attributed to the reactions of Joe White's customers thereafter.

2585 Further, in the period immediately after Completion, the same Joe White executives continued to be involved in the operations. They were probably in the best position to assess why it was that Joe White was unable to perform at levels that it had done in the past.

2586 Furthermore, the disruption that occurred after 1 November 2013 was exactly what Stewart and Wicks had predicted in the event that there was a requirement to immediately desist with the Operational Practices upon Cargill taking over.[1654]

2587 Moreover, some observations ought to be made about the relevance of Cargill's approach from 1 November 2013.

2588 *First*, Cargill cannot be properly criticised for ceasing the Operational Practices. They were in breach of contract. The continued implementation of the Operational Practices would have been wrongful without informing Joe White's customers of their

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1654 See pars 1210-1218, 2417 above, noting that both Hughes and Wicks agreed with Stewart's assessment of the extended transition period that was required.

existence.

2589 *Secondly*, it would be expected that if Cargill had informed all of Joe White's customers immediately on 1 November 2013 that Joe White was routinely breaching its supply contracts, that would have been highly disruptive to the Joe White Business.[1655]

2590 *Thirdly*, to the extent that Cargill's testing regime differed from Joe White's by seeking to rely (with each customer's agreement) upon the theoretical blend results rather than actual results, the evidence suggested that this could only have assisted Joe White. This was because, in contrast to requiring results of testing on the actual malt produced fall within customer specifications (usually in addition to requiring that the theoretical blend results that preceded the production also fell within specification), under the Cargill Blending and Certificate of Analysis Procedure only the first of these 2 analyses needed to produce satisfactory results (again, to emphasise the point, with the agreement of the customer). And yet, despite this apparent improved prospect of being able to report that malt was within specification, once Cargill took over there was an inability to repeatedly produce theoretical blend results that were within specification at acceptable levels.

2591 Next, the Viterra Parties referred to alleged problems arising from the unavailability of correct barley varieties after 1 November 2013, including the need to transport barley between Joe White's plants, to purchase some varieties at a premium and to sell some stock as feed barley or at a written down value. The Viterra Parties submitted that the particulars of these allegations in the Statement of Claim lacked sufficient particularity for them to be given any weight. There was no substance to this point. The particulars were not the subject of any strike-out application, and were plain in their terms.[1656] Further, evidence pertaining to these matters was put before the

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1655 This point assumes, contrary to the fact, that Cargill had a proper and comprehensive understanding of the Operational Practices as at 1 November 2013.

1656 The particulars in question read as follows: (8) The fact that after Completion, Joe White was required to transport varieties of barley between plants in order to supply malt that complied with the required barley varieties in Joe White's malt supply contracts, incurring higher costs; (9) The fact that after Completion, Joe White was required to purchase additional volumes of varieties of barley that complied with the required barley varieties in Joe White's malt supply contracts, and pay a price premium for

court.[1657]

2592 Next, the Viterra Parties referred to the fact that, after 1 November 2013, Joe White was able to secure agreements with Asia Pacific Breweries, Orion Breweries, SAB Miller and Sapporo Vietnam for gibberellic acid to be used despite its previous prohibition. On this basis, it was contended that the Joe White executives could not have assessed the impact of ceasing to use gibberellic acid in any meaningful way as they had not factored in such agreements. This was undoubtedly correct insofar as it went. Naturally, what was stated by the Joe White executives in October 2013 about what would have occurred if Joe White ceased using gibberellic acid when prohibited was nothing more than a forecast. However, Cargill Australia's case did not depend upon such forecasts being entirely accurate. The substantive point was that the Joe White executives anticipated, correctly, that there would be material disruption to the Joe White Business if the Gibberellic Acid Practice ceased immediately.

2593 Further, this submission appeared to assume that procuring such agreements to use gibberellic acid was otherwise not disruptive to the Joe White Business. To the extent that there was evidence on this point, it suggested otherwise.[1658] To elaborate, the evidence suggested that, because Joe White's customers were told of the situation without any prior warning, then it was difficult for those customers to get alternate supply in the short term. Furthermore, there was no dispute that exogenous gibberellic acid reduced total germination time by as much as a day, and that, to the extent Joe White was unable to secure agreements of the nature referred to above, production times and costs must have necessarily been increased.

2594 Next, the Viterra Parties referred to Cargill Australia's reliance upon statements by Joe White executives in 2011 to the effect that the practice of using off-grade barley would make it challenging to produce quality malt within customer specifications.

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compliant barley varieties; (10) The fact that after Completion, barley that did not meet the requirements in Joe White's malt supply contracts had to be sold through alternative channels and as feed and its value written down.

1657 See, for example, par 1574 above.

1658 See pars 1674, 1677, 1684, 1708-1713, 1739-1742, 1747, 1781, 1786, 1801-1822, 1835 above and fnn 959, 1612-1613 above.

They pointed out that the email referred to in support of this contained a statement not from the Joe White executives, but rather from a representative of Accenture Consulting.[1659] In circumstances where there was no evidence that that representative had any expertise in relation to malt, they submitted the allegation could not be established. They also referred to the evidence of Stewart that he did not really see any noticeable difference in the quality of the malt coming through after the Malt Cost Reduction Transformation Project had been implemented,[1660] and to the fact that Stewart was not taken to this email chain during the course of his evidence.

2595 This submission ignored the evidence of Stewart that he did make objections and statements in 2011 about the challenges of producing quality malt with off-grade barley, and that Hughes agreed with Stewart's position.[1661] Also, Stewart forwarded the email chain in question to Hughes without taking any exception to the observation that had been made by the Accenture Consulting representative who, presumably, made such an observation in light of discussions he had had as part of the Malt Cost Reduction Transformation Project.

2596 Further, it was plain from the evidence at trial that the poorer the quality of the barley and the larger the proportion of low grade barley in a batch, the less likely it would be that a maltster would be able to produce quality malt. Naturally, if it were otherwise maltsters would simply use feed barley or off-grade malting barley (which is usually cheaper) exclusively to produce malt.

2597 Next, the Viterra Parties addressed the issues concerning storage capacity and its connection with the likelihood of producing malt within specification. While acknowledging that storage capacity was a factor that might affect a maltster's ability to produce malt within specification, the Viterra Parties submitted that Cargill Australia had not established that before October 2013 Joe White was unable to produce malt within specification because of its storage capacity. They also submitted

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1659 The particulars to the Statement of Claim referred to the email chain set out at par 145 above as an example of such statements.

1660 See fn 128 above.

1661 See par 145 above.

Cargill was aware of Joe White's storage capacity and was capable of assessing any limitations before entering into the Acquisition Agreement.

2598 As to the second of these matters, although Cargill knew of the amount of storage capacity before committing to the Acquisition, and initially had some concerns, it had received assurances on a number of occasions that the storage available to Joe White was adequate and that Joe White was capable of meeting customer specifications.[1662] In circumstances where Cargill was not familiar with the Australian market (including the barley varieties that were being used) or the "customer book",[1663] it was perfectly reasonable for Cargill to rely upon the assurances received, particularly in light of the fact that issues concerning storage formed part of the annexures to the Acquisition Agreement.[1664]

2599 In making the first of these 2 submissions, the Viterra Parties failed to refer to 2 documents created both before and after Completion that were integral to the question concerning the relationship between storage capacity and the ability to produce malt within specification. The first of these documents was the product of Stewart's review contained in the Key Recommendations Memorandum, that was agreed to by other Joe White executives involved, and in which it was reported that Joe White did not have adequate barley or malt storage to reliably meet customer specifications.[1665] The second document was created relatively soon after Cargill took control, by which Youil reported that there were 3 Joe White export plants requiring capacity increases so that customer specifications could be met.[1666] Further, the evidence demonstrating the inadequacy of the storage capacity was not confined to these 2 documents.[1667] In short, the evidence was that Joe White's storage capacity was plainly inadequate if customer specifications were to be met regardless of which approach was taken to

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1662 See, for example, pars 702, 736-737, 740, 772, 786, 790, 858, 865-866, 875-876, 878-880 and fn 520 above.
1663 See par 686 above.
1664 See, for example, par 884 above.
1665 See pars 1210, 1216 above.
1666 See par 1671 above.
1667 See, for example, pars 1718, 1723, 1727, 1752, 1783, 1800, 1805, 1823 above.

malt production testing and reporting.[1668]

2600 Next, the Viterra Parties referred to the changes made to the supply chain as a result of the Malt Cost Reduction Transformation Project. Previous submissions about this project were referred to and the further submission was made that the evidence did not establish that "any such matters" made it more difficult to procure the approved barley.

2601 The evidence was that, by October 2013, Joe White was getting "bad barley" from Glencore and not getting what it wanted.[1669] The inability of Joe White to get precisely the barley it wanted had been the position since the introduction of the Malt Cost Reduction Transformation Project,[1670] and before.[1671] Further, after the Acquisition Joe White was, at times, required to pay a premium to purchase each of the barley varieties it required.[1672] In short, the supply chains in place in 2013 did not adequately meet Joe White's requirements. Further, the supply chains were changed as a result of the Malt Cost Reduction Transformation Project[1673] and were undoubtedly part of the problems Joe White faced in 2013 in supplying malt in accordance with customer requirements and specifications.

2602 Next, the Viterra Parties submitted that after the Acquisition Joe White customers "generally, or at least in many instances" were willing to accept derogated malt. It was correct to contend that there were many instances when Joe White's customers agreed to a derogation and accepted malt out of specification.[1674] However, this fact may be explained, at least in part, by the reality that Joe White's customers needed the malt in order to continue their beer production. Further, the fact that customers

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1668 For completeness, the Viterra Parties led evidence from an expert to the effect that all Joe White's plants, except the specialty plant at Delacombe and possibly Tamworth, had insufficient malt storage capacity and an insufficient number of storage bin segregations to allow for the reporting and blending policies adopted by Cargill.

1669 See par 1297 above.

1670 See par 234 above.

1671 See par 95 above.

1672 See pars 1574, 1785 above.

1673 See pars 135-141 above.

1674 See pars 1574, 1596-1598, 1623-1624, 1657-1659, 1675-1677, 1741 above.

accepted derogations did not equate to them being satisfied with Joe White's performance or provide any real indication as to their willingness to do so on an ongoing, long-term basis. Furthermore, many customers repeatedly expressed their dissatisfaction with the frequent requests for derogations.[1675]

2603 In summary, it was incontrovertible that the need to request derogations because of an inability to meet customer specifications was harmful to the Joe White Business after the Acquisition. These requests were necessary if Joe White was to discontinue the routine practice of supplying malt that did not comply with customers' requirements and specifications without their permission.

2604 Next, the Viterra Parties submitted that there was no need to rely upon the Viterra Practices and the Viterra Policies to avoid the impact of producing malt out of specification. It was submitted that such a contention by Cargill Australia should be rejected, having regard to the "true purpose" for the Viterra Policies and limitations on testing methodologies. For reasons discussed elsewhere,[1676] this submission must be rejected.

2605 Next, the Viterra Parties referred to Cargill Australia's allegation that Joe White did not tell its customers that it was supplying malt out of specification because Joe White had assessed doing so would have negatively affected its relationship with its customers. Further, they referred to the evidence of Stewart concerning Boon Rawd's understanding that maltsters modified Certificates of Analysis and Stewart's assertion that customers already knew about the "common industry practice" of being supplied with malt that was not what it was represented to be in the Certificate of Analysis.[1677] They contended that the awareness of customers was the reason for not telling customers of the Reporting Practice, and that the evidence did not establish the reasons why the Varieties Practice and the Gibberellic Acid Practice were not disclosed to customers, or what impact such disclosure might have had on customer

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1675 See, for example, pars 1601-1604, 1625, 1640, 1657, 1677, 1708, 1718, 1728, 1739, 1744, 1747, 1785 above.
1676 See issue 9 above.
1677 See pars 176, 411-413, 1664-1666 above.

relationships.

2606 These submissions must be rejected in their entirety. If customers fully appreciated the implementation of the Reporting Practice, and that was fully understood by Joe White, there could have been no reason to keep the Viterra Policies secret and to positively take steps to ensure that customers and auditors remained ignorant of their existence.[1678] Further, Stewart's evidence in this regard was an attempt to justify his past behaviour, but it was entirely inconsistent with his ongoing consciousness of impropriety in relation to the implementation of the Reporting Practice. If in truth Stewart believed the Reporting Practice was common industry practice of which Joe White's customers were fully aware, there would have been no occasion for him to be troubled by Joe White's adherence to it. His candid evidence about his discomfort in August 2010 and adhering to the Reporting Practice unfortunately being part of his job spoke volumes.[1679]

2607 Further, the submission that the reason for Joe White engaging in the Varieties Practice and the Gibberellic Acid Practice had not been established was without merit. Joe White engaged in each of the Operational Practices, and did not disclose it to its customers, in order to achieve greater returns and avoid the repercussions of routinely not being able to produce malt that complied with customer requirements and specifications. Further, by not disclosing the Operational Practices, Joe White was able to maintain the façade of supplying malt in accordance with customer specifications when the Joe White executives involved in operations (and other employees also involved in operations) knew that this was not a fact. In particular, Hughes as chief executive officer, was instrumental in creating and maintaining this façade both in the conduct of the Joe White Business and in the contents of the Information Memorandum and other communications made in the sale of the Joe White Business.

2608 In summary, none of the Viterra Parties' submissions on this issue can be accepted.

X.10.12.4 Joe White's financial and operational performance was substantially

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1678 See pars 287-292 above.

1679 See pars 161, 167, 174 above.

underpinned by the Operational Practices

2609 The evidence clearly demonstrated that the financial and operational performance of Joe White from 2010 to 31 October 2013 was substantially underpinned by the Operational Practices. By utilising the various aspects of the Operational Practices, Joe White supplied malt in a far more seamless and cost-effective manner than it would have been able to if it had complied with its contractual obligations, or had attempted to do so and been open with its customers when it could not.

2610 The fact that the Viterra Parties were able to point to some other factors after October 2013 that may have adversely affected the performance of the Joe White Business was of little moment. None of these matters altered the fact that, at the time of the Acquisition, the Joe White Business had significant flaws with its operations and was dependent upon the Operational Practices to maintain a level of performance resembling anything like that portrayed in the Information Memorandum, the Management Presentation Memorandum and each of the other pre-contractual communications as recorded in the Acquisition Agreement.

2611 In my view, this was the only conclusion reasonably open on the evidence. Contrary to the Viterra Parties' submissions, there was no need to call expert or lay evidence on the point given the evidence that was already before the court. Further, having worked closely in the Joe White Business for nearly 4 months in February 2014, Viers referred to the systematic approach that had been adopted in implementing the Operational Practices having been much more pervasive than Cargill could have imagined "to the extent the asset and business system were built on it".[1680]

2612 Before leaving this issue, an observation should be made about the way in which the Viterra Parties put their case based on the Alleged Industry Practices and their contention that the Operational Practices did not substantially underpin the Joe White Business. As the Viterra Parties would have it, all, or nearly all, significant commercial maltsters in the industry engage in the Operational Practices as part of standard industry practice. Their position was that this conduct was entrenched in the malting

[1680] See par 1684 above. The email recording this was tendered as part of both Eden's and Viers' evidence in chief. Neither witness was asked any questions about Viers' assessment. See also par 1685 above.

industry throughout the world, but that such conduct was not significant to the performance of the Joe White Business. These respective positions did not sit together comfortably.[1681] That said, the absence of a finding that the Alleged Industry Practices existed[1682] in no way undermined the cogency of the evidence that the Viterra Practices were integral to the Joe White Business operating in the manner in which it did between 2010 and 31 October 2013.

X.10.13 Joe White was unable to produce and sell malt in the manner that had been represented to Cargill without routinely engaging in the Operational Practices

2613 It is already apparent from what is set out in the previous section that Joe White was unable to produce and sell malt in accordance with customer specifications in the volumes or for the returns as represented in the Information Memorandum, and as represented during the course of the Due Diligence, without routinely engaging in the Operational Practices. To repeat, the financial and operational performance of Joe White would not have been as was reported to Cargill if Joe White had not engaged in the Operational Practices as it did between 2010 and October 2013.

X.10.14 Conclusion

2614 For the reasons stated, Cargill Australia established that each of the material facts identified as part of issue 10 existed at all relevant times; that is, the Undisclosed Matters existed as alleged.

X.11 Was it the fact that, before 22 October 2013, each of the Viterra Parties did not know of any of the matters pleaded in paragraph 30(bb), (bc), (bd) and (be) of the Defence?

2615 As referred to above,[1683] the Viterra Parties admitted the following matters, which they

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1681 See further issue 34 below.
1682 See issue 13 below.
1683 See par 1854 above.

alleged were not known to the Viterra Parties before 22 October 2013:

(1) The Viterra Policies were written policies of *Joe White*.[1684]

(2) The Joe White Business was generally conducted in accordance with the Viterra Policies as they existed from time to time.

(3) On occasions prior to 31 October 2013, Joe White supplied shipments of malt to customers which were produced in part or whole from barley varieties which had not been approved by the customer in question.

(4) On occasions prior to 31 October 2013, the Joe White Business supplied shipments of malt to customers which were produced using gibberellic acid in circumstances where the customer in question did not permit the use of gibberellic acid.

2616 Both the Cargill Parties and the Viterra Parties made submissions on this issue based on common law principles.

X.11.1 Legal principles

2617 Knowledge on the part of a corporation requires a process of attribution.[1685] The primary (though not universal) rule of attribution of knowledge provides that the knowledge or the state of mind of a person (or persons) may be attributed to a company where that person is (or those persons are) the directing mind and will of the company.[1686] In order to attribute a state of mind to a company it may be necessary to specify persons so closely and relevantly connected with the company that the state of mind of those persons can be treated as being identified with the company.[1687] The person or persons who may be found to be the directing mind and will of the company

1684 That is, it was alleged they were only policies of Joe White and not Viterra's policies.

1685 *QBE Underwriting Ltd v Southern Colliery Maintenance Pty Ltd* (2018) 97 NSWLR 459, 480 [95] (Leeming JA, with whom Macfarlan and Payne JJA agreed).

1686 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 506A-E (Lord Hoffmann delivered the judgment of the Privy Council).

1687 *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270, 279.5 (Bright J), quoted in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 582.9–583.1 (Brennan, Deane, Gaudron and McHugh JJ).

may depend on the circumstances in which a particular question of attribution arises.[1688] The primary rules of attribution are generally found in the company's constitution and are also implied by company law.[1689]

2618 The primary rules of attribution are supported by the general rules of attribution, which are the principles of agency.[1690] The circumstances in which knowledge of an agent is imputed to a principal can vary.[1691] Ordinarily, knowledge of an agent will be imputed to the principal where an agent is employed on behalf of the principal and has a duty to communicate such knowledge to the principal.[1692] Further, the agent must be acting within their actual or apparent authority,[1693] and not acting "totally in fraud of the company".[1694]

2619 Although any agreement to have or not have an agency relationship between the 2 persons said to be principal and agent is relevant to the question of whether in fact that relationship does or does not exist as a matter of law, any such agreement is not determinative. The question is to be determined by considering what they have agreed to do in fact and whether that amounts in law to a relationship of principal and agent.[1695]

1688 *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi SRL (No 12)* (2016) ATPR 42-525, 43081-46 [224] (Besanko J), referred to with approval in *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 454 [135] (Edelman J, with whom Allsop CJ and Besanko J relevantly agreed).

1689 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 506B-E.

1690 Ibid, 506E-G.

1691 See, for example, *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 702A-703D, where Hoffmann LJ listed 3 categories of circumstances where knowledge may be imputed: (1) where the agent is authorised to enter into a transaction in which his own knowledge is material; (2) where the principal has a duty to investigate or to make a disclosure and the principal employs an agent to discharge this duty; and (3) where the agent has actual or ostensible authority to receive communications on behalf of the principal.

1692 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 658.9 (Mason J). Compare *Laming v Jennings* [2018] VSCA 335, [95]-[99] (Kyrou, McLeish and Niall JJA) and *Sunshine Retail Investments Pty Ltd v Wulff* [1999] VSC 415, [117], [119] (Hedigan J) where no duty existed to communicate and no knowledge was imputed.

1693 The legal principles underpinning actual and apparent authority are set out at pars 3087-3092 below.

1694 *Commonwealth v Davis Samuel Pty Ltd (No 7)* (2013) 95 ACSR 258, 511-513 [1867]-[1880] (Refshauge J); *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 366-367 [282]-[284] (Finn, Stone and Perram JJ); *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* (2003) 178 FLR 1, 280 [1143]-[1145] (Chesterman J); *Cashflow Finance Pty Ltd v Westpac Banking Corporation* [1999] NSWSC 671, [429]-[436] (Einstein J); *Beach Petroleum NL v Johnson* (1993) 43 FCR 1, 28-29 [22.30], 31-32 [22.34] (von Doussa J).

1695 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611, 645 [133] (Finn J),

2620 Furthermore, knowledge may be knowledge of a corporation if it is known by the appropriate officer or agent, or is contained in current official records of the corporation.[1696]

2621 The position is less clear when a corporation's knowledge needs to be considered by reference to the knowledge of 2 or more officers or agents of the corporation. The aggregation of individuals' knowledge for the purpose of attributing liability to an organisation has been considered in several contexts outside fraud, including in tort, contempt of court, and unconscionable conduct.

2622 The authorities below bear out that in most cases, it will not be appropriate to aggregate the knowledge of individuals to then attribute that knowledge to a corporation. However, the authorities leave open the possibility of aggregating knowledge in specified circumstances, where:

(1) The relevant person or people said to have knowledge are the "directing mind and will" of the company to which knowledge is sought to be attributed.

(2) The officer or agent is under a duty and has the opportunity to communicate it to another.

(3) The knowledge is already held in aggregated form.

It is illustrative to refer to a number of authorities on this matter.

2623 In *Australian Competition and Consumer Commission v Radio Rentals Ltd*,[1697] the Commission alleged that the respondents had entered into and enforced a large number of agreements with an intellectually disabled customer, in such a way that constituted unconscionable conduct. The Commission submitted that the

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citing *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130, 1137C (Lord Pearson, with whom the other lords agreed).

1696 *QBE Underwriting Ltd v Southern Colliery Maintenance Pty Ltd* (2018) 97 NSWLR 459, 480 [95] (Leeming JA, with whom Macfarlan and Payne JJA agreed), quoting *Commercial Union Assurance Co of Australia v Beard* (1999) 47 NSWLR 735, 750 [62] (Davies AJA, with whom Meagher JA agreed).

1697 (2005) 146 FCR 292.

respondents knew about the customer's intellectual disability because the knowledge of individual call centre operators who dealt with the customer could be aggregated to establish the knowledge of the corporation.

2624 After referring to *Krakowski v Eurolynx Properties Ltd*[1698] and *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd,*[1699] Finn J rejected the aggregation of the knowledge of the individual call centre operators, noting:[1700]

> If the ACCC's submission were to be accepted to its full extent as put, it would have potentially alarming consequences for large, multi-function, corporations. It could also raise, potentially, rather significant privacy issues.

2625 However, without expressing a concluded view, his Honour accepted that "separate information held by an officer or agent of a corporation can be aggregated with information held by another at least where the first such person has 'the duty and the opportunity to communicate it to the other'".[1701] Finally, Finn J noted that "[t]he contexts can vary widely in which the question of attribution of knowledge to a corporation can arise in virtue of knowledge possessed by one or more of its officers and agents".[1702] Accordingly, his finding was confined to circumstances where "what is sought by the aggregation of the knowledge is to alter the character of that knowledge when it is attributed to the employer corporation where no justification for the aggregation (eg participation by several employees in the same transaction) has been made out".[1703] His Honour indicated the result may have differed if the individual operators who recorded entries were involved in "different aspects of one transaction", or if the records sought to be aggregated had been "contrivedly or artificially kept in a disaggregated form".[1704]

2626 In *Elliott v Nanda,*[1705] the applicant had obtained employment with an employer via

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1698 (1995) 183 CLR 563, 582-583 (Brennan, Deane, Gaudron and McHugh JJ). See issue 22.1 for a more detailed discussion of the principles referred to in this case.
1699 [1998] 3 VR 133, 145 (Tadgell JA), 160-161 (Ashley AJA).
1700 (2005) 146 FCR 292, 327 [181].
1701 Ibid, 327 [182], citing *Re Chisum Services Pty Ltd* (1982) 7 ACLR 641, 649-650 (Wootten J).
1702 Ibid, 327 [183].
1703 Ibid.
1704 Ibid, 326 [179].
1705 (2001) 111 FCR 240.

the Commonwealth Employment Service, operated by the Commonwealth. In the course of that employment, the applicant had been sexually harassed by her employer. In considering whether the Commonwealth had permitted the employer to discriminate against the applicant, Moore J considered the knowledge of the Commonwealth Employment Service case workers. His Honour considered that "[t]he collective knowledge of officers of the [Commonwealth Employment Service] can be treated as the knowledge of the Commonwealth", citing *Krakowski v Eurolynx Properties Ltd*.[1706] His Honour then contrasted the situation with respect to fraud, stating:[1707]

> In some circumstances, the knowledge of individual employees or officers of a corporation cannot be aggregated in a way that alters the character of the knowledge. For example, a corporation does not act fraudulently where several of its employees (involved in the corporation's conduct) possess discrete pieces of information (by itself innocent information) which, if known to one employee, would evidence fraud.

2627 In the circumstances of *Elliot v Nanda*, it was found that an additional reason that the knowledge could be aggregated was because it was already held in aggregated form in an information file, and was noted in a computer record accessible to case workers.[1708]

2628 In *K & S Corporation Ltd v Sportingbet Australia*,[1709] the plaintiffs claimed a constructive trust over disputed moneys. The defendant denied it had the requisite level of knowledge or notice. On the question of aggregation, Besanko J noted that "[t]he legal position is not clear".[1710] His Honour distinguished between situations where 2 individuals with partial knowledge are part of the directing mind and will of the company (where it appeared that the knowledge could be aggregated and attributed to the company),[1711] and where that is not the case. Then, his Honour recognised that "knowledge may be aggregated if the person who knows one piece of information is

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1706 Ibid, 295 [170].
1707 Ibid.
1708 Ibid.
1709 (2003) 86 SASR 312.
1710 Ibid, 339 [107].
1711 Ibid, citing *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563; *Entwells Pty Ltd v National & General Insurance Co Ltd* (1991) 6 WAR 68.

under a duty to ascertain the other piece of information known by another officer of the company".[1712] In rejecting that aggregation was possible in the circumstances of the case before him, his Honour said:[1713]

> I do not think that I should find that something is known to a company when part of the information is not known to anyone forming part of the directing mind and will of the company and is known only to an agent who was under no duty to communicate the information to those persons forming part of the directing mind and will.

2629 In *Port Stephens Shire Council v Tellamist Pty Ltd*,[1714] the New South Wales Court of Appeal considered whether exemplary damages should be awarded against a council in relation to a trespass. Ipp JA, with whom Giles JA agreed, doubted whether the requisite mental element could be established by a "theory of collective knowledge", where different acts of 2 or more persons without knowledge of what the others did or would do would be attributed to a corporate body and used to infer contumelious conduct.[1715] By contrast, Santow JA (in dissent) read *Krakowski v Eurolynx Properties Ltd* to indicate that consciousness of fraud could be found by "combining the knowledge of those sufficiently closely and relevantly connected to the corporation".[1716]

2630 In *Optus Administration Pty Ltd v Wright*,[1717] the New South Wales Court of Appeal considered a company's liability in negligence for mental harm suffered by a man, after another man attempted to kill him while the 2 were attending a training course at the premises of the company. Basten JA, with whom Hoeben JA agreed, found that there was no authority for the proposition that knowledge in different employees (operating below the level of senior management) could be aggregated and attributed to a company for the purpose of demonstrating negligence on the part of the company.[1718]

1712 Ibid, 339 [108].
1713 Ibid, 339 [110].
1714 [2004] NSWCA 353.
1715 Ibid, [407]-[408].
1716 Ibid, [316]. See further pars 3452 below.
1717 (2017) 94 NSWLR 229.
1718 Ibid, 244-245 [49]-[52].

2631 In *GM Global Technology Operations LLC v SSS Auto Parts Pty Ltd*,[1719] in the context of an intellectual property dispute, the principles outlined by Edelman J in *Commonwealth Bank of Australia v Kojic*[1720] were accepted by Burley J.[1721] In so doing, he rejected an approach that would allow a registered owner of rights to "mosaic the knowledge of individuals in a corporation to produce a result".[1722]

2632 In *Farah Custodians Pty Ltd v Commissioner of Taxation*,[1723] Wigney J noted that liability for the tort of misfeasance in public office could not be established by aggregating the acts and knowledge of various officers.

2633 In *J McPhee & Son (Aust) Pty Ltd v Australian Competition and Consumer Commission*,[1724] the Full Federal Court rejected a submission that the trial judge had erred in finding that a company's intention was to be ascertained from an aggregation of the mental state of the individuals involved. Rather, it was found that the trial judge correctly applied the principles in *Krakowski v Eurolynx Properties Ltd* by considering the intention of each individual and attributing it to the company, rather than aggregating the mental state of the individuals involved.[1725]

2634 In *Choundary v Capital Airport Group Pty Ltd*,[1726] in the context of a contempt of court matter against a corporation, Gyles J considered that it was not legitimate to aggregate the knowledge of the individuals identified and attribute the aggregated knowledge to the corporation.[1727]

2635 The mere fact that companies have common directors does not establish common knowledge.[1728] However, an officer's or a director's state of mind may be attributed to more than 1 company in certain circumstances. Common knowledge will be

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1719 (2019) 371 ALR 1.
1720 (2016) 249 FCR 421.
1721 (2019) 371 ALR 1, 31-32 [96]-[100].
1722 Ibid, 32 [99].
1723 [2018] FCA 1185, [108].
1724 (2000) 172 ALR 532 (Black CJ, Lee and Goldberg JJ).
1725 Ibid, 569-570 [128].
1726 [2006] FCA 1755.
1727 Ibid, [25].
1728 *Clarke v Great Southern Finance Pty Ltd (in liq)* (2010) 243 FLR 451, 463-464 [32] (Croft J).

established where a person is the directing mind of both companies.[1729] Further, common knowledge may also be established where an officer or a director of the first company is under a duty to communicate the knowledge to the second company, and the officer or director of the second company is under a duty to receive the knowledge.[1730] However, knowledge will not be imputed where an officer or a director has a duty not to communicate such knowledge between the 2 companies,[1731] or where an officer or a director is acting totally in fraud of the company.[1732]

2636 In some circumstances knowledge may be imputed where there is an expectation that the director or officer of 2 companies will report knowledge from 1 company to the other.[1733] However, where a director has 2 conflicting fiduciary duties between the 2 companies, they should either refrain from participation if possible, or resign.[1734] In any event, the director's knowledge would not be treated as knowledge of both companies.

2637 Naturally, as part of determining whether or not an agent's knowledge is also knowledge of the principal, it is necessary to consider the basis upon which the agent has been given authority and the scope of that authority. In some circumstances, an agent may be authorised to represent a principal in all respects, and in other circumstances the authority may be limited.[1735] In short, the rules of attribution of knowledge must always be tailored to the situation in which they are applied.[1736] As

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1729 See, for example, *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd (in liq)* (1999) 96 FCR 217, 229-230 [48]-[49] (Hill, Sackville and Finn JJ).

1730 *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 404E-F (Buckley LJ, with whom Goff and Waller LJJ relevantly agreed).

1731 *Harkness v Commonwealth Bank of Australia Ltd* (1993) 32 NSWLR 543, 553E-555F (Young J).

1732 See fn 1694 above.

1733 See *TNT Australia Pty Ltd v Normandy Resources NL* (1989) 53 SASR 156, 182.5-183.2 (Jacobs J) considering *Re Rossfield Group Operations Pty Ltd* [1981] Qd R 372, 377E (Connolly J), where the court stated that the facts did not give rise to an expectation to disclose information. For cases considering a duty to disclose information see *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685, 698G (Nourse LJ), 700E (Rose LJ), 702H-703B (Hoffmann LJ); *Re Fenwick Stobart & Co Ltd* [1902] 1 Ch 507, 511.1 (Buckley J); *Re Hampshire Land Co* [1896] 2 Ch 743, 748.9 (Vaughan Williams J).

1734 Ford, *Principles of Company Law* (17th ed, 2018), [16.220].

1735 *Igloo Homes Pty Ltd v Sammut Constructions Pty Ltd* [2005] NSWCA 280, [81] (Ipp JA, with whom Santow JA agreed), quoting *Blackburn, Low & Company v Vigors* (1887) 12 App Cas 531, 537-538 (Lord Halsbury).

1736 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 511G-512B (Lord Hoffman).

was stated in *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)*,[1737] it is a question of the interpretation of the relevant rule of responsibility, liability or proscription to be applied to the corporation, in light of its context and its purpose. If a particular state of mind of a corporation is required to be established by the relevant rule, the court must determine whose state of mind is to count as the knowledge or state of mind of the corporation for the purpose of the relevant rule.

X.11.2 Attribution – the context

X.11.2.1 The Viterra Parties' submissions

2638 The Viterra Parties submitted that after Viterra's acquisition of Joe White in 2009, Joe White was run as an independent business with minimal connection with the Viterra Group's operations, with Joe White's head office located in a separate building to Viterra's. Initially, there was no elaboration upon what this minimal connection entailed. However, after some questions during oral closing submissions, the Viterra Parties accepted that the connection included a significant number of matters. They also appeared to resile from the contention that Joe White was run "independently", describing it as a "weasel word". However, they submitted Viterra's involvement with matters like the Malt Cost Reduction Transformation Project, was some sort of direction, but was not something in the operations of the Joe White Business. It was suggested it was analogous to a barrister owning a farm and directing to the manager that the farm was only to run sheep. Such a direction was said not to go to how the sheep operation was run.

2639 The Viterra Parties referred to the definition of Business in the Acquisition Agreement.[1738] They submitted what was contained in the Acquisition Agreement reflected the position that it was Joe White that was running the Joe White Business. Reference was also made to a number of recitals, including the statements that the Land Seller was the sole legal owner and, together with Joe White, beneficial owner of the Minto Land and the Buildings, and that the Minto Land and the Buildings were

1737 (2018) 357 ALR 240, 266 [1660] (Beach J).
1738 See par 1022 above.

used by Joe White in the conduct of the Business. Based on this, it was contended this property was not being used by Viterra. Also referring to the recitals concerning the [Joe White] Intellectual Property and the Dom Boxes, the same submission was made about this property having been used by Joe White. In a similar vein, reference was made to Warranty 6.1.[1739]

2640 The Viterra Parties further submitted that the duties of the executives of Joe White were specifically limited to functions related to Joe White and that they had "no other function within the Viterra Group or the Glencore Group", save for an exception the Viterra Parties identified.[1740] They contended the sole exception to this dichotomy was the role of Hughes, in relation to whom it was submitted that there was no evidence as to the level of his involvement in the operations of Viterra after late 2012. Indeed, the position was put as high as "the evidence is that Hughes' duties were limited to duties with Joe White". When it was suggested this submission was inaccurate in light of Hughes' position, including Hughes being part of the Viterra executive, it was submitted Hughes had a duty to report on Joe White; that is, he was reporting on his area of responsibility. The Viterra Parties submitted there was a clear demarcation between the Third Party Individuals (whose functions related solely to Joe White and who remained at Joe White after Completion) and others (whose functions did not relate to Joe White and who remained with Viterra after Completion). As an example of the latter category, Fitzgerald was said not to have any functions of Joe White "in and of itself". A little later in the submission, Mattiske was submitted to be in the same category as Fitzgerald.

2641 In relation to the correct approach to be taken in light of the decision of the High Court in *Krakowski v Eurolynx Properties Ltd*,[1741] the Viterra Parties submitted it would be an error to take the collective knowledge or aggregation approach of numerous individuals of a corporation to determine the knowledge of a corporation.[1742]

1739 See par 1034 above.

1740 See par 52 above.

1741 (1995) 183 CLR 563.

1742 See *Emhill Pty Ltd v Bonsoc Pty Ltd (No 2)* [2007] VSCA 108, [31] (Warren CJ, with whom Buchanan and Ashley JJA agreed); *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133, 145.1 (Tadgell JA, with whom Winneke P agreed).

However, they accepted (correctly) that in light of this decision a corporation may be held to have the requisite knowledge and intent if a single person had such a state of mind which could be attributed to the corporation, whether or not that person engaged in the impugned conduct.[1743] This was referred to in their submissions as the hybrid approach.

2642 In relation to the hybrid approach, the Viterra Parties submitted that a corporation may lose knowledge of a fact after a period of time. While it was acknowledged that a corporation could not shed knowledge by simply shedding people,[1744] it was submitted that "where a company previously had, but no longer has, a connection with a person whose knowledge was attributable to the company, and where there is no evidence that the relevant knowledge was shared with anyone else remaining connected with the company, it should be found that the company does not have the relevant knowledge".

2643 With regard to Hughes' knowledge, the Viterra Parties submitted Cargill Australia needed to establish that either Hughes was the directing mind and will of the relevant entities for the purposes of the transaction or he was acting as an agent. With respect to the latter of these 2 alternatives, it was submitted it was necessary to establish Hughes was selected to be an agent because his own knowledge was relevant to the transaction, or the Viterra Parties or any of them for whom Hughes was acting as agent had a duty to investigate or make disclosure, and those entities or that entity employed Hughes to discharge this duty.

2644 The Viterra Parties submitted that on no view could Hughes be considered the directing mind and will of the Sellers. Further, they submitted Hughes' level of responsibility in the sale process did not support the attribution of knowledge to any of the Viterra entities. The basis of this submission included the following contentions: (1) an inference should be drawn that Hughes would not have given evidence that he was part of a "working group" on behalf of the Viterra Parties for the sale of Joe

1743 This is discussed in more detail in relation to deceit: see issue 22 below.

1744 *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473, 527 [244] (Sheller, Stein and Giles JJA).

White;[1745] (2) there was no such "working group" for the sale of Joe White; (3) Hughes' participation was not as an agent for any entity other than Joe White; (4) Hughes was not an agent for any of the Viterra Parties by reason of the "Pre-Contractual Disclaimers",[1746] he had no actual or ostensible authority to act as agent in any capacity, and as Hughes had no authority or responsibility to speak for Viterra his knowledge should be found not to count as Viterra's knowledge; (5) shortly before the Acquisition Agreement was finalised, it was agreed by the parties that Viterra's knowledge was limited to the knowledge of identified individuals, which did not include Hughes, and as such Cargill acknowledged that Hughes' knowledge was not included;[1747] and (6) to the extent that Hughes was considered to be acting as an agent, the sale process was run by Glencore, not Viterra, and any agency was limited to Hughes' conduct not his knowledge.

2645 Alternatively, the Viterra Parties submitted that, if Hughes was found to be an agent *for Viterra* for the purposes of the transaction, the scope of that agency was limited such that Hughes' knowledge should not be attributed to Viterra. It was contended the reasons why this was so were: (1) where an agent acts outside her or his authority with a particular knowledge or intention, that knowledge or intention should not be attributed to the principal;[1748] (2) to the extent that Hughes had authority to act as agent for Viterra, that authority was limited to assisting Viterra in providing accurate

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1745 See pars 3097, 3102 below for the allegations made by Cargill Australia concerning the "working group".

1746 In this regard, the Viterra Parties did not identify any specific clause or term. The "Pre-Contractual Disclaimers" was a reference to terms in the Confidentiality Deed, terms in the Phase 1 Process Letter, the disclaimers in the Information Memorandum, terms in the Phase 2 Process Letter, terms of the Data Room Protocol and the disclaimers in the Management Presentation Memorandum. They submitted that by reason of those pre-contractual disclaimers, Cargill had agreed that Glencore and its subsidiaries had no obligation to undertake any level of disclosure and that there was no guarantee as to the accuracy or completeness of any of the information provided. In their submissions the Viterra Parties referred to "Pre-Contractual Disclaimers", whereas in the Defence, the Viterra Parties used the definition "Sale Process Disclaimers" to refer to the substantially same terms and statements. Some different defined terms were used, but the submissions confirmed that the terminology for these defined terms was used interchangeably. All references in the Viterra Parties' submissions to "Pre-Contractual Disclaimers" will be considered as references to the Sale Process Disclaimers as defined in the Defence: see par 2828 below.

1747 This submission is set out in more detail in considering Cargill Australia's deceit claim against Viterra: see issue 22, and in particular par 3247 below.

1748 *Blackburn, Low & Company v Vigors* (1887) 12 App Cas 531, 537.9-538.2 (Lord Halsbury).

information about Joe White's operations as was shown by Hughes being requested to verify the Information Memorandum and the Warranties;[1749] and (3) if it were found that information provided was misleading and deceptive, then by virtue of Hughes' position he must have known of that fact and therefore was acting outside the scope of his authority when providing inaccurate information to Viterra and then verifying that information as being accurate.

2646 Submissions were also made as to why the knowledge of various other officers or employees of Viterra Ltd, both employed before or during the events of 2013, ought not be attributed to the Viterra Parties. It is unnecessary to set out the detail.

X.11.2.2 The Cargill Parties' submissions

2647 The Cargill Parties made submissions concerning the relevant principles, most of which need not be referred to as they were largely uncontroversial. However, as part of these submissions, it was contended that there may be more than 1 person whose mind should be attributed to a company.[1750] The Cargill Parties submitted the knowledge of 2 people may be capable of aggregation if 1 officer or agent has a duty and opportunity to communicate such knowledge to the other. As for this proposition, reference was made solely to the judgment of Allsop CJ as part of a Full Court of the Federal Court. However, his Honour prefaced this observation by stating "[d]epending on the relevant statutory context or substantive rule …". Further, he made this observation immediately after stating he agreed with Edelman J's reasons concerning aggregation.[1751] For the reasons explained above,[1752] the submission put by the Cargill Parties on this area of the law appeared to oversimplify the position.[1753]

2648 The Cargill Parties submitted the relationship between Joe White, Viterra Malt and

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1749 See pars 445-451 above and issue 125.6 below.

1750 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 583.2 (Brennan, Deane, Gaudron and McHugh JJ).

1751 *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 438 [66] (Allsop CJ, with whom Besanko J agreed), noting that Allsop CJ (at 438 [65]) and Besanko J (at 440 [78]) agreed with Edelman J (at 451-457 [119]-[149]) about what was said about aggregation by the majority in the High Court in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563.

1752 See pars 2621-2634 above.

1753 See also *NIML Ltd v MAN Financial Australia Ltd* (2006) 15 VR 156, 167-168 [38]-[39] (Nettle JA, with whom Buchanan JA and Bongiorno AJA agreed).

Viterra Ltd was symbiotic. The Cargill Parties referred to the fact that Joe White owned its goodwill, but Viterra Malt owned all of the issued capital of Joe White, and Viterra Operations and Viterra Ltd owned assets used in the Joe White Business. They also noted that when Glencore acquired Viterra,[1754] Viterra and Joe White each became a wholly owned subsidiary of Glencore. Further, it was submitted that Viterra Ltd executed the contracts for services to employ staff working in the malt business of Viterra, including the Third Party Individuals.

2649 Furthermore, it was submitted that Viterra Ltd or Viterra Operations, or both, conducted a grain storage and handling business, which supplied barley to Joe White. They noted that after Glencore's acquisition of Viterra, both Glencore and Viterra Operations separately supplied barley to Joe White.

2650 It was submitted that Joe White was Viterra's malt business unit and that there was no relevant distinction between Joe White and the Viterra Malt business unit, other than the corporate ownership structure. In such circumstances it was contended the malt business was run by Viterra and controlled by Viterra Ltd and Viterra Malt, and later by Glencore.

2651 In support of their submissions, the Cargill Parties relied on the following:

(1) Viterra and Glencore management reports treated the malt group as a single entity with no reference to Joe White. (This submission was not entirely correct.)[1755]

1754 See pars 352-353 above.

1755 In relation to documents tendered:

(1) The monthly Viterra management report for April 2010, titled "Viterra Australia/New Zealand Management Report" that was distributed to Fitzgerald, Hughes, Gordon and Argent, contained the term "JWM", which was a reference to Joe White.

(2) Under Glencore's ownership the monthly report for February 2013, titled "Australia/New Zealand Finance Report" used Viterra Malt and "JWM" synonymously when setting out the $1.6 million trading profitability of Viterra Ltd.

(3) The monthly report for September 2013, titled "Glencore Grain/Viterra Australia/New Zealand Finance Report" that was distributed to Fitzgerald, Mattiske and Argent, referred to malt repeatedly, as well as Viterra Malt and the malt business, but did not refer to Joe White.

In any event, each of the above reports referred to "malt" as a business unit of Viterra.

(2) The human resources, finance and legal shared services provided by Viterra continued under Glencore, the cost of which was estimated in the Information Memorandum to be $2 million per annum.

(3) The Viterra Policies, which were available on Pulse, referred exclusively to Viterra Malt and were marked with Viterra Malt's name and logo.[1756]

(4) The Malt Cost Reduction Transformation Project slides and papers, which dealt extensively with the cost of barley, the supply of malt, and related matters such as storage, also referred exclusively to Viterra Malt, and bore the Viterra Malt name and logo.

(5) Viterra Ltd employed all of Joe White's staff.

2652 Further, the Cargill Parties submitted that in addition to being Viterra Ltd's employees, all staff had Viterra email addresses. Furthermore, the Joe White executives' employment documents referred to Viterra Ltd as the employing entity or Viterra Malt as the business for which they worked, and did not refer to Joe White; for employment docs see Stewart, Wicks, Hughes, Youil and Argent.[1757]

2653 Moreover, the Cargill Parties submitted that while the Joe White executives were employed by Viterra Ltd, they provided their services to the malt business. The Cargill Parties noted that in the Viterra Parties' opening of this trial it had been stated that Viterra's malting business was, "for all practical purposes", Joe White. Therefore, it was submitted that the assertion that Joe White's executives were not executives of Viterra was meaningless.

2654 In relation to the refusal by Viterra to accept Cargill's suggested changes to the

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1756 However, in the reference section of the Viterra Certificate of Analysis Procedure, there was a reference to a folder named "JWM" (that is, Joe White) in giving details of where a malt blend parameters document was saved.

1757 The employment records indicated that Hughes was "Executive Manager, Malt" with Viterra, Youil was "General Manager – Operations" with Viterra Malt, Wicks was "General Manager – Commercial" with Viterra, Stewart was "General Manager – Technical" with Viterra Malt and Argent was "Controller – Processing Australia and New Zealand" with Viterra.

"Knowledge and belief" clause of the Acquisition Agreement,[1758] the Cargill Parties submitted this was not relevant to the issue at hand. In essence, it was contended that the contractual terms upon which the parties agreed was not the end of the enquiry.[1759]

X.11.2.3 Analysis

2655 The attempt by the Viterra Parties to characterise the connection in 2013 between the conduct of the Joe White Business and the Viterra Group as minimal bore no resemblance to the facts. The suggested analogy of a farm owner doing no more than directing the farm manager to run sheep on the land was far removed from the level of involvement Viterra had in the conduct of the Joe White Business. Without seeking to be exhaustive,[1760] the evidence demonstrated that:[1761]

(1) Viterra was involved in the purchase of barley for Joe White.[1762]

(2) From late 2012, Glencore Grain supplied barley to Joe White.

(3) Joe White had access to Viterra's segregations, meaning Joe White did not have to lease an entire silo.

(4) At least some,[1763] if not all, of the employees working in the Joe White Business were employed by Viterra Ltd and their services (in some cases not exhaustively) were provided to Joe White.[1764]

1758 See clause 31.15 of the Acquisition Agreement: par 1033 above. See also pars 979, 989, 992 above.

1759 At 1 point in the Cargill Parties' submissions, reference was made to Hughes' knowledge being attributable to Viterra Ltd and Viterra Malt; that is, there was no reference to Viterra Operations. Whether this was intentional or not, there was no reason to distinguish Viterra Operations and no such distinction was made on the pleadings concerning attribution of Hughes' knowledge. See also pars 992 above and 3542 below.

1760 See, for example, pars 191 (concerning the requirement that Hughes comply with all of Viterra Ltd's operational practices, procedures, policies and directions, as amended from time to time), 195 (concerning Hughes' obligation to deliver up all correspondence to Viterra Ltd upon termination), 535 (concerning Viterra's barley procurement policy), 537 above and fn 491 above regarding the numerous Viterra Malt policies according to which the Joe White Business was required to comply.

1761 These matters are in addition to the fact that Hughes and Argent were formally retained to act for Glencore and Viterra in the sale process.

1762 It was stated in Cargill's closing submissions that Viterra was involved in the purchase of malt, but it must be assumed it was intended to refer to barley in this context.

1763 This was the way in which the position was put in closing submissions. There was no evidence that anyone other than Viterra Ltd employed those engaged in the Joe White Business: see also pars 62, 537 above.

1764 The limited evidence on the issue of which entity paid the Viterra Ltd employees who worked at Joe

(5) The Third Party Individuals, along with all other Viterra employees who worked in the Joe White Business, were subject to the Viterra Code, which included a requirement that a compliance form be completed annually as part of a Viterra employee's performance review.[1765]

(6) The Viterra Code expressly required the Third Party Individuals and all others at Joe White to disclose to Viterra Ltd any violations or any possible violations of the Viterra Code as soon as they became aware of them.[1766]

(7) The Third Party Individuals were required to be the subject of a Viterra performance and development review on an annual basis, which included or may have included a review of the executives' performance by reference to Viterra's objectives and Viterra business procedures used by the Joe White Business.[1767]

(8) The Third Party Individuals were required to perform roles for Viterra, such as: Hughes as a Viterra director and executive, and after December 2012 as a Viterra executive;[1768] Stewart being directed to be involved in research and development for Viterra;[1769] and Argent being appointed to the position of controller of processing for both Viterra Malt's and New Zealand's feed business with the obligation to report directly to Viterra Ltd's finance director.[1770]

(9) Viterra imposed detailed budgets and cost-saving measures with which Joe White was required to comply.[1771]

White suggested Viterra Ltd also paid the salaries of these employees. For example, a letter to Stewart from Viterra Ltd dated 14 February 2012 informed him of a pay increase and that his salary would be paid fortnightly.

1765 See par 62 above.
1766 See par 63 above.
1767 See pars 230-233 above.
1768 See further subparagraph (15) below.
1769 See par 232 above.
1770 See par 51 above and fn 4387 below.
1771 See, for example, par 234 above.

(10) Joe White and Viterra shared the following services:

(a) Computer and information systems, giving Joe White access to Viterra's barley quality data and other information including the location of barley.

(b) A legal department. On the occasions when Joe White engaged external lawyers, approval from the Viterra legal team was required.

(c) A human resources department.

(d) Finance support from Glencore for taxation, payroll and cash management functions, and services in relation to accounts payable and accounts receivable.

(e) Support from Glencore's safety, health and environment department.

(f) A document numbering system implemented by Viterra for storing company documents on Viterra's intranet, Pulse.

(11) Joe White generally sought assistance from Viterra's legal department if contracts needed to be signed by directors or if complicated legal issues arose.

(12) Most of the written communications of the Joe White Business utilised Viterra's communications regime as all staff had Viterra email addresses.

(13) The only Third Party Individual to give evidence, Stewart, had a business card in 2013 that referred to Viterra Malt (rather than Joe White) and he also signed off on his emails using Viterra Malt.[1772] Further,

[1772] When some confusion arose during Stewart's cross-examination about whether it was appropriate to refer to Joe White or Viterra Malt in framing questions concerning certain business or financial interests, Stewart explained that under Viterra's ownership the Joe White Business was known as Viterra Malt.

Stewart's position description issued by "Viterra" in 2013 referred to the Joe White Business as the "Malt business" or "Malt" and also referred to "Viterra Malt", the "Viterra malt commercial team" and the "Malt Group". There was no reference to "Joe White" or "the Joe White Business" as part of his job description.[1773]

(14) The covering letter to the Hughes/Viterra Contract confirmed Hughes' "Permanent Full Time position of Executive Manager, Malt *with Viterra*" (emphasis added), and the terms of the Hughes/Viterra Contract made no mention of Joe White.[1774] Further, as part of Hughes' performance assessment, he was required to meet objectives of Viterra Malt and take "Key Actions" in that regard.[1775]

(15) Pursuant to the Hughes/Viterra Contract, Hughes was required to work at Viterra's head office and there was no provision which suggested there was a separate head office of Joe White.[1776]

(16) Hughes remained on the executive body for Viterra and participated in Viterra's executive meetings for Australia and New Zealand after he ceased to be a director of Viterra and Joe White.[1777]

(17) When Hughes was challenged by Mattiske as to why he and others had not been told about the Operational Practices, Hughes responded that Gordon had either put in place or endorsed the relevant policies and

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1773 See also fn 63 above and fnn 4171, 4387 below.

1774 See pars 188-189 above.

1775 For example, Hughes' performance and development review in July 2010 included objectives to ensure that Viterra Malt exceeded a certain compliance level in relation to "Regulatory, Safety and Environment", that it complied with regulatory production licensing, that it achieved certain levels of profitability, that it achieved an improvement in "OG&A [being Operating, General and Administrative]/mt across Viterra Malt", and so on. The review referred to "Malt development" and required Hughes to break down the "malt silo reputation through embracing the functional/divisional initiatives targeting grain segregation, safety and malt cost review projects". In short, his review was directed towards the performance of Viterra Malt, and Viterra more generally.

1776 See par 193 above.

1777 See par 52 above. In closing submission, the Viterra Parties accepted Hughes was never asked before 31 October 2013 to cease his role as a Viterra executive and the Viterra Australian and New Zealand committee.

procedures.[1778]

(18) Viterra owned assets used by Joe White, comprising:

(a) Land.

(b) Intellectual property.

(c) Dom Boxes.

2656 In summary, Viterra presented and treated the Joe White Business (known as "Viterra Malt") as its business, and exercised considerable control over it.[1779] As a reflection of this, by way of example only, in Argent's position description it was stated that "Viterra" was 1 of the world's largest malt producers and that with "malting plants across Australia, we proudly supply Australian malt to the world's best brewers". Further, there was no evidence that Joe White had any decision-making executive body that was independent of Viterra (or after late 2012, Glencore and Viterra). It is in this context, including the very significant role Viterra played in the affairs of Joe White (in conjunction with Viterra Malt) and the extent to which the affairs of Joe White were considered to be the affairs of Viterra, that attribution of knowledge must be considered.

2657 The recitals and terms of the Acquisition Agreement did not change the underlying facts. Although the matters relied upon by the Viterra Parties in this regard were plainly relevant to any determination concerning how and by whom the Joe White Business was being operated, there was no case pleaded based upon any issue estoppel by reason of what was agreed between Cargill and Viterra in the Acquisition Agreement. Further, nothing contained in the recitals or Warranty 6.1 demonstrated that the factual matters set out above were incorrect.

2658 Specifically in relation to the submission concerning the functions of the Third Party Individuals,[1780] it did not reflect the facts for a number of reasons. Dealing with

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1778 See par 1255 above. But also see par 166 above.
1779 See also pars 230-234 above.
1780 See par 2640 above.

Hughes, during the time he was a director of each of Viterra Ltd, Viterra Operations and Viterra Malt, he necessarily had functions to perform for those companies in that capacity.[1781] Further, there was no evidence to support the contention that after Hughes ceased to be a director of these companies (and Joe White) his role on the executive committee or more generally was confined to merely reporting on the affairs of, and performing functions for, Joe White.[1782] Equally, to the extent that the position descriptions of the other Third Party Individuals were before the court, they also demonstrated that the functions of those individuals were not simply limited to functions related to Joe White.[1783] Furthermore, there was no clear demarcation between the executives working for Joe White and other Viterra Ltd employees who had no involvement in the day-to-day operations of Joe White. Plainly, as its company secretary, Fitzgerald had functions he was required to perform for Joe White,[1784] and yet he remained with Glencore and Viterra after the Acquisition was completed. A like observation may be made in relation to the position of Mattiske, who at all times from December 2012 up until Completion was a director of Joe White.[1785] Moreover, there was no evidence to suggest that, in relation to clause 9.1(d) of the Acquisition Agreement,[1786] someone from Viterra Malt needed to be informed of details about the Joe White Business in order for Viterra Malt to be able to comply with its obligations under that clause.

2659 A further contextual matter was that the Operational Practices had been implemented (and for that matter utilised at a level to constitute the Viterra Practices) by executives who were employed by Viterra Ltd as part of the Joe White Business for the entire time that Viterra had owned Joe White, over which time a number of Viterra

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1781 Although the law does not provide for any minimum business functions of directors, directors have statutory obligations that must be met as well as being required to ensure that the functions of the board are carried out: LexisNexis, *Ford, Austin & Ramsay's Principles of Corporations Law*, [7.030]-[7.060].

1782 See pars 190-196 above.

1783 See pars 231-233, 2656 above and fnn 4171, 4387 below.

1784 A company secretary is responsible for a company's record-keeping, including the maintenance of registers, the lodgment of documents, the preparation of minutes of board and directors' and members' meetings, and so on: LexisNexis, *Austin & Black's Annotations to the Corporations Act*, Part 2D.4, [2D.204A]. See also, for example, the *Corporations Act*, ss 142, 254X, 319(1), 349A.

1785 See fn 1781 above.

1786 See par 1028 above.

executives (including Hughes) were directors of Joe White.[1787]

X.11.3 Attribution of knowledge

X.11.3.1 Hughes' position

2660 Hughes was clearly not the directing mind or will of any of the Viterra Parties in 2013 for the purposes of the sale process. Both Hughes and Argent were excluded from some of the key meetings concerning the sale,[1788] they were the subject of direction from Glencore and they had no authority to enter into or dictate the terms of any legal relations with any prospective purchaser. However, dealing specifically with Hughes, in addition to his role as a Viterra executive, he had been given authority to assist with the sale of the "Viterra Malt business"; indeed, he had been required to give assistance.[1789] This had been done not only by his employer, Viterra Ltd,[1790] but at the direction of Glencore.[1791] Both his position as a Viterra executive and the specific retainer Hughes agreed to at the direction of both Glencore and Viterra gave Hughes actual authority to assist in the sale on behalf of each of the Viterra Parties. To adopt the evidence of King, in Hughes assisting Glencore and Viterra in the sale he was doing it "for [them]".[1792]

2661 In summary, as to the basis upon which Hughes acted as an agent, the key points include:

(1) Hughes was a director of the Viterra entities and Joe White until 17 December 2012[1793] and after ceasing in those capacities,[1794] he continued to participate as a Viterra executive, by virtue of his role with Viterra (including by reason of his employment with Viterra Ltd and his

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1787 See pars 47, 142, 359 above and par 4800 below.
1788 See, for example, par 370 above.
1789 See par 1876 above.
1790 See fn 1067 above.
1791 See pars 366-367, 1876 above. See also the concluding words of the retainer letter: par 1876 above.
1792 See par 368 above.
1793 Hughes was a director of Viterra Malt between 20 December 2011 and 17 December 2012 and a director of both Viterra Operations and Viterra Ltd between 24 November 2011 and 17 December 2012. Hughes was a director of Joe White between 20 December 2011 and 17 December 2012.
1794 See par 47 above.

position as an executive manager of Viterra Malt).[1795]

(2) Hughes' service contract with Viterra Ltd made no reference to Joe White.[1796]

(3) Pursuant to his contract of service, Hughes participated in Viterra's schemes, had his remuneration attached to the performance of Viterra and owed duties to Viterra Ltd,[1797] which owned the shares in the companies that owned Viterra's malt business and assets (to the extent they were not owned by Viterra Ltd itself).

(4) In many respects, there was no clear delineation between Viterra Malt's business and the Joe White Business.[1798]

(5) Hughes was retained to act for Glencore and Viterra in the sale process; he was required to assist[1799] and was selected and incentivised to do so because his own knowledge and ongoing participation was relevant to the transaction.[1800] Further, as part of this agreement, Hughes was required to ensure the operations of the Viterra Malt business were conducted "in a professional and efficient manner".[1801]

(6) Hughes was required to verify that the contents of the Information Memorandum were accurate as a relevant person in the Joe White Business with respect to the numerous sections that were allocated to him.[1802]

1795 See par 52 above.
1796 See pars 188-193 above.
1797 Indeed, Viterra Ltd sued Hughes in this proceeding for alleged breaches of some of these duties: see issue 138 below.
1798 The Viterra Parties' submission that the Information Memorandum suggested otherwise was not to the point. In this regard, it should be noted that Viterra Malt was only expressly referred to once in the Information Memorandum as the 100 percent owner of the issued capital of Joe White.
1799 See pars 1876-1877, 2660 above.
1800 See pars 367-369, 393 above.
1801 See par 1876 above.
1802 See pars 446-451 above.

(7) The ultimate manner in which information was to be communicated by Hughes remained the subject of the control or direction of Glencore.[1803] At all times Hughes was required to portray the Joe White Business in positive terms under the supervision and in the presence of Merrill Lynch and he understood, as was the fact, that he was not to "stray" from this and that he was required to ensure others also did not "stray".[1804]

2662 Given his common directorships, the absence of any conflict in these roles (and his related positions) and the manner in which Viterra oversaw Hughes' position as a Viterra Ltd employee, for the period up until 17 December 2012, there was no relevant distinction to be drawn between Hughes' knowledge acquired as a director and an executive officer of Joe White and his knowledge acquired as a director and an executive of Viterra Malt, Viterra Operations or Viterra Ltd.[1805] Equally, after 17 December 2012 up until 31 October 2013 there was no relevant distinction to be drawn between Hughes' knowledge acquired in the more limited role from that previously, as an executive officer of Joe White, and his knowledge acquired in the more limited role as an executive of each of the Viterra entities.[1806] In short, relevantly the duties owed by Hughes to communicate his knowledge of the affairs of the Joe White Business were owed to the Viterra entities to no lesser extent than they were owed to Joe White. Indeed, in light of the duties, responsibilities and obligations Hughes owed directly to Viterra (many of which were recorded in writing), it is difficult to perceive of a duty at a general level that it might be said that Hughes owed to Joe White which in substance was not also owed to Viterra, particularly in light of the fact that there was no suggestion of any conflict at any time between the duties Hughes owed to the various companies.

1803 See, for example, pars 402, 436, 699-700, 766, 872 above. See also, *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611, 646 [136] (Finn J).

1804 See par 872 above.

1805 None was suggested by the Viterra Parties in relation to this period.

1806 It was submitted by the Cargill Parties that there was no evidence to support the assertion that Hughes was employed by Joe White while Viterra was in control, except for when he was an officer of Joe White, between December 2011 and December 2012, when he was also a director of all 3 Viterra companies.

2663 Further, there was no submission put (nor could it have been seriously put) that, when Hughes was both a director and an executive of Viterra up until mid-December 2012, his knowledge of the affairs of the malt business (to use a neutral term) was not the knowledge of Viterra. That knowledge of Hughes as an executive director of all relevant companies was not somehow shed from the knowledge of Viterra when he ceased his directorships (but continued on as a Viterra executive) only a couple of months or so before the decision was made to sell the issued capital in Joe White and Hughes was directed to assist. While the consequence of Hughes ceasing to be a director undoubtedly altered the nature of his role and duties with respect to the Viterra entities, his knowledge was still a relevant matter for consideration in circumstances where he continued as an executive and was assigned specific tasks and a specific role by Viterra (and Glencore) as part of the sale process.

2664 As an aside, at the same time Hughes ceased to be a director of the Viterra entities, he ceased to be a director of Joe White. The Viterra Parties' submissions did not address how it was said that there was no loss of attribution of Hughes' knowledge in relation to the state of mind of Joe White as a result of these simultaneous resignations of all the companies in question, but that attribution of knowledge ceased in relation to the 3 other companies.

2665 Presumably, if it had been specifically addressed, it would have been said by the Viterra Parties that Hughes continued on as an executive of Joe White in the conduct of the Joe White Business, but the response to any such submission would have been that Hughes also continued as an executive of Viterra. To elaborate, during the time Hughes was a director of each of the Viterra companies, he was not just *an* executive of the malt business, but rather was *the* executive manager. After December 2012, he continued on in that executive role for Viterra, in a direct employment relationship with Viterra Ltd, regularly partaking in Viterra executive meetings, and owing duties to Viterra, including duties of disclosure.

2666 As has been touched on already, there was no conflict between Hughes' 2 roles. It was entirely compatible for Hughes to perform his role as an executive, managing the Joe

White Business, and to be an executive of Viterra. Further, there was no conflict in Hughes, in both his positions with Joe White and Viterra, agreeing to assist and then assisting both Glencore and Viterra in the proposed sale.[1807] This was even more so given Joe White was wholly owned by Viterra, and because Viterra Ltd treated the Joe White Business, including the customers, as Viterra's business.[1808]

2667 Furthermore, no part of Hughes' conduct was a fraud *on Viterra*. Hughes was not overseeing the implementation of the Operational Practices for his own gain or to somehow defraud Viterra. On the contrary, the Operational Practices implemented as the Viterra Practices over many years enabled the Joe White Business to function, and achieve a level of profits, for the returns to Viterra in a manner that would and could not have been achieved if the Operational Practices were not in place.[1809] Further, insofar as Hughes was involved in settling the various documents for Glencore and Viterra that were provided to Cargill, and in making representations about the Joe White Business to Cargill, he was acting in accordance with his actual authority in seeking to obtain the best price that could be achieved for Glencore and Viterra. In circumstances where the Viterra Parties seek to maintain that the very agreement that Hughes helped to procure ought to be upheld, there could be no real issue about Hughes acting in total fraud of them.[1810]

2668 It must follow that Hughes' knowledge of the Joe White Business, including the Viterra Practices, was attributable to Viterra,[1811] including during the sale process when he was acting in accordance with the direction to assist with the divestment.

2669 As to the Viterra Parties' submission that Cargill was on clear notice that Viterra's knowledge did not include the knowledge of Joe White's executives and therefore attributing Hughes' knowledge to Viterra would undermine the bargain struck

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1807 Compare comments made in *TNT Australia Pty Ltd v Normandy Resources NL* (1989) 53 SASR 156, 182.5-183.2 (Jacobs J) in relation to *Re Rossfield Group Operations Pty Ltd* [1981] Qd R 372, 377E (Connolly J).

1808 See, for example, par 196 above.

1809 See, for example, par 1284 above and Hughes' reference to managing risk. See also issue 10.12 above.

1810 See, for example, *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389, [206]-[212] (Allsop P, with whom Bathurst CJ and Campbell JA agreed).

1811 That is, each of Viterra Ltd, Viterra Operations and Viterra Malt.

between the parties,[1812] this submission was not to the point. What was being or not being agreed to in the last days of negotiations was whose knowledge would be contractually deemed to be the Sellers' knowledge for the purposes of the operation of certain Warranties concerned with a Seller's awareness or knowledge.[1813] Such a circumstance did not somehow alter what had actually occurred before, or retrospectively expunge the conduct that had already been engaged in. Similarly, the existence of the Sale Process Disclaimers[1814] did not change the circumstance that Hughes had the knowledge that he did, that he had that knowledge and retained it in his capacity as an executive of Viterra, that he was making statements in relation to the Joe White Business at the direction of Glencore and Viterra, and that he had been chosen to do so on behalf of Glencore and Viterra because of his knowledge and position.

2670 Of course, if there was actually a limitation on Hughes' authority to make representations regarding the Joe White Business and Cargill was on notice that Hughes had some form of limitation to his authority when making such representations as part of the sale process, then that would be an entirely different matter. The Viterra Parties referred to the Sale Process Disclaimers generally in making their submission in this regard, and did not point to any particular term of any of the Sale Process Disclaimers to identify any such express limitation. Further, the fact that the Sale Process Disclaimers provided that Glencore and its subsidiaries[1815] (or Glencore and its Representatives)[1816] had no obligation to disclose matters and that there was no guarantee as to the accuracy or completeness of the information provided did not specifically address Hughes' authority. If the Viterra Parties chose to disclose information, including by means of expressly authorising Hughes to make representations concerning the Joe White Business after they had ensured Hughes was well instructed by Glencore, was on message and Glencore had

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1812 See also issue 22 below.
1813 Clause 31.15: see par 1033 above.
1814 See par 2828 below.
1815 As per the Information Memorandum and the Management Presentation Memorandum.
1816 As per the Confidentiality Deed.

established an understanding with him that he was not to stray from that message,[1817] then they could not escape the fact that he was acting within authority when he did what he did as instructed. This conclusion is supported by the fact that Hughes fell within the definition of "Discloser" in the Information Memorandum and the Management Presentation Memorandum, and of "Representative" in the Confidentiality Deed.[1818] It is further supported by the requirement imposed by Glencore that Merrill Lynch be present, as Glencore's (and Viterra's) representative, at any meetings at which Hughes made representations about Joe White.[1819] At no time did the omnipresent Merrill Lynch make any suggestion that Hughes was stating anything he was not authorised to convey.

2671 It follows that as a Viterra Ltd employee and Viterra executive, retained and directed in the manner that he was to assist with the sale, Hughes' state of mind must be attributed to Viterra in determining whether Viterra had knowledge of the Operational Practices before 22 October 2013.

2672 The position was not as straightforward with respect to Glencore. Clearly, different considerations applied as Hughes was never an employee, a director or an executive of Glencore. However, as Hughes was chosen by Glencore to assist Glencore itself (as well as Viterra) in seeking to sell the shares in Joe White and the related assets, including by being authorised to assist with drafting and finalising the marketing documents and make oral presentations about the Joe White Business to enable Glencore to facilitate the sale, Hughes' state of mind concerning his knowledge of Joe White operations must also be attributed to Glencore.

1817 See pars 367, 700, 872 above.

1818 See pars 475, 588 above respectively and see also pars 2174, 2181 above and par 4809 below. Further, it was noteworthy that the Viterra Parties did not seek to identify the wording in the Information Memorandum or the Management Presentation Memorandum under the heading "Acknowledgments" as indicating that Hughes did not have authority despite that sentence specifically addressing the question of authority. No doubt, this was because Hughes fell within the definition of "Discloser" and accordingly was being referred to as a person who had not given authority in the circumstances identified (rather than as a person who did not have authority).

1819 See par 367 above.

X.11.3.1.1 Hughes' knowledge

2673 A further question that arose under this issue was whether Hughes himself had knowledge of the matters pleaded in paragraph 30(bb), (bc), (bd) and (be) of the Defence.[1820]

2674 The Cargill Parties referred to the evidence that Stewart and McIntyre had raised concerns with Hughes, both personally and on behalf of other staff, about signing the Viterra Code given the use of the Malt Blend Parameters Procedure, the pencilling of Sign-Out Reports and the corresponding reporting of "results" in Certificates of Analysis.[1821] Further, it was submitted that Hughes had described the practices to Gordon and on this basis it should be inferred that he relayed to Gordon the concerns about which he was informed by Stewart.[1822]

2675 The Viterra Parties submitted that the evidence did not support a finding that Hughes had knowledge of all the aspects of the Undisclosed Matters. However, these submissions were not really responsive to the issue raised and went well beyond the specific matters pleaded in paragraphs 30(bb), (bc), (bd) and (be) of the Defence, which were simply confined to the existence of the Operational Practices.[1823]

2676 As is explained below,[1824] the evidence overwhelmingly established that Hughes did have knowledge of the matters pleaded in paragraphs 30(bb), (bc), (bd) and (be) of the Defence.[1825] In addition to numerous other indicia, such as his communications regarding the concerns in 2010,[1826] and his involvement generally in the Joe White Business as a "hands-on" executive manager,[1827] the matters that were disclosed to

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1820 See par 2615 above.
1821 See pars 84, 158-161 above.
1822 See pars 161-163 above.
1823 This submission was made in relation to issue 22, but was incorporated by way of cross-reference into this issue.
1824 See issue 22 below and in particular the references in fn 2454 below.
1825 See par 1854 above. This finding does not equate to Hughes knowing the Viterra Policies were policies of Joe White alone; the evidence showed that at all relevant times the Viterra Policies were written policies of Viterra.
1826 See pars 162-163 above.
1827 See par 47 above.

Cargill on 15 October 2013[1828] and as recorded by Lindner on 23 October 2013[1829] demonstrated Hughes was fully across the existence and implementation of the Operational Practices.[1830]

2677 In light of these findings, it is unnecessary to consider the submissions made in relation to other Viterra employees and officers. As it has been found that Hughes' knowledge was attributable to the Viterra Parties, whether the same knowledge was also attributable because of the knowledge of others is somewhat academic given that Hughes was the key person identified by Cargill Australia for these purposes. That said, given the important role Fitzgerald played in relation to a number of events, the submissions in relation to him will be addressed.

X.11.3.2 Fitzgerald's position

2678 In addition to his roles for Viterra, Fitzgerald was the secretary of Joe White from 10 March 2010 to 31 October 2013.[1831]

2679 The Viterra Parties did not dispute that Fitzgerald's knowledge would be attributed to Glencore and Viterra. Thus, this question turned on whether Fitzgerald had knowledge of the matters pleaded in paragraphs 30(bb), (bc), (bd) and (be) of the Defence before 22 October 2013.

X.11.3.2.1 The Cargill Parties' submissions

2680 The Cargill Parties submitted that Fitzgerald was instrumental in the events that led to the creation of the Viterra Certificate of Analysis Procedure. They referred to an email chain, the last email of which was sent to Fitzgerald,[1832] in which it was stated that employees were being asked to certify they were using exclusively malt-grade barley when they were in fact using "non malt grade barley".[1833] The Cargill Parties contended that the email chain demonstrated the employees did not consider they

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1828 See, for example, pars 1102-1155, 1251, 1257 above.

1829 See pars 1279-1288 above.

1830 The issue of Hughes' knowledge of the implementation of the Operational Practices at a level and in such a manner such that they amounted to the Viterra Practices is dealt with in issue 22 below.

1831 See par 114 above.

1832 See pars 156-157 above.

1833 The Cargill Parties also noted that Gordon was informed of the practice of making changes to Certificates of Analysis.

were being honest in their dealings with customers. Two of the emails in the chain recorded that Fitzgerald's advice was being sought on the issues raised.

2681 Further, the Cargill Parties submitted that it could be inferred from Fitzgerald's involvement in the events leading to the creation of the Viterra Certificate of Analysis Procedure that Fitzgerald was aware that the Joe White Business was conducted in accordance with the Viterra Policies. It was submitted that although Fitzgerald's involvement concerning issues with the Viterra Code occurred before the creation of the Viterra Certificate of Analysis Procedure, the procedure itself was established for the purpose of codifying and thereby endorsing the way Joe White was doing business.

X.11.3.2.2 The Viterra Parties' submissions

2682 The Viterra Parties submitted that whilst Fitzgerald had some involvement in the Malt Cost Reduction Transformation Project, his involvement provided no basis for finding that he had any knowledge of the relevant matters. It was submitted that although he was on the steering committee, Fitzgerald was not listed as a person involved in the Malt Cost Reduction Transformation Project, nor was there any evidence to suggest that he reviewed the project in any detail. Further, it was submitted that there was nothing in the material relevant to the Malt Cost Reduction Transformation Project that could have given Fitzgerald reason to suspect that Joe White was engaging in any of the alleged practices the subject of this proceeding.

2683 Furthermore, it was submitted the evidence did not establish that Fitzgerald was aware of the Viterra Certificate of Analysis Procedure, nor that Fitzgerald had any knowledge of the Malt Blend Parameters Procedure.[1834]

X.11.3.2.3 Analysis concerning Fitzgerald's knowledge

2684 As part of Fitzgerald's involvement in the Malt Cost Reduction Transformation Project, he was consulted with regard to assessing legal requirements that were

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1834 The Viterra Parties made submissions in respect of clause 31.15 of the Acquisition Agreement to the extent the Cargill Parties sought to rely on it in relation to this issue. As no submissions referring to clause 31.15 were made by the Cargill Parties with respect to this topic, they need not be addressed here.

missed from the global agreement and coordinated a response to the review of the Viterra Code.[1835] During his involvement, Fitzgerald became aware of the fact that employees were being asked to certify they were using exclusively malt-grade barley when they were not in fact doing so, and that employees did not consider that they were being honest with customers when it came to the reporting practices. Further, it is highly probable, given his involvement in the Malt Cost Reduction Transformation Project, that Fitzgerald was made aware of the policy of increasing Joe White's use of off-grade barley to reduce malt costs.[1836]

2685 Further, Fitzgerald was heavily involved in the sale process in 2013, including finalising the Information Memorandum. According to Mattiske's evidence, in order for Fitzgerald to fulfil his role as part of the sale process, he needed to be aware of corporate policies within Viterra.

2686 Accordingly, it was highly likely that Fitzgerald had some knowledge of some practices or strategies of Joe White. That said, the evidence did not establish that he had full knowledge of the extent of any such practices or strategies, nor specific knowledge of the matters pleaded in paragraphs 30(bb), (bc), (bd) and (be) of the Defence. Nothing the Cargill Parties relied upon demonstrated Fitzgerald was informed of any of the Operational Practices. Although Fitzgerald was an obvious witness for the Viterra Parties and was not called, the limited evidence concerning his own knowledge did not provide a proper basis to draw any inference that he personally knew or was on notice of the Operational Practices.

2687 The findings concerning Fitzgerald regarding this issue are confined to his position alone. Further, they do not amount to a positive finding that he did not know about the Operational Practices, but rather that it has not been proven that there was any basis to find that he did.

X.11.4 Further observations

1835 See pars 156-157 above.

1836 See par 251 above.

2688 In circumstances where the Operational Practices were such a fundamental and entrenched part of the Joe White Business, and had been managed and overseen by Viterra for a number of years by senior employees of Viterra, it is difficult to conceive how the Operational Practices could be said not to be part of Viterra's knowledge. Further, in relation to the Reporting Practice, although the evidence was a little unclear as to which persons had access to precisely what documents on Pulse, it was relevant that the Viterra Policies were actually maintained, updated and stored on Viterra's intranet as well as the Records System, albeit on less than a satisfactory basis.[1837] They were also available at every Joe White plant.[1838]

X.12 Did (a) Glencore and/or (b) Viterra disclose to Cargill, in the Information Memorandum or during the Due Diligence, any, and if so which, of the matters alleged to be the Undisclosed Matters?

X.12.1 Introduction

2689 This issue will be addressed by sequentially referring to each of the Undisclosed Matters.[1839] Cargill Australia alleged that Glencore or Viterra, or both, failed to disclose the Undisclosed Matters in the Information Memorandum or during the Due Diligence.

2690 The Cargill Parties submitted that the Viterra Parties did not allege that the Undisclosed Matters were expressly disclosed. The Cargill Parties were correct in this respect. The Viterra Parties instead invited the court to infer that most of the Undisclosed Matters were disclosed, by submitting that: (1) a number of statements were made to Cargill; (2) these statements conveyed to Cargill certain information; and (3) this information (coupled with Cargill's pre-existing knowledge of the industry) amounted to substantial disclosure of matters relevant to the Undisclosed Matters.

2691 The Viterra Parties made a number of preliminary submissions before engaging with

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1837 See pars 206, 249, 277-278, 286-290, 1533, 2113 above. For completeness, see par 4803 below.
1838 See, for example, par 271 above.
1839 The Undisclosed Matters as alleged are set out in full at par 1851 above.

the substance of the Undisclosed Matters.

2692 *First*, the Viterra Parties submitted that the existence and extent of the Undisclosed Matters remained unknown even at the end of the trial. As already noted,[1840] the Viterra Parties admitted that Joe White generally conducted its business in accordance with the Viterra Policies. They also conceded that "on occasions", prior to Completion, Joe White supplied malt produced from barley varieties not approved by the customer or produced malt using gibberellic acid when not permitted by the customer. Beyond these admissions, the Viterra Parties submitted that there was insufficient evidence to establish the existence of the Undisclosed Matters. Given this uncertainty, the Viterra Parties submitted that it was "not precisely clear" what the Cargill Parties asserted ought to have been disclosed.

2693 It has been determined that the Undisclosed Matters existed as alleged by Cargill Australia.[1841] Further, what amounted to the Undisclosed Matters was clearly set out in the Statement of Claim and repeated in identifying issue 10 above.

2694 *Secondly*, the Viterra Parties submitted they had no knowledge of the Undisclosed Matters and therefore their non-disclosure by the Viterra Parties was not relevant conduct for the purposes of the Australian Consumer Law. This submission is considered in issue 15 below.

2695 *Thirdly*, to the extent that certain information was disclosed to Cargill, Inc, the Viterra Parties made 2 submissions in relation to attribution. *First*, it was submitted the information disclosed by means of the Information Memorandum, the Data Room, the Q&A Process and the site visits was disclosed by Glencore, as opposed to Viterra. This was submitted on the basis that Glencore was the entity that conducted the sale process and there was "no evidence" that the information was provided by any of the Viterra entities. *Secondly*, in relation to information disclosed in the Management

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1840 See par 1854 above.

1841 See issue 10 above. Although such a finding does not equate to a determination of precisely the extent to which the Viterra Practices were engaged in, it was not part of Cargill Australia's case to prove the exact proportion or the exact amount of times the relevant conduct occurred.

Presentation, the Operations Call, the Commercial Call and the Barley Inventory Call, the Viterra Parties submitted that this was disclosed by Joe White, and not any of the Viterra Parties. These issues have already been addressed.[1842] As the Viterra Parties' position has been rejected, they need not be discussed further. (The Viterra Parties acknowledged that the information they alleged was provided by Joe White and not by them did not fall within the question posed, but it was contended it was highly relevant to Cargill's knowledge.)

X.12.2 The Viterra Practices regarding contractual requirements and specifications

X.12.2.1 Statements alleged to have been made to Cargill

2696 In relation to non-compliance with customer contractual requirements and specifications, the Viterra Parties submitted that the evidence demonstrated a number of statements were made to Cargill, Inc in relation to the barley available to, and used by, Joe White.

2697 The first such statement was that Joe White's customers included SAB Miller "and Heineken subsidiaries Oriental Brewery and Asia Pacific Breweries". The Viterra Parties submitted that Cargill was aware of the variety specification requirements for at least these Joe White customers.

2698 It is correct that SAB Miller and Oriental Brewery were listed as "International Customers" of Joe White in the Information Memorandum.[1843] It is also correct that De Samblanx noted seeing "APB", a reference to Asia Pacific Breweries, in a list of customers visible during a site visit and that he was aware that "Heineken" was a Joe White customer.[1844]. However, as already noted, [1845] there was no evidence that Oriental Brewery was a Heineken subsidiary, and therefore no basis to conclude that Cargill was aware of its specific requirements because of any such relationship. Further, with respect to Asia Pacific Breweries and SAB Miller, although Cargill had

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1842 Including at pars 2176-2179 above. See also issue 124 below.
1843 See fn 391 above.
1844 See pars 788-789 above.
1845 See fn 391 above.

some knowledge from its own dealings about those customers' requirements, the relevant information provided throughout the Due Diligence, when considered as a whole, gave no indication that Joe White was not complying with the requirements (as specified to Joe White) of these customers.[1846]

2699 The next alleged statement concerned Joe White's contracts for the purchase of malting barley that did not specify any particular variety. The Viterra Parties relied on barley purchase spreadsheets recording Joe White's barley purchases from 2010 to 2013. These spreadsheets were included in the Data Room and were said to show about half of Joe White's contracts for the purchase of barley did not specify particular varieties to be used. This statement has largely been established by reason of the information provided during the Due Diligence.[1847]

2700 The next alleged statement was that Joe White purchased significant quantities of non-grade 1 malting barley. Again, the barley purchase spreadsheets were relied upon.

2701 The next alleged statement (which was closely linked to the previous statement) was that Joe White considered that it could use up to 30 percent of non-malt 1 varieties of barley. There was no dispute about this. Argent made this statement in the Barley Inventory Call on 23 July 2013, as recorded in the agreed summary at annexure E of the Acquisition Agreement.[1848]

2702 The next alleged statement was that Joe White regularly purchased Hindmarsh barley, being non-malting barley. The Viterra Parties again relied on the barley purchase spreadsheets included in the Data Room.[1849] According to these records, Joe White made 2 purchases of Hindmarsh barley in the 2010-2011 season, 1 in the 2011-2012 season and 2 in the 2012-2013 season, each order being over 1000 tonnes. Accordingly, the evidence showed Joe White purchased significant tonnage of Hindmarsh barley throughout the relevant period.[1850]

1846 See pars 789, 819-821, 871-874, 877, 884-885, 893-897 above.
1847 See par 1003 above.
1848 See par 924 above.
1849 See par 1003 above.
1850 See par 954 above.

2703 The next alleged statement was that challenges Joe White faced included "barley prices impacted by Australian weather" and the "ability to source barley of correct variety, quality and specification". Both these statements were made in the Management Presentation Memorandum.

2704 The next alleged statement was, as at the time of the Management Presentation, Joe White could not obtain its desired barley varieties in New South Wales. This statement was recorded in the Goldman Sachs summary of the Management Presentation.[1851]

2705 The final alleged statement regarding barley availability and use was that Joe White's ability to compete in Japan had been significantly limited due to its inability to source quality barley as compared with Canadian competitors. This statement was made by Hughes to representatives of Cargill in the Commercial Call, as recorded in the agreed summary at annexure E to the Acquisition Agreement.[1852]

2706 In relation to processing conditions used by Joe White, the Viterra Parties submitted that Cargill, Inc was told of 2 matters.

2707 *First*, Joe White was only steeping/germinating its malt for 5 to 6 days, as compared to Cargill's facilities which steeped/germinated malt for 6 to 7 days, and De Samblanx and Hermus considered that this "might mean a process non-conformance that can be addressed either by waiver or by reducing plant capacity".

2708 The statement in quotes was made in relation to germination times of 4 days for most plants, and was contained in the Operations Spreadsheet, finalised by De Samblanx with input from Hermus, in the context of observing some clients like Heineken required a period of 5 days for germination.[1853] Further, Eden, together with De Samblanx, referred to Joe White's "steeping/germination" period of 5 days and Cargill being at "6/7" days in an email sent 27 June 2013.[1854] No reference was made

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1851 See fn 520 above.
1852 See par 914 above.
1853 See pars 771, 819 above.
1854 See par 755 above.

to Joe White steeping/germinating malt for "5 to 6" days in the material relied on by the Viterra Parties. However, in substance Cargill became aware in late June or early July 2013 that Joe White's "steeping/germination" times were shorter than Cargill's.

2709 *Secondly*, the Viterra Parties submitted Cargill was informed that Joe White used temperatures and allowed for changes in the temperatures in its processing conditions, which could compensate for the short processing times Joe White was using. Further, they submitted De Samblanx knew this conduct was not consistent with the processing conditions required by Cargill's customers, such as Heineken.

2710 The relevant evidence was also in the Operations Spreadsheet. De Samblanx noted that there were high temperatures in steeping and germination. He stated that this could compensate for the short process time but was not in line with processing parameters of global customers "like Heineken". He also noted that the "Delta T over the malt bed" in at least 1 plant was not allowed by some customers "like Heineken".[1855]

2711 Finally, on the issue of the prohibited use of gibberellic acid, the alleged statement was that Joe White used gibberellic acid as an additive, which Cargill believed was "normally not allowed by most of international brewers", with the consequence that De Samblanx and Hermus formed the view that there was "some potential risk that Cargill Guiding Principles are compromised".[1856] The comments as quoted were made in the Operations Spreadsheet as at 8 July 2013.

2712 In summary, most of the statements as alleged by the Viterra Parties were made.

X.12.2.2 Information conveyed by the matters alleged

2713 The Viterra Parties submitted that, as a result of the above statements, Cargill was informed of various matters, much of which was established on the evidence.

2714 *First*, Joe White was using significant quantities of off-grade barley, as well as some non-malting barley, and around half of Joe White's contractual arrangements for

1855 See pars 779, 819 above.
1856 See par 819 above.

procurement of barley did not permit Joe White to specify the variety to be supplied.

2715 In relation to off-grade barley, as noted above,[1857] the purchase of off-grade barley did not suggest that Joe White supplied malt contrary to customer specifications. In relation to non-malting barley, Cargill was told that Joe White purchased Hindmarsh barley. However, the barley purchase spreadsheets relied on did not specify that Hindmarsh barley was a non-malting barley variety. Only a person who knew Hindmarsh barley was a non-malting barley would have been informed of the use of non-malting barley from the spreadsheets.

2716 Viers gave evidence that at the time he read 1 of the spreadsheets he did not know that Hindmarsh was not a malting grade barley.[1858] Purser gave evidence that, although she did not recall the spreadsheet, she would not have been concerned about the purchases of Hindmarsh barley for a variety of reasons.[1859] There was no evidence from any Cargill witness other than Purser that indicated they knew that this Australian barley variety was a non-malting variety.

2717 In any event, in circumstances where Cargill did not know and was not informed of the specific varieties required by each of Joe White's customers (to the extent such requirements existed), any knowledge it acquired concerning off-grade barley, or varieties that were non-malting barley, did not put Cargill on notice, or provide grounds for it to reasonably suspect, that Joe White was engaged in the Varieties Practice or that it was supplying malt in breach of contract because it did not comply with customer specifications.

2718 In relation to Joe White's procurement arrangements, Cargill was informed that Joe White could not specify the variety to be supplied for all its purchases. But this information did not carry with it anything beyond that in the circumstances outlined above. Further, it implicitly conveyed Joe White could choose barley varieties to be

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1857 See par 928 above.

1858 See par 954 above. The spreadsheets were 2 different versions which presented the same data. There were minor differences not relevant to these issues.

1859 See par 955 above.

used for some of its customers.

2719 *Secondly*, there was no doubt Cargill was expressly told Joe White had difficulties sourcing the varieties it wanted at times, including in New South Wales, and that Joe White had difficulty competing for Japanese customers due to limitations on the availability of barley. But this information of itself, or in combination with the other information provided, did not indicate to Cargill that there was an ongoing problem or that, as a result, Joe White was routinely not complying with customer requirements and specifications, much less that it was deliberately concealing the varieties of malt being supplied.

2720 *Thirdly*, as to the statement that Joe White was using processing conditions which, to Cargill's belief, were not permitted by customers, including some of Joe White's customers, Cargill was informed of matters early on in the Due Diligence that gave rise to a suspicion that such processing conditions were being used. However, the matter did not rest there. After 8 July 2013, when such suspicions were clearly held, further enquiries were made and information was obtained which satisfied the relevant Cargill employees that Joe White was not supplying malt other than in the manner it was required to.[1860]

2721 *Fourthly*, on the issue of Joe White using gibberellic acid, the Viterra Parties were correct in contending this information was conveyed in the context where Cargill believed most international brewers did not permit its use.[1861]

X.12.2.3 Did the statements as made amount to disclosure of the Viterra Practices in relation to customer requirements and specifications?

2722 As is clear from what has already been stated, the information conveyed did not amount to disclosure that Joe White supplied malt to customers that did not comply with contractual requirements and specifications. In summary, in relation to the first and second matters, the information relating to barley grades and barley varieties did not suggest, either expressly or impliedly, that Joe White supplied malt to its

1860 See pars 882, 891-903 above.
1861 See par 819 above.

customers contrary to customer specifications.[1862]

2723 In relation to the third point, while some information provided alerted Cargill to the possibility of processing conditions being different to what was permitted by some customers, ultimately any concerns were alleviated by further information provided during the Due Diligence, and in relying on this further information Cargill was acting reasonably.

2724 Finally, in relation to the fourth point regarding gibberellic acid, the information conveyed did not amount to a disclosure that the use of gibberellic acid was non-compliant with customer contracts or it was used without customers' knowledge. In fact, Cargill was expressly assured this did not occur.[1863] Further, the fact that a significant amount of gibberellic acid formed part of Joe White's inventory did not put Cargill relevantly on notice when many customers permitted its use.[1864]

X.12.3 The Viterra Practices regarding misstatement of results in Certificates of Analysis

X.12.3.1 Statements alleged to have been made to Cargill

2725 In relation to the misstatement of results in Certificates of Analysis, the Viterra Parties submitted that Cargill, Inc became aware of some further matters.

2726 They referred to the fact that Cargill was told: (1) most of Joe White's facilities had only a fifth or a sixth as much storage as facilities in Canada;[1865] (2) Joe White had low silo capacity and, with the exception of Tamworth, Joe White's plants had only around a third of the storage capacity of Cargill Malt's plants;[1866] (3) Joe White did not have

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1862 See also pars 920-921 above.

1863 See pars 788, 1099 above.

1864 See par 40 above.

1865 See fn 520 above.

1866 See par 682 above. Curiously, in making this submission the Viterra Parties relied on evidence given by De Samblanx that he asked a question about low silo capacity during the Management Presentation: see par 737 above. In making submissions in response to issue 4 above, the Viterra Parties submitted the court should find that the answer to this question was not given as De Samblanx had suggested: see pars 2169-2171 above. Accordingly, the Viterra Parties' position appeared to be that De Samblanx's evidence should be accepted insofar as he deposed that he raised the issue, but not insofar as he deposed to the answer given. In any event, the Viterra Parties did not suggest there was any response given by Hughes which informed Cargill the storage capacity was inadequate. Such a suggestion

independent laboratories (which gave De Samblanx concerns in relation to the integrity of Joe White's Certificates of Analysis);[1867] and (4) Joe White used the Malt Proficiency Scheme procedure which, it was submitted, showed that Joe White's analytical approach was to record a result as being non-conforming only if the result was plus or minus more than 2 standard deviations from the target parameter.[1868]

2727 Except for the last statement, it was clear each statement was made as alleged. As to the last, it went beyond what was actually disclosed. Item 12.4 of the Data Room index was listed as "Malt Analytes Proficiency Testing Scheme (MAPS) Participation". The document containing the Malt Proficiency Scheme was attached. The disclosure of this document, together with its description in the index, disclosed no more than Joe White participated in the Malt Proficiency Scheme.[1869]

X.12.3.2 Information conveyed by the matters alleged

2728 The Viterra Parties submitted that the following information was conveyed by the above statements.

2729 *First*, Joe White had significantly lower storage capacity than Cargill or Canadian facilities generally had, between a third and a sixth of the storage. This was conveyed.

2730 *Secondly*, Joe White's malt testing was not done in laboratories located independently from the malting facilities. This was conveyed.

2731 *Thirdly*, Joe White's analytical approach was to record a result as non-conforming only when the result was more than 2 standard deviations from the target (and by inference, a result within 2 standard deviations was considered to be in conformance). No such information was conveyed. By disclosing the Malt Proficiency Scheme in the manner that it was, Cargill was told no more than Joe White participated in the

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would have been contrary to the evidence.

1867 See pars 776-778 above.

1868 The Malt Analytes Proficiency Testing Schemes Procedure was disclosed in the Data Room: see par 210 above. It was accepted that it would have alerted a reader to the analytical approach relating to 2 standard deviations, however it said nothing about the existence of the Reporting Practice: see par 223 above. See also pars 209, 1380 and fn 1001 above.

1869 See pars 207-210, 215-216, 218-223, 1015, 1019, 1380 above.

scheme, and thereby tested the accuracy of its testing equipment by means of a well-known, industry-accepted scheme.[1870]

X.12.3.3 Did the statements as made amount to disclosure of the Viterra Practices in relation to misstatement of results in Certificates of Analysis?

2732 In relation to the *first* point, regarding Joe White's lower storage capacity relative to Cargill or Canadian facilities, this simply did not amount to disclosure of the misstatement of results of analytical testing in Certificates of Analysis. Further, De Samblanx was told by Hughes that there was "no real quality issues" as a result of the "limited storage".[1871] If the circumstances were as stated by Hughes, there would be no occasion to misstate results.

2733 Equally, the *second* point, that Joe White's malt testing was not done in independent laboratories, did not disclose that Joe White was misstating results of analytical testing in Certificates of Analysis. As described above,[1872] this provoked concern for De Samblanx around the integrity of Certificates of Analysis; however, this fell far short of disclosure of a routine practice of misstating results in Certificates of Analysis without informing customers. Further, whatever concerns De Samblanx had were addressed in subsequent discussions.

2734 In relation to the *third* point, regarding Joe White's analytical approach, neither the existence of the Malt Proficiency Scheme procedure and reference to it in the Data Room, nor Joe White's participation in the Malt Proficiency Scheme itself, would have alerted the reader to Joe White's overall approach or amounted to disclosure of the practice of secretly misstating results in Certificates of Analysis whether within 2 standard deviations or otherwise. The procedure said nothing about changing results on Sign-Out Reports or in Certificates of Analysis. Therefore, neither the procedure, nor the limited manner that it disclosed something about Joe White's approach, amounted to disclosure of the existence of the Viterra Practices.

1870 Ibid.
1871 See pars 2169-2171, 2180-2183 above.
1872 See pars 772-773 above.

X.12.4 The Viterra Policies were not disclosed

2735 Joe White engaged in the Viterra Practices,[1873] which were partly recorded in and endorsed by the Viterra Policies.[1874] The existence of the Viterra Policies was not disclosed to Cargill in the Information Memorandum or during the Due Diligence. The Viterra Parties effectively conceded this when dealing with another issue and, in response to this issue, made no submissions on this point.[1875]

X.12.5 The remaining Undisclosed Matters

2736 The next Undisclosed Matter alleged was that Joe White's financial and operating performance for the financial year 2010 to part of the financial year 2013 was substantially underpinned by Joe White's practice of supplying malt to customers, pursuant to the Viterra Practices and the Viterra Policies, which did not comply with the customer contracts. The final Undisclosed Matter alleged were that, but for the Viterra Practices, Joe White could not produce and sell malt in the volumes and to the specifications required by customers, or in the volumes and for the returns reflected in the Financial and Operational Information.

2737 These Undisclosed Matters were addressed together in the Viterra Parties' submissions.

X.12.5.1 Statements alleged to have been made

2738 The Viterra Parties submitted that Cargill, Inc was told the following statements relevant to these matters, each of which was made or recorded in writing:

(1) The historical financial information in the Information Memorandum had primarily been sourced from Joe White's general ledger and extracted from the Administration System used by Joe White.[1876]

1873 See issue 10 above.

1874 See pars 1854-1858 above. See also pars 158-201 above for discussion of the relationship between the Viterra Practices and the Viterra Policies.

1875 See par 3294 below.

1876 See pars 523-524 above.

(2) The financial information provided in the Management Presentation was subject to specified pro forma and normalised adjustments (upon which Cargill, Inc could undertake further due diligence enquiries).[1877]

(3) The Data Books provided in the Data Room were primarily prepared using Joe White's general ledger and trial balance, as well as information extracted from Joe White's Administration System, and the pro forma and normalised adjustments used were as set out in the Data Books.[1878]

(4) The challenges and risks Joe White faced included:

(i) Barley prices impacted by Australian weather.[1879]

(ii) The ability to source barley of correct variety, quality and specification.[1880]

(iii) As at the time of the Management Presentation, Joe White could not get its desired barley varieties in New South Wales.[1881]

(5) Joe White's barley and accumulation margin was underpinned by Joe White's use of blending.[1882]

(6) Joe White's margin could be achieved "because of price difference between Malt1 and non-Malt1 … and blending".[1883]

(7) Over a historical period, Joe White had engaged in a disciplined

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1877 See par 728 above. To be precise, the Management Presentation Memorandum stated that pro forma normalisation adjustments were made to the financial information for the 2011 and 2012 financial years. Further, the words in parenthesis in subparagraph (2) were not stated in the Management Presentation Memorandum, but the Phase 2 Process Letter which proceeded it provided for due diligence questions and answers: see par 640 above.

1878 See par 678 above, and in particular the references to "Viterra Malt" rather than "Joe White".

1879 See par 720 above. But also see what Cargill was told during the Commercial Call about the ability to always manage to secure the required barley during adverse weather conditions, the unlikelihood of drought impacting the whole of Australia and Joe White's general ability to manage weather conditions: pars 914, 919 above. See also pars 926, 947 above.

1880 See par 733 above.

1881 See fn 520 above.

1882 See par 730 above.

1883 See par 929 above.

approach to cost reduction by way of a transformation project, designed to drive efficiency gains.[1884]

(8) Since 2000, Joe White's focus had moved from quality to cost reduction.[1885]

2739 Further, the Viterra Parties relied upon their submissions regarding the inferences to be drawn from the fact that Hermus and Christianson were not called as witnesses. For the reasons outlined above,[1886] such inferences should not be drawn in relation to either Hermus or Christianson.

X.12.5.2 Information conveyed by the matters alleged

2740 The Viterra Parties submitted, on the basis of the above statements, Cargill, Inc was informed that the Financial and Operational Information provided to Cargill, Inc in the course of the sale process was based on Joe White's records of its actual results. As such, the Financial and Operational Information therefore reflected, and was based upon, Joe White's actual operating practices, including cost reduction initiatives. This was conveyed by the statements referred to in paragraph 2738(1) to (8) above.

2741 Further, they submitted Cargill, Inc was told Joe White had difficulties at times obtaining the barley varieties it required. This was conveyed by the statements in paragraph 2738(4) above, but in a somewhat qualified manner.[1887]

X.12.5.3 Did the statements as made amount to disclosure of the remaining Undisclosed Matters?

2742 The information of which Cargill, Inc was informed did not amount to disclosure of the remaining Undisclosed Matters for the following reasons.

2743 *First*, neither the fact that Joe White's financial information was based on its actual results or operating practices, nor the provision of the information that, at times, Joe White had difficulty obtaining barley varieties it required, conveyed that Joe White's

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1884 See par 731 above.

1885 This concise summary was correct, but so it is not misunderstood, the precise words stated were as set out in fn 520 above which indicated quality was no longer the main issue, with cost reduction more important; that is, it was not stated that there was not any focus at all on quality.

1886 See pars 1997-2100 above.

1887 See fn 1879 above.

financial and operating performance was underpinned by the Viterra Practices or the Viterra Policies. Nor did this information convey that, but for the Viterra Practices, Joe White could not produce and sell malt to customers' specifications, or in the volumes, or for the returns reflected in the Financial and Operational Information. This is self-evident and does not require further explanation.

2744 *Secondly*, this conclusion was fortified by the fact that the existence of the Viterra Practices and the Viterra Policies was not disclosed in the Information Memorandum or the Due Diligence. In the absence of such disclosure, the information conveyed gave no suggestion that the financial and operating performance was underpinned by either the Viterra Practices or the Viterra Policies, or that Joe White could not produce and sell malt to the same specification, volumes or returns without them.[1888]

2745 *Thirdly*, although later in time it was material that Cargill was specifically assured of Joe White's ability to produce and sell malt in the volumes and to the specifications required by customers, and in the volumes and for the returns reflected in the Financial and Operational Information.[1889]

X.12.6 Conclusion

2746 In conclusion, none of the matters raised by the Viterra Parties provided any basis for suggesting that the Undisclosed Matters were disclosed in the Information Memorandum or during the Due Diligence. The answer to the question posed by issue 12 is an unqualified no.

X.13 Prior to 4 August 2013:

(1) Were the Alleged Industry Practices engaged in by other commercial malthouses throughout the world who were in the business of

1888 See par 494 above.
1889 See issue 24 below.

supplying malt to customers, not including internal malt production facilities/units within brewing businesses and, if so, to what extent?

(2) Were the Alleged Industry Practices not ordinarily disclosed to customers?

(3) If the Alleged Industry Practices were engaged in by other commercial malthouses in the commercial malting industry, were the Alleged Industry Practices known to:

(a) other maltsters in the commercial malting industry and, if so, to what extent; and

(b) Cargill, Inc and Cargill Australia?

X.13.1 Did the Alleged Industry Practices exist?

X.13.1.1 An overriding problem with the Viterra Parties' position

2747 There was a temptation to deal with much of this issue very briefly in light of the underlying problem the Viterra Parties faced in seeking to establish that each of the Alleged Industry Practices were standard practices in the malting industry in the period leading up to 4 August 2013 (when the Acquisition Agreement was executed). There was a mismatch between the expert evidence called by the Viterra Parties and a substantial part of the case they sought to advance. In essence, in seeking to justify the conduct of Joe White (while owned by Viterra and then Glencore and Viterra), the Viterra Parties contended that the Operational Practices were standard industry practices that were *not ordinarily disclosed to customers*.[1890]

2748 The expert called by the Viterra Parties, Bruce French ("French"),[1891] gave evidence on this topic. He stated that transparency with customers was important and that maltsters generally adopted this position.[1892] His evidence was that the industry

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1890 For clarity, the Viterra Parties did not contend that the Alleged Industry Practices were the same as the Operational Practices. Rather, they contended that the Operational Practices (and, if they were proven to have existed, the Viterra Practices) were similar to the Alleged Industry Practices such that they could be described as being, or being akin to, standard industry practices.

1891 French has a bachelor of science degree in agriculture from the University of Guelph, Ontario and a certificate in management from the Canadian Institute of Management, Calgary, Alberta.

1892 This evidence was adduced in the context of French being cross-examined about his evidence on "Certificate of Analysis Practices". Given the broad and unqualified manner in which this evidence was given, it was unclear whether this "important" practice also applied to the use of barley varieties other than those specified. The Viterra Parties submitted the evidence was confined to practices relating to Certificates of Analysis because French's primary report referred to "non-approved malting varieties" when expressing his opinion, however it is difficult to reconcile why transparency would be important with respect to Certificates of Analysis in seeking to satisfy customer specifications, but would not be important in relation to barley varieties used in seeking to satisfy customer specifications. That said, necessarily this evidence could not apply with respect to the use of gibberellic acid when prohibited. Further, French's evidence was that to the extent the Gibberellic Acid Practice was engaged in it was done in a non-compliant manner.

practice concerning Certificates of Analysis did not involve making deliberate misrepresentations to customers about the quality of the malt, or knowingly shipping malt that was out of specification without discussing it with the customer and obtaining a derogation. In explaining this evidence, he said that if there was a problem with test results because of a known bias, then a maltster would usually have an objective discussion with the affected customers to understand the problem, and to "agree exactly" on what it was *and* the reporting basis of the testing.[1893] French's account of such a usual industry position bore virtually no resemblance to how things occurred at Joe White up to 31 October 2013.[1894]

2749 The Viterra Parties sought to overcome this difficulty by contrasting French's experiences with those of the expert called by the Cargill Parties, Hertrich. They submitted that the only rational way to reconcile French's evidence regarding the existence of the Alleged Industry Practices with Hertrich's evidence was to focus on Hertrich's experience. That is, as a person who had always worked in breweries, Hertrich was not aware of them, which would have followed from the fact that the Alleged Industry Practices were not ordinarily disclosed to customers. This submission cannot be accepted. It was directly contrary to the evidence of French, at least in relation to practices that related to reporting results in Certificates of Analysis. In other words, the court would be required to reject the clear, unequivocal and unchallenged evidence of French concerning the importance of transparency in order to accept this submission. There could be no juridical basis to adopt this approach.[1895]

1893 For completeness, French gave evidence that some customers would not even recognise the fact that sampling, blending and laboratory analysis variance existed and would not allow out-of-specification values to be reported, so they would simply not get involved in any discussion which permitted out-of-specification malt.

1894 The word "virtually" is included in this proposition as there was evidence that Stewart and others spoke to Joe White's customers at times about some issues relating to malt production. However, there was no evidence that the adjustments made to specifications by way of the Malt Blend Parameters Procedure, or by way of pencilling either before or after the introduction of the Viterra Certificate of Analysis Procedure, were ever disclosed to customers, let alone agreed upon. Quite the contrary, the Reporting Practice was deliberately concealed from Joe White's customers and auditors, something French acknowledged was not a feature commonly adopted in industry policies.

1895 In making this observation, the evidence French gave about not talking a lot about the position with customers has not been ignored. French's evidence was that if there was a need to talk about adjusting results or it was appropriate to talk about it then it would certainly be raised. He also stated that it was

2750 However, given the extensive amount of evidence directed towards this issue and the fact that it was a key plank in the Viterra Parties' defence to a number of matters, a more detailed consideration follows.

X.13.1.2 Some preliminary matters

2751 French provided 3 reports. His primary report was originally dated 8 November 2018, and was the subject of amendments before being finalised on 4 March 2019. He also prepared a supplementary report dated 21 November 2018. In addition to his reports, he co-authored a joint expert report with Hertrich. Before considering the substance of French's evidence, 4 points must be noted.

2752 *First*, this part of the Viterra Parties' case amounted to a contention that all commercial malting houses throughout the world (other than internal malt production facilities) were involved in conduct ordinarily consisting of secretly: (1) changing reported results which sometimes had the effect of reporting that malt was within specification when the test results indicated it was not; (2) using barley varieties contrary to customers' specifications; and (3) using gibberellic acid when it was prohibited by customers. The seriousness of such a contention is manifest.

2753 *Secondly*, there was a very significant mistake in French's primary expert report. In this report he stated that, having trained as a malt master and worked for a limited number of maltsters for a number of years, he had been self-employed as a consultant in the malting industry since 2013. Obviously, on its face, such consultancy experience would provide a significant ground for him to be expressing expert opinions about the industry in 2013 (being the latest relevant year for the substance of the allegations about the malting industry up to 4 August 2013). However, at the outset of his cross-examination this suggested experience was exposed as being incorrect. French did

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not something that was put first and foremost in discussions with customers. Such evidence was entirely consistent with his evidence that there was transparency in relation to such conduct occurring, and if the conduct were disclosed and agreed to, there would be no need to discuss it on every occasion when speaking with customers. Further, the evidence of Stewart to the effect that the Reporting Practice was not disclosed to customers because they already knew about it has also been taken into account. Given the material differences between what was described by French on the 1 hand and the Reporting Practice on the other hand, there was no proper basis, despite Stewart's evidence, to infer that Joe White's customers knew of the manner in which Joe White pencilled and misreported results.

not commence being a consultant in the malting industry until 2015. He apologised for the error.[1896] In short, the opinions expressed by French were based on a narrower experience of the industry at the relevant times than appeared to be the position on the face of his primary report.[1897]

2754 *Thirdly*, the cross-examination of French also exposed that much of what was contained in his expert reports was not based on his own direct personal experience or learning as an expert in the industry, but rather was based on a hypothesis. French gave evidence that he simply proceeded on the basis that the experience he had had at a limited number of organisations reflected the experience of commercial maltsters in the industry more generally. As he explained, rather than having specialised knowledge of these matters, French assumed for the purposes of giving his evidence that commercial maltsters in the industry encountered similar problems to those he had encountered; and further assumed that they would have sought to find similar solutions. To be clear, it may often be appropriate for an expert to express a general opinion in order to assist a court by way of expert evidence.[1898] Although there was no question that French had specialised knowledge of malting and the malting industry based on his training, study and experience, his experience did not extend to almost the entirety of the industry about which he was giving his evidence.

2755 *Fourthly*, while initially declining to comment on whether or not the conduct referred to in paragraph 44 of the Defence was ethical,[1899] French gave evidence that Graincorp did in fact engage in "some of the alleged practices". Later in his evidence, French asked the court if he could revisit his answer and made a distinction between ethics and legality. After confirming the ambit of his primary report, French then gave evidence that "we engaged in unethical practices". He gave further evidence that he

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1896 There was extensive argument about the admissibility of the industry expert reports: see *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 20)* [2019] VSC 44. The statement in the expert report that French had been a consultant since 2013 was expressly referred to in this ruling (at [45]), and was relied upon by me as a relevant matter in determining that French's report was admissible.

1897 See further par 2823 below.

1898 See, for example, *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313, 350.2-351.2 (Lockhart, Wilcox and Gummow JJ).

1899 See par 2757 below.

believed that each of the companies listed in schedule A to his primary report (in relation to which he had given evidence about their practices)[1900] had engaged in misleading customers to the extent that they engaged in the practices identified and also had behaved unethically.[1901]

2756 Each of these second, third and fourth matters referred to above detracted from any weight that might otherwise have been given to French's evidence.

X.13.1.3 The Viterra Parties' allegations, the evidence relied upon and their submissions

X.13.1.3.1 The allegations

2757 The relevant allegations were made in paragraph 44 of the Defence, which ultimately read as follows:

> They deny paragraph 27,[1902] refer to and repeat paragraphs 12, 15 to 21 and 25 to 33 above and say further that the alleged representations were not conveyed because:
>
> (a) prior to 4 August 2013, practices of the following kind were engaged in by other commercial malthouses throughout the world who were in the business of supplying malt to customers (**the commercial malting industry**), not including internal malt production facilities/units within brewing businesses (with the "commercial malting industry" being all commercial malthouses throughout the world who were in the business of supplying malt to customers, not including internal malt production facilities/units within brewing businesses):
>
> (i) practices involving the routine making of adjustments to analytical test results (in a subjective and/or objective manner, such as adjustments within two standard-deviation units) due to the inherent variability of malt and testing procedures (including the inability to repeat or reproduce precisely the same result when malt is tested more than once, and to account for anticipated or known differences between the malthouse's testing results and the customer's testing results), before reporting the qualities of the malt to customers, which sometimes have the effect of changing the recorded value from

1900 French did not give any evidence in relation to Cargill Malt or Joe White in schedule A.

1901 The Cargill Parties submitted that the court should find French's first account as to the ethics of the conduct ought to be accepted on the basis that the substance of his report was that the practices he referred to were justified and explicable. No doubt, this was part of the Cargill Parties seeking to distinguish the Operational Practices from those practices the subject of French's evidence. It is unnecessary to make any finding about which account was French's "genuine" evidence. He expressed some confusion in giving his evidence, and, in any event, his personal opinion about whether or not the conduct in question was ethical was not probative of any of the matters required to be determined.

1902 Paragraph 27 of the Statement of Claim set out the allegation that by making various statements Glencore or Viterra, or both, conveyed certain representations concerning the financial and operational performance of Joe White: see issue 15 below.

outside of the customer's specification, to within the customer's specification;

(ii) practices involving the supply of malt to customers which was produced from barley varieties other than those specified by the customer, as and when required from time to time in order to achieve the customer's specifications and requirements for malt, other than the specified barley variety, for example where the specified barley variety was no longer available; and

(iii) practices involving the use of gibberellic acid in breach of customer agreements, as and when required from time to time in order to achieve the customer's desired performing malt,

(collectively, [the Alleged] **Industry Practices**);

(b) the [Alleged] Industry Practices were not ordinarily disclosed to customers; and

(c) the existence of the [Alleged] Industry Practices:

(i) was known to most participants in the commercial malting industry, including Cargill Inc and Cargill Australia;[1903] and

(ii) the [Viterra Parties] (including, in particular and without limitation, the four "knowledge" individuals referred to in clause 31.15 of the Acquisition Agreement)[1904] did not have any awareness or knowledge of the [Alleged] Industry Practices prior to 22 October 2013.

Particulars

The [Viterra Parties] refer to Schedule A.

2758 Schedule A listed 30 maltsters, including Cargill Malt and Joe White.[1905] With respect to each maltster, the schedule identified the countries in which it operated before August 2013.[1906] The list identified whether it was said the maltster used: prohibited gibberellic acid; non-approved barley varieties; and malt blend and Certificate of Analysis procedures similar to Joe White. In relation to gibberellic acid, French's

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1903 The reference to "most participants" in par 44(c)(i) was particularised as being 85 to 100 percent of the participants in relation to the practices referred to in par 44(a)(i), as being 65 to 100 percent of the participants in relation to the practices referred to in par 44(a)(ii), and as being 75 to 100 percent of the participants in relation to the practices referred to in par 44(a)(iii) of the Defence. In relation to the knowledge of the industry participants other than Cargill pleaded in par 44(c)(i), reference was made to a large number of paragraphs of French's primary expert report and to some of Stewart's evidence on the topic. In relation to Cargill's knowledge pleaded in par 44(c)(i), 9 pages of particulars were provided by reference to documents tendered and evidence given at trial.

1904 See par 1033 above.

1905 It did not include smaller participants in the industry, which was explained on the basis that the Viterra Parties were not aware of them.

1906 The list of the 30 maltsters and where they were said to operate was compiled by Mallesons, not French.

position was that he had insufficient knowledge to comment with respect to 13 of the 28 maltsters listed. In relation to use of non-approved barley varieties, French also stated he had insufficient knowledge to comment in relation to 14 of the 28 maltsters. As to the procedures adopted in relation to blending and Certificates of Analysis, French's position was that he stated affirmatively that all 28 maltsters used procedures similar to Joe White.

2759 As already noted, the Viterra Parties primarily relied upon the evidence of French to establish this part of its case. Commencing in 1980, French had had 38 years of experience in the malting industry "with companies eventually owned by Graincorp". This time was spent at 3 Canadian locations for 12 years, and then in technical and operational roles in Canada, the United States and Germany.[1907] As at August 2012, Graincorp produced 6.6 percent of the world's malt.

2760 For the purposes of this primary report, the first question put to French was in the following terms:

> [T]o what extent were the Viterra Policies, or any of the alleged Viterra Practices, similar to practices adopted by other malthouses prior to 4 August 2013?

2761 In addressing this question, French dealt with the Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice separately.

X.13.1.3.2 The Reporting Practice

2762 French gave evidence that most malting companies had either undocumented or written procedures with respect to blending, similar to the Malt Blend Parameters Procedure. He said such procedures were designed to ensure blends were calculated to a customer's specification, which he said was an important feature commonly adopted in the industry.

2763 French then identified a number of factors he said experienced persons creating a malt blend would take into consideration in creating a blend with the capability of being

[1907] In relation to working in Europe, French had only worked for 1 European malthouse, namely Schill Malz, and did not commence that employment until September 2013.

within specification.[1908]

2764 During his cross-examination, French was taken to the Malt Blend Parameters Procedure. He agreed that, in its terms, this procedure authorised Joe White staff to use the parameters stated in place of customer specifications. He further agreed that Joe White's procedure operated as a standing authority to be able to pack and ship malt where all of the analytes were within the specifications created pursuant to the Malt Blend Parameters Procedure rather than in accordance with the customer's specifications. French acknowledged that such a standing authority was not a feature that he set out in his report which identified what he said was common industry practice. He further acknowledged that concealing the procedure from auditors and customers was another feature not commonly adopted in industry.

2765 Having given this evidence, French also stated that he thought the Malt Blend Parameters Procedure was designed so that malt met customer specifications. He stated that his evidence was given on the assumption that adhering to the Malt Blend Parameters Procedure would ensure that customer specifications would be met. But he then acknowledged that he would have to go through the document and compare its details with the customer specifications, and that he had not done that because the customer specifications were never provided to him. Further, French made no attempt to address that part of the Malt Blend Parameters Procedure which permitted a plant manager "where appropriate" to ship malt if a parameter fell outside the identified parameters or if an analysis value for a parameter was not available.[1909] Self-evidently, this aspect of the procedure was not concerned with complying with customer specifications or even with the alternate parameters stipulated in the Malt Blend Parameters Procedure.[1910]

1908 These factors included: variability of analysis between bins; variability within bins; the inclusion rate of malt from a bin; known changes in theoretical blend analysis (when compared to analysed analysis); bias between the maltster's laboratory and the customer's laboratory; and the method of calculation of the theoretical blend within the blending software.

1909 See par 236 above.

1910 In order to determine appropriateness, a plant manager was directed that she or he should assess the potential impact of an approved blend on customer shipment quality and its impact on all parameters: ibid. Such an assessment proceeded on the basis that the malt did not comply with the parameters as specified.

2766 In short, contrary to the position expressed in his report, French was unable to give meaningful evidence as to whether or not the Malt Blend Parameters Procedure was designed to ensure customer specifications were met. Accordingly, for this reason alone, his statement in his primary report that, based on his experience, he was of the opinion that Joe White's blending procedures as documented in the Malt Blend Parameters Procedure were similar to practices adopted by 85 to 100 percent of malthouses, was not soundly based. Further, and in any event, the manner in which French formed the opinion that 85 to 100 percent of the commercial malting industry utilised the particular blending procedures referred to was completely unexplained. In these circumstances, little, if any, weight can be given to such an opinion.[1911]

2767 French also expressed opinions with respect to the Malt Proficiency Scheme.[1912] After giving some details, he stated that the commercial malting industry operated on the basis that any test result within 2 standard deviations was acceptable. French narrowed this very general statement during his oral evidence.

2768 Initially, he stated that any result within 2 standard deviations "can be within specification", but then asked to change his answer. Next, he stated results would be within specification if they were "then 2 standard deviations of their upper or lower spec as appropriate". In further clarifying the position, French gave evidence that there was also a need to look at the trend line, because if there was a trend of a number of data points sequentially that were out of specification but within 2 standard deviations then the result could actually be out of specification notwithstanding it was within 2 standard deviations. In expanding on the last of this series of answers, French stated it was not permissible to simply look at a result on a one-off basis, but rather there were a lot of factors that were required to be taken into account when a competent maltster made adjustments to results. French then acknowledged that a

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1911 Particularly in light of the matters set out in pars 2753-2754 above.

1912 He prefaced this by stating it was well accepted in the commercial malting industry that the malting analytical testing either by the methods of the European Brewing Convention or of the American Society of Brewing Chemists was not precision testing and had a high degree of variation both within a laboratory and between laboratories.

result that read within 2 standard deviations could still be out of specification.[1913] Equally, he gave evidence that due to variability, it was common to get out-of-specification test results when in fact the malt was within specification.

2769 Under cross-examination, French agreed that laboratories participated in the Malt Proficiency Scheme in order to determine whether they were performing satisfactorily by reference to their peers. He also agreed that it was not part of such schemes to justify maltsters misrepresenting the results of testing.

2770 With respect to the capability of analytical testing, French said there were inherent limitations in some testing methodologies. He gave evidence of a lack of understanding of this by some breweries, which resulted in specifications being provided for some analytes with lower or upper limits that were beyond the capability of analytical testing. He said that, as a result of this, it was accepted in the commercial malting industry that results could be adjusted with an objective or subjective approach and that most maltsters had procedures allowing for this. French noted that the adjustment of results was sometimes referred to in the commercial malting industry as pencilling. French then directed his attention to the Viterra Certificate of Analysis Procedure and stated that this procedure ensured that there were clear objective guidelines for employees to follow with clear responsibilities and approval authority.[1914]

2771 A critical part of French's primary report identified the factors that he said must be taken into consideration "and are considered by all maltsters" when making adjustments to malt analyses. Those factors were:

a. Does the theoretical blend have the capability to be within specification?[1915]

1913 In giving this answer, French said he had been told by statisticians that if there were 7 results out of specification but within 2 standard deviations then statistically a result could be out of specification.

1914 An assessment of the objectivity or otherwise of the Viterra Certificate of Analysis Procedure is provided in issue 9 above.

1915 As an aside, French gave evidence of his direct experience of occasions where some of his customers' specifications were reported based on the results of the theoretical blend when the shipping time did not allow for wet chemistry testing to occur. He said this was done with the customers' permission.

b. Is the sample representative of the malt shipment? Is it appropriate to take another sample if possible, for retesting?

c. Was there a problem in the laboratory that could impact results[?] Was there any shift in the analysis of the control sample[?] Is a retest warranted?[1916]

d. Is the malt analyte out of specification consistent with other malt analysis for that customer?

e. Will this be an outlier in the overall shipping trend?

f. Were there any known problems with the blend, for example:

i. Bin running long or short;

ii. Bin unexpectedly going empty.

g. Should an analyte be out of specification how sensitive is the brewery to this analytical parameter?

h. Has there been a discussion about this analytical parameter being difficult to achieve with a customer, with either a formal or informal derogation?

i. Is there a trend (either up or down) in a number of shipments based on the wet chemistry analysis or is there a shift in the process based on a number of shipments?

2772 After identifying these, French stated that he understood that Joe White's staff appeared to be well aware of these factors and observed that some of them were "partly documented" in the Viterra Certificate of Analysis Procedure.[1917]

2773 Under cross-examination, French acknowledged that the practice that he believed was industry practice that gave rise to adjustments being made necessarily involved a maltster going through a process of investigation of these factors he had identified. He agreed that part of this process would involve investigating the reason for the variance and determining whether retesting might be required. With respect to the existence of variance in sampling, blending and laboratory analyses, he said this did

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1916 During cross-examination, French was taken to McIntyre's evidence about Joe White informing customers that malt had been re-analysed when it had not been and different results were pencilled without any further testing: see par 86 above. Further, there was no evidence given by any witness to suggest such conduct was standard or acceptable. French said it was never part of his practice to engage in such conduct.

1917 This understanding was based on reviewing Stewart's and McIntyre's witness statements, however French was not given access to the oral evidence Stewart gave at trial.

not justify adjustments to every laboratory result in every situation prior to reporting to customers.[1918] In confirming this position during cross-examination, French went on to say that a variance would require a complete investigation as to whether the malt was truly within the specification before any adjustment was made. He continued, "[i]n other words, what we were doing was using this knowledge to adjust based on analytical variation, partly, to properly describe the malt as being within specification".

2774 Further, French stated that any pencilling of results could not be properly done simply to make results look as if they were within specification without going through an investigation of the factors he had identified, and such an investigation would not involve the participation of unqualified persons.[1919] Furthermore, he stated that the process did not involve making adjustments for commercial reasons alone.[1920] Moreover, French gave evidence that to the extent Joe White's practices involved any of the conduct referred to in this paragraph, he would have to qualify his opinion about what he understood to be Joe White's practices being similar to practices followed by Graincorp (and therefore, by extension, most malthouses).

2775 Even without this qualification of his evidence, most if not all of the factors identified by French said to form part of the industry practice of pencilling were non-existent at Joe White in the implementation of the Reporting Practice. Certainly, none of them were engaged in as part of a structured procedure, in stark contrast to the "necessary" steps that were identified as part of French's evidence.

2776 For completeness, French said that in his experience on occasions there were results that were adjusted even when the results were outside 2 standard deviations "after appropriate consideration of the factors enumerated above".

2777 The matters referred to in paragraphs 2763 to 2772 above were discussed in paragraphs 32 to 40 of French's primary report. Later in his report, French stated as

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1918 This was the agreed position of the experts.
1919 Compare fn 77 above.
1920 Contrast pars 2237-2238 above.

follows:

> For the reasons provided in paragraph[s] 32-40 above, I am of the opinion that the policies, procedures and practices in place at [Joe White] with respect to the Certificate of Analysis generation, as documented in the Viterra [Certificate of Analysis Procedure] were similar to practices followed by most malthouses prior to and on or about August 4, 2013. By most malthouses, I mean 85%-100% of maltsters in the commercial industry, including those identified in Column C of Confidential Schedule A.

2778 Yet again, how French arrived at this conclusion was not explained. For example, how French chose 85 percent (as opposed to 80 percent or some other number) remained a complete mystery.

2779 French recorded a similar conclusion based on paragraphs 24 to 45 of his primary report. For the reasons already explained,[1921] these conclusions can be given little, if any, weight.

X.13.1.3.3 The Varieties Practice

2780 In addressing this topic, French stated that most customers would stipulate the varieties of barley to be used in the terms of the malt purchase contract. He also stated that most maltsters put in place a planning process "similar to that which was undertaken by Joe White" to ensure barley varieties were purchased so that the correct varieties could be supplied at the proper time. Under cross-examination, French indicated that he had assumed Joe White's processes could be described this way. Further, he acknowledged that purchasing non-approved barley varieties for customer use was not part of the planning process he was referring to.

2781 French also gave evidence of a practice of using varieties not approved by customers "to ensure that malt shipments [met] analytical specifications and that brewing performance requirements [were] met". Further, he said the industry recognised that the contribution to brewery performance of a particular barley variety was of less importance than the "malt analytical analysis". In this regard, his evidence was that the values of the relevant analyte levels of each batch contributing to the malt shipment were of greater impact on the final performance in the breweries.

1921 See pars 2766, 2778 above.

Furthermore, French spoke in terms of non-approved varieties being used for the purpose of producing better quality malt. During cross-examination, French accepted that none of the reasons given for using non-approved varieties was to acquire barley more cheaply in an effort by the maltster to save money.

2782 It must also be noted that, in referring to non-approved barley varieties being used, French confined himself to non-approved varieties that were accredited as a malting variety. The practice of which he spoke said accredited varieties would "always" be used unless the customer agreed otherwise. It followed that, unless a customer had expressly approved the use of Hindmarsh,[1922] then Joe White's regular use of that barley variety in substitution for an approved variety would never fall within French's description of how non-approved varieties were used in the industry.[1923]

2783 Accordingly, none of the reasons given for using non-approved varieties matched the underlying reason for much of Joe White's non-compliance with barley varieties required. Further, French's evidence did not disclose the extent to which he said non-approved varieties were used in the industry as a percentage of total volumes of malt supplied, or generally in what percentage in any particular batch or batches.

2784 After giving the evidence referred to above, French then made the statement that 60 to 100 percent of malthouses in the commercial malting industry used non-approved malting varieties. How these percentages were arrived at was completely undisclosed in his report.[1924] In light of his evidence about this conclusion being based on a hypothesis,[1925] and the fact that the basis of any such hypothesis had not been disclosed in his report,[1926] very little, if any, weight can be placed upon this conclusion.

1922 There was no evidence that a Joe White customer ever did.

1923 Indeed, French expressed the opinion that the use of Hindmarsh barley was not in accordance with industry practice, except in respect of contracts that permitted the use of feed-grade barley.

1924 Including how he was able to reach this conclusion when he had insufficient knowledge in relation to 14 of the 28 maltsters identified.

1925 See par 2754 above.

1926 As to the assumption he made as revealed during cross-examination (see par 2754 above), there was no proper basis for the court to decide whether that assumption was soundly based.

X.13.1.3.4 The Gibberellic Acid Practice

2785 French's evidence on this topic was very limited. He stated that he was aware, generally without saying how, that gibberellic acid was used in the commercial malting industry worldwide for some customer contracts that stipulated it was not to be used. He then gave a single example of a "major brewer" in Japan initiating a testing program before 4 August 2013 to detect the use of exogenous gibberellic acid.[1927] Later in his report, French stated that, to his knowledge, gibberellic acid was detected in a number of shipments and that the testing was industry knowledge. Beyond these statements, no further details were given.[1928] In short, French's report did not record any observations that he made directly about the use of gibberellic acid in relation to any of the maltsters listed in schedule A other than those about which he said that he had insufficient information.

2786 After providing this very limited information, French stated that he was not surprised to see the non-compliant application of gibberellic acid by Joe White. French then stated that "[t]herefore" it was his opinion that using gibberellic acid when it was not permitted was a practice adopted in the industry before 4 August 2013 by 70 to 100 percent of malthouses. Again, French failed to disclose any reasoning or explanation as to how he reached those figures.[1929] For similar reasons to those expressed with respect to non-approved barley varieties, in the absence of any real reasoning for the opinion expressed, very little, if any, weight may be attached to this opinion for the purposes of this case.

2787 In his re-examination, French gave evidence that he had direct knowledge of Graincorp companies using gibberellic acid when it was prohibited. However, consistent with his evidence about hypothesising about other maltsters, there was no suggestion that he had any such knowledge with respect to any of the other companies that he identified in schedule A.

1927 French gave evidence that he had been told confidentially by the brewer that it was doing the testing program.

1928 Under cross-examination, French stated he was unaware how many times the testing took place.

1929 Again, there was no attempt to explain how he was able to reach this conclusion when he had insufficient knowledge in relation to 13 of the 28 maltsters identified.

X.13.1.3.5 The position adopted by the Viterra Parties

2788 In their closing submissions, the Viterra Parties failed to address any of these substantial difficulties. In essence, for various reasons, the Viterra Parties submitted that French's evidence should be preferred to Hertrich's evidence. Regardless of whether or not Hertrich's evidence was adversely affected by the matters raised, that did not assist the Viterra Parties to address or overcome the significant and fundamental inadequacies in French's evidence.

X.13.2 Knowledge of practices similar to the Viterra Practices

2789 A further question asked of French was, to what extent were practices such as the Viterra Practices, or similar practices, engaged in sufficiently by malthouses such that participants in the malting industry on or around 4 August 2013 would have been likely to have been aware of them as practices sometimes engaged in by malthouses? This question was also addressed separately with respect to the Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice.

2790 By way of general observation, as it has not been established that the Alleged Industry Practices existed, this question does not arise. For completeness, whatever practices existed in the industry with respect to changing test results or substituting barley varieties, there was no probative evidence at all, beyond the clandestine conduct of Joe White itself, to support a finding that any such conduct was ordinarily not disclosed to customers.[1930] Outside the procedures of Joe White, the evidence unequivocally indicated that if a maltster was mindful to supply malt with specifications other than in accordance with a supply contract, then it would ordinarily disclose that to its customer and seek agreement to the non-complying shipment.[1931] Notwithstanding this fundamental obstacle to this part of the Viterra Parties' case, even if the Viterra Parties had established the Alleged Industry Practices existed, there were further material difficulties concerning the Reporting Practice and the Varieties Practice because of this issue.

1930 This comment concerning the lack of probative evidence includes a reference to the tentative views expressed by Viers in November 2013: see pars 1589-1590 above. See also pars 2804-2805 below.

1931 See par 2748 above.

2791 French's position in relation to the Reporting Practice and the Varieties Practice proceeded on the assumption that, contrary to what has been found above, the practices adopted by Joe White reflected the common practices in the commercial malting industry which French described in his evidence. Accordingly, the opinions he expressed about knowledge of what he said were common practices did not have a sufficient nexus to either the Reporting Practice or the Varieties Practice to be relevant. Further, similar to the serious deficiencies noted about the opinions expressed above, French again expressed his views about knowledge of "most participants" in the commercial malting industry without identifying how he arrived at the percentages that did.[1932] For this reason alone, no real weight could properly be attached to these opinions.

2792 In relation to the Reporting Practice, French also commented upon the draft presentation circulated by Evers within Cargill in February 2014.[1933] French referred to his experience in stating that the "solutions" identified in that draft presentation[1934] were similar to practices utilised within the commercial malting industry. By way of examples, he stated that: (1) where an analysis was required before laboratory results were available, customer approval would be gained to report the theoretical blend followed by the laboratory testing of samples representing each blend; and (2) some customers were open to discussion about analytical capability and would adjust or widen specifications to allow for analytical variability.[1935] It is sufficient for present purposes to note that what was contained in the draft presentation were not "solutions" being put forward by Cargill, but were suggestions of possible solutions by Evers, a mechanical engineer and a reliability excellence leader responsible for efficiency and reliability of assets. He was not a qualified maltster and he did not

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1932 Again, French expressed the view that 85 to 100 percent of participants knew of the Reporting Practice and 65 to 100 percent knew of the Varieties Practice, or practices similar to those practices.

1933 See par 1644 above.

1934 See pars 1649-1650 above.

1935 French also said that in his experience most customers would have 1 or more analytic specification "that fell outside the capability of the testing model, in which the specification limits were within [2] standard deviations of the testing method". Leaving aside the limited nature of French's relevant experience (see pars 2753-2754 above), beyond this very broad statement no further details were given. In these circumstances, the evidence was of limited probative value.

work with customers.[1936] Further, the unequivocal evidence was that none of the possible solutions were being contemplated other than on the basis that, if they were to be adopted, it would only be with the consultation and approval of customers.[1937]

2793 In relation to the Varieties Practice, French's primary report gave 3 examples to demonstrate why it was that he said that the common practice of using non-approved varieties was known.

2794 *First*, French referred to the conduct of Asahi in about 2010 or 2011 of initiating tests of malt shipped to it from Australia, Europe and Canada for varietal purity inclusion rates. French stated that these tests allowed Asahi to objectively compare suppliers' analyses and malt brewery performance from a given geography and investigate differences which arose after taking into account known disparities of malthouses or barley supply within the region. French did not identify how many times Asahi tested its malt or what proportion of malt was tested over any given period of time. Further, French provided no results of any testing.[1938]

2795 *Secondly*, French referred to a "major importer of a significant quantity of malt into Africa, mostly from the European Union" that had variety specifications. This importer was said to perform random analyses of third-party samples, using a method known as polymerase chain reaction, to determine the varieties in a malt shipment. French said that he was aware this process was put in place "prior to and on or around" August 2013 due to non-compliance issues with variety integrity. Although his report gave no such detail, under cross-examination French said that he knew this particular importer tested the majority of shipments. He provided no details of how he knew this or the results of any such testing.

2796 *Thirdly*, French gave another example of polymerase chain reaction testing being made

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1936 See pars 1611, 1645, 1649-1655 above.

1937 See par 1617, 1655 above.

1938 Although not put to French, it would appear that the decision of Asahi to test malt for varietal purity would be equally consistent with Asahi checking whether minimum varietal purity levels of 95 percent were being met without necessarily being concerned that maltsters were deliberately using more significant quantities of unauthorised barley varieties: see par 2422 above.

available to brewers by an organisation in Nancy, France.[1939] However, his report did not state how many brewers had utilised the test, what proportion of malt might have been tested or what the results of any tests might have been.

2797 In summary, the limited and opaque information provided with respect to each of these examples meant that the probative value of the evidence was equally limited.

2798 Finally on this question, French addressed gibberellic acid. He referred to earlier matters in his report in repeating that, in his experience, gibberellic acid was used throughout the commercial malting industry "as required, in a non-compliant manner on a worldwide basis". Obviously, this took things no further in relation to the pre-existing deficiencies on this topic. However, he introduced further matters.

2799 In addition to referring to a major Japanese brewer,[1940] French gave 3 other examples of the use of gibberellic acid. The first of these concerned the use of gibberellic acid in certain circumstances in North America, but said nothing about whether or not customers consented to its use. The second example referred to French's experience in Europe "to produce malt to specification and sometimes … in a manner not compliant with customer contracts"; but French had no experience of working in Europe before September 2013. The third example referred to an independent organisation in the United Kingdom, Brewery Research International, which offered a service to detect any exogenous gibberellic acid in malt. Further, French gave evidence that he was informed by that organisation that the service was being offered as a result of demand from the industry. Notably, again, French gave no evidence about how many brewers used the service, the number of tests that had been carried out or the result of any testing.

2800 After referring to these matters, French then stated:

> Therefore, I am of the opinion that the use of [gibberellic acid] similar to the Viterra practice was sufficiently engaged in by some malthouses prior to and on or around August 4, 2013, such that participants in the commercial malting

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1939 IFBM was referred to as the organisation, which French said in part stood for International Fermentation Beverage but he did not know for what the "M" stood.

1940 See par 2785 above.

> industry would likely have been aware of these practices. In my opinion 75-100% of participants in the commercial industry would have been aware of these practices.

2801 Yet again, the reasoning behind this opinion was far from apparent. What was clear was that, given French's limited exposure to the industry at large, this opinion necessarily contained a great degree of speculation and could be given very little weight, if any.

2802 Another question asked of French concerned information disclosed during the Due Diligence. Most of this evidence was ruled inadmissible.[1941] An observation made by French concerning the Varieties Practice remained. French stated his understanding that Cargill had a policy of strict variety compliance. He stated that this would not be typical of industry practice. Beyond this very broad statement of his understanding, precisely what French knew of Cargill's policy was not identified in his report. Further, this opinion must necessarily be confined to French's experience in the industry generally up to 2013, which was exposed during cross-examination to be limited.[1942]

X.13.3 If the Alleged Industry Practices existed, were they known to other maltsters, including Cargill?

2803 Again, this question does not arise. But to be clear, although key decision-makers of Cargill was aware of the alteration of Certificates of Analysis, including by pencilling, the use of barley varieties in substitution for contractually specified barley varieties and the use of prohibited additives to assist in meeting customer specifications in some parts of the malting industry, none of this amounted to knowledge of anything like the Alleged Industry Practices (or the Viterra Practices). In other words, Cargill's knowledge of some conduct in the industry, ranging from nefarious to dubious, did not equate to knowledge, or even grounds for suspicion, that Joe White was engaged in such activities. Further, for reasons discussed elsewhere,[1943] Cargill was not put on

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1941 *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 20)* [2019] VSC 44, [50(27)].
1942 See par 2753 above.
1943 See issue 12 above.

notice before executing the Acquisition Agreement that any such conduct was occurring at Joe White.

2804 The Viterra Parties' submissions concerning industry knowledge proceeded on the premise that the Alleged Industry Practices had been established by the evidence of French, together with some related evidence of Stewart, McIntyre and Testi. It suffices to say that the evidence of none of these further witnesses was probative of industry practices as alleged.[1944]

2805 For completeness, they also referred to evidence of Cargill employees. In relation to Eden's evidence, this included his evidence about "malt lore" concerning "smoothing", but that evidence was confined to a single instance with respect to a Chinese business and, in Eden's own words, was based on hearsay. They also referred to his evidence about the way Cargill ran its malt business,[1945] and Cargill's own experience with "smoothing" by businesses it had acquired.[1946] As for De Samblanx, they referred to his evidence about customers assuming a precision with analytical capabilities that could not be delivered,[1947] and the fact that there are numerous sources of analytical variance in the testing of malt, including various examples. With respect to Viers, they referred to his evidence that Cargill would see the performance of a competitor very rarely, he guessed maybe once or twice a year, and would wonder whether or not they had engaged in changing results in order to make it appear that they complied with specifications.[1948] Finally, they referred to a case study prepared by Cargill in November 2012.[1949]

2806 By reason of these matters, it was submitted that Cargill had knowledge of the Alleged Industry Practices in relation to Certificates of Analysis. As already discussed, Cargill's limited knowledge of actual or possible improper practices in the commercial malting industry and knowledge of the variability of test results did not equate to, or

1944 See, for example, par 176 and fn 195 above.
1945 See par 1645 above.
1946 See, for example, pars 1091-1094 above.
1947 See par 1646 above.
1948 See par 1093 above.
1949 See fn 686 above.

come close to, knowledge of the Alleged Industry Practices.[1950]

2807 In relation to the Alleged Industry Practices concerning barley varieties, the Viterra Parties referred to evidence concerning Cargill's knowledge in June 2013 of a Cargill malthouse in Argentina blending up to 5 percent of old crop and not reporting this in Certificates of Analysis, with the possible consequence that the guiding principles of the Cargill Code had been compromised.[1951] In relation to this evidence, there was nothing to suggest that this conduct was anything other than an isolated matter with respect to only 1 customer or that it involved misstating individual specifications or barley varieties used. In short, it did not provide any basis for the existence of the Alleged Industry Practices.

2808 Next, reference was made to Hughes' notes of the 15 October Meeting and his reference to Cargill raising the issue of barley suitability on several occasions.[1952] For reasons stated above,[1953] including the fact that Hughes did not give evidence, the weight that can be attributed to these notes was limited where the notes were in direct conflict with the sworn testimony of trial witnesses. In any event, the notes did not identify what it was that Hughes was stating Cargill understood was the industry practice with respect to barley substitutability. Without any evidence from Hughes, it was entirely unclear as to what it was that Hughes was noting. To the extent that it might be said these notes suggested that Cargill representatives understood that there was a standard industry practice in existence in October 2013 which was the same or similar to the Varieties Practice, I do not accept that this was an accurate statement of Cargill's position.

2809 Next, the Viterra Parties referred to the evidence concerning the use of Hindmarsh after Cargill took control of Joe White.[1954] However, it was not established that after 1 November 2013 Hindmarsh (being a barley variety not accredited for malting) was

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1950 See par 2803 and fn 824 above.
1951 See pars 632-635 above.
1952 See pars 1120-1121 above.
1953 See pars 1148-1154 above.
1954 See par 1562 above.

included in blends without disclosure to the relevant customers.[1955]

2810 In conclusion, none of the matters put forward by the Viterra Parties established that Cargill was aware of anything that resembled the Alleged Industry Practices concerning barley varieties.

2811 Finally, in relation to gibberellic acid, the Viterra Parties referred to an email chain in April 2012 to which Viers was a party and contended that, based on its contents, Cargill suspected that some of its competitors, including Rahr Malting, may have been using gibberellic acid in a non-compliant manner in order to improve malt quality and obtain an advantage over Cargill. This contention was not put to Viers, or any other Cargill witness. Although an email in the chain referred to the use of a green pencil,[1956] and that testing for gibberellic acid was "supposedly difficult to do", that same email suggested that Rahr Malting usually selected high-quality barley, had a good malting team and excellent customer relations. Further, there was nothing in the email chain that stated that Cargill suspected use of gibberellic acid when it was prohibited.[1957] Furthermore, a later email in the chain identified a number of Japanese customers that also, it was said, were capable of analysing the presence or otherwise of gibberellic acid.

2812 In these circumstances, a single email chain referring to a single competitor in such terms did not amount to probative evidence that Cargill suspected "competitors" may have been using gibberellic acid where prohibited by breweries; much less that an industry practice of the type alleged existed.

2813 Next, the Viterra Parties referred to the fact that gibberellic acid was present in Joe White's chemical register, which was apparent during the Due Diligence and

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1955 See fnn 952, 1021 above.

1956 This was apparently a reference to changing test results of an analysis in order to make it appear that a specification had been met when it had not.

1957 The Viterra Parties contended it could be inferred that the email chain was referring to non-compliant use of gibberellic acid on the basis that the email discussed malt supplies to Japanese brewers who generally prohibited use and the extent to which brewers were able to test for the presence of exogenous gibberellic acid.

additional evidence in that regard.[1958] However, in circumstances where many customers permitted the use of gibberellic acid, this fact gave no indication of prohibited use.[1959]

2814 Lastly on this topic, the Viterra Parties referred to the evidence concerning De Samblanx's lack of surprise during the 15 October Meeting when being told of the use of gibberellic acid contrary to customer requirements. For reasons stated above,[1960] that account of De Samblanx's reaction has not been accepted.

2815 In summary, these additional matters raised by the Viterra Parties did not take the position any further.

X.13.4 Conclusion

2816 French's evidence and the other evidence relied upon by the Viterra Parties did not establish the Alleged Industry Practices existed, or that anything remotely resembling such practices were common practice in the commercial malting industry.

X.13.5 Some further remarks

2817 In light of the conclusions reached, it is unnecessary to consider the evidence of Hertrich.[1961] Suffice to say that he rejected the suggestion that any of the Alleged

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1958 See pars 819, 1003 above.

1959 Eden was cross-examined at length on the issue. He could not recall whether he was told that Joe White was only using gibberellic acid when permitted. His evidence was there was no way Cargill could have known about gibberellic acid being used when prohibited because Cargill did not have access to the customers' contracts. When he was asked why he proceeded in such circumstances, Eden said Cargill was told Joe White had systems, processes and an outstanding high-performing team that meant it was a really well-run business. Eden acknowledged the possibility that a high-performing team of a well-run business could use gibberellic acid when not permitted, but he gave evidence he accepted on trust that this would not be occurring. See also par 788 above.

1960 See pars 1133-1140, 1148-1154 above.

1961 Hertrich's background was as a customer of malthouses in working for 3 large brewing companies in the United States. He initially spent 15 years of training and holding operational positions in breweries, and then for the next 28 years (until his retirement in 2009) he worked in senior brewing and head office positions. In his supervisory roles, he worked with every commercial malting company in the United States and Canada. Further, when employed by Anheuser-Busch, Inc the largest global brewing operation (until it was taken over), his supervision included malt plants in Ireland, England, Belgium, Spain, Hungary, Argentina and China. His technical supervision responsibility functions included developing malt purchasing contract shipment specifications, engaging with malting companies on their ability to meet contract specifications, resolving issues concerning compliance with specifications, evaluating and approving new malting barley varieties, attending annual specification meetings with

Industry Practices were standard practices in the malting industry. In broad summary, his evidence was to the following effect:

(1) It was not widespread or generally accepted practice in the malting industry to make adjustments to test results, including altering reported test results, so as to record them as being within specifications when they were not.

(2) Although he recognised the limitation of his opinion because he worked for breweries rather than inside a malting company laboratory, in his experience in managing internal brewery malting plant operations test results were not adjusted.

(3) Adjusting results by standard deviation as a formal procedure was not a recognised methodology.

(4) It was not widespread or generally accepted in the malting industry to substitute barley varieties not detailed in the supply contract or to substitute non-approved varieties without the customer's knowledge or consent.

(5) It was a further step away from accepted practice to substitute malt made from feed barley, as such barley had not even met the minimum standards for accreditation as a malting barley.

(6) When the brewer supply contract specifically prohibited its use, it was not widespread or generally accepted in the malting industry to use gibberellic acid in the production of malt without the customer's

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malting companies, carrying out regular visits to every major malt plant in North America, representing 3 brewing companies at the American Malting Barley Association, representing Anheuser-Busch, Inc at the Canadian Brewing and Malting Barley Research Institute, developing malting plant processing specifications, the development of finished malt shipment blends, supervising the operation of internal malting plant laboratories in the generation of Certificates of Analysis, ensuring the resolution of any brewery performance process issues, and evaluating malt plant engineering with respect to processing capability, renovation design, new plant design and construction.

knowledge or consent.[1962]

(7) Reputable malting companies take a contractual requirement prohibiting gibberellic acid very seriously.

(8) Inherent limitations of testing methodology and sampling did not provide justification to make adjustments to test results without disclosing that to the customers.[1963]

(9) It was a widespread and generally accepted practice within reputable malting companies that, when malt was produced out of specification, the customer would be informed of that and permission would be sought to release the shipment on the disclosed specifications.

2818 It is also instructive to refer to Hertrich's evidence about the relationship between malt supplied, beer produced and Certificates of Analysis. His evidence was that the brewing process control was based on managing the natural brewing process to limit the range of outcomes into as narrow a band as possible. To control variation, brewers created specifications that detailed target values, maximum values and minimum values on multiple measurement parameters. Further, brewers formulated malt specifications with the knowledge of the relationship between malt supplied and the beer to be produced, including the malt drivers of beer outcomes, with the goal of setting malt specifications that would deliver reliable results for each brewer's specific process for a specific beer. A Certificate of Analysis was provided to the brewer as confirmation that its specifications had been met.[1964]

2819 Further, in his experience, very few brewing companies performed malt analysis on

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1962 Hertrich gave evidence that the brewers for whom he had worked had audit programs which included unannounced inspections of maltsters operations 4 times a year at every malting company in North America and twice a year for all other malting companies supplying malt. The inspections included looking at additive equipment and the presence of additives. He said "we" had a no additive policy and he was confident additives were not used, although he conceded if it were used in a particular shipment, it would not be apparent to the brewer unless the individual shipment was tested.

1963 Hertrich suggested that limitations in testing methodology were not a foreign concept to brewers, who understood the limits of sampling method accuracy at a higher level than maltsters based on the large number of complex tests that were run on beer during its brewing, packaging and release for shipment.

1964 Subject to the understanding referred to in fn 1963 above.

incoming malt shipments to confirm the shipment analysis, but rather relied on the accuracy of the Certificate of Analysis.

2820 On the issue of variance, Hertrich gave evidence that brewing was a natural process that employed agricultural raw materials. In addition to this source, there were multiple sources of variation throughout the brewing process. The brewing process control was based on managing the natural process to limit the range of outcomes. In order to control variation from all raw materials, not only malt, brewers created shipment specifications.

2821 Strict adherence and compliance to specifications did not guarantee success. Equally, non-compliance with specifications did not guarantee failure. However, diligence in the application of specifications limited the range of potential outcomes in the malting process and the brewing process.

2822 On another matter, Hertrich prepared a short report in November 2018 responding to French's amended report dated 8 November 2018 (which preceded French's amended expert report tendered at trial). In addition to Hertrich stating that nothing in French's 8 November 2018 report altered the views he had previously expressed, he referred to a new paragraph inserted by French. This new paragraph referred to French's experience that it was common to adjust Certificates of Analysis based on analytical testing variability, which French said was done in part by reviewing the trend line of each particular analyte.[1965] Hertrich stated he did not agree with this opinion. He referred to his own experience and expressed the opinion that analytical results in Certificates of Analysis were not adjusted at all, including any possible adjustments with respect to analytical testing variability or by the use of trend line analysis. By reference to the European Brewing Convention[1966] and the American Society of Brewing Chemists, Hertich explained why there was no justification to alter any specific result as part of a properly run laboratory process. Hertich made it clear under cross-examination that his evidence in this regard was not confined to vertically-

1965 See also pars 2768-2771 above.

1966 This convention was also referred to in the evidence as the European Brewery Convention.

integrated operations where the maltster and the brewer were part of the same enterprise.

2823 Finally, before leaving this topic, an observation must be made about the status of French's evidence generally. The court was required to make rulings with respect to admissibility before French gave his evidence. While some of his evidence was ruled inadmissible, much of the evidence was permitted to be adduced based on the contents of his reports as they stood.[1967] I feel compelled to state that if the evidence given by French at trial had been given by way of a voir dire before any ruling on admissibility, it would have been highly likely that substantially more, if not all, of French's evidence would have been ruled to have been inadmissible as it became apparent that the opinions he expressed were largely speculative and based on, relevantly, very limited specialised knowledge.[1968]

X.14 Was it the fact that each of the Viterra Parties did not have any awareness or knowledge of the Alleged Industry Practices prior to 22 October 2013, including that none of Rees, Fitzgerald, Mann and/or Mattiske had any such awareness or knowledge?

2824 In light of the conclusions reached in issue 13 above, this issue necessarily fell away.

2825 For completeness, the references to Rees, Fitzgerald, Mann and Mattiske in the question as posed were a consequence of those persons being referred to in clause 31.15 of the Acquisition Agreement.[1969] If I am incorrect in the determination of issue 13 above, and the Alleged Industry Practices existed on and before 4 August 2013, then there was no evidence to suggest that any of Rees, Fitzgerald, Mann or Mattiske were actually aware of the Alleged Industry Practices or any common industry practices similar to the Alleged Industry Practices.[1970]

1967 *Cargill Australia Ltd v Viterra Malt Pty Ltd* (No 20) [2019] VSC 44, [50].

1968 In making this observation, it is not intended to make any comments about the expertise of French as a maltster or the veracity of his evidence with respect to how practices were engaged in at Graincorp.

1969 See par 1033 above.

1970 This finding is confined to actual knowledge and does not otherwise touch upon deemed knowledge for the purposes of cl 31.15 of the Acquisition Agreement.

X.15 Did Glencore and/or Viterra make any, and if so, which, of the representations pleaded in paragraph 27 of the Statement of Claim, including in light of: the Sale Process Disclaimers (pleaded in paragraph 31 of the Defence); the Acquisition Agreement Liability Terms (pleaded in paragraph 37 of the Defence); and the Alleged Industry Practices?

X.15.1 The pleadings

2826 By paragraph 27 of the Statement of Claim, Cargill Australia alleged that by:

(1) The Information Memorandum Statements.

(2) Disclosing the Financial and Operational Information.

(3) Further or alternatively, the Operations Call Statements.

(4) Further or alternatively, the Commercial Call Statements.

(5) Further or alternatively, the Management Presentation Statements.

(6) Further or alternatively, failing to disclose the Undisclosed Matters,

"Glencore and/or Viterra" conveyed representations ("the Financial and Operational Performance Representations") that:

(7) The production, sales and earnings figures stated in the Financial and Operational Information were based upon strict quality control procedures and analysis.

(8) The production, sales and earnings figures stated in the Financial and Operational Information were based upon customer contracts including customer specifications being complied with.

(9) By reason of the matters set out in the 2 preceding subparagraphs, the production and sales figures stated in the Financial and Operational Information had been properly and lawfully achieved.

(10) Joe White had not withheld or concealed material information from customers.

(11) The assets of the Joe White Business were sufficient for Joe White to sell malt in the volumes and for the returns stated in the Financial and Operational Information.

(12) Joe White had low future capital expenditure needs in the short to medium term.

(13) When procuring barley, Joe White gave priority to obtaining barley that best met its customers' specifications and requirements.

(14) Joe White employed technical analysis and strict quality control procedures to ensure that the malt it produced consistently met its customers' specifications.

(15) A central reason for Joe White's ability to achieve the performance described in the Information Memorandum was its ability to produce malt that met its customers' exact specifications and requirements, and its focus on doing so.

(16) The Undisclosed Matters did not exist.

2827 Pausing here, it is important to be clear about precisely what this definition in the Statement of Claim encapsulated by its reference to other definitions in the Statement of Claim. Each of the Information Memorandum Statements, the Operations Call Statements, the Commercial Call Statements and the Management Presentation Statements were defined by reference to specific pleaded statements. In contrast, the definition of Financial and Operational Information and of the Undisclosed Matters were defined to include all or any, or any combinations of the pleaded matters.[1971]

2828 The Viterra Parties denied these allegations. They also cross-referred to the Phase 1

[1971] See par 1851 above.

Process Letter Statements, to the Information Memorandum Disclaimers, to the Confidentiality Deed Terms, to the Phase 2 Process Letter Statements, to the Data Room Protocol Terms, to the Management Presentation Memorandum Disclaimers (together, "the Sales Process Disclaimers"), as well as to their defences to the allegations concerning the Operations Call and the Commercial Call, to their allegations concerning the justification of the Viterra Practices and the Viterra Policies,[1972] to their allegation that by reason of the Sale Process Disclaimers there was no requirement of disclosure, and no requirement of withdrawal or qualification of the statements made, and to their allegations concerning the Alleged Industry Practices,[1973] in alleging that the Financial and Operational Performance Representations were not made. By paragraph 31 of the Defence, the Viterra Parties alleged that if any of the matters pleaded in paragraph 19 of the Statement of Claim was the fact then, by reason of the Sale Process Disclaimers, not only was there no requirement for disclosure to Cargill of any of those matters, but there were also no consequences by reason of any non-disclosure.

2829 Although the Defence to the allegations in paragraph 27 of the Statement of Claim did not refer to any terms of the Acquisition Agreement, the issue as defined did so by reference to paragraph 37 of the Defence; and for completeness the issue will be dealt with on that basis. Paragraph 37 of the Defence referred to clauses 1.1, 7.2(f)(iii), 8.1(d), 13.2, 13.3(b), 13.4(a)-(g), 13.5(a) and (b), 15.2(a), 15.2(d), 15.4(a), 15.8(b), 15.9, 15.11 and 31.12 ("the Acquisition Agreement Liability Terms").[1974]

2830 Before continuing, it is convenient to define the Information Memorandum Statements, the Financial and Operational Information, the Management Presentation Statements, the Operations Call Statements and the Commercial Call Statements collectively as "the Pre-Execution Statements".[1975]

1972 See issue 9 above.
1973 See issue 13 above.
1974 See pars 1022, 1027, 1029, 1030, 1033 above.
1975 The definition of Pre-Execution Statements is a neutral cumulative definition to distinguish these components of the definition from various other ways in which they have been defined in the pleadings.

X.15.2 Were the Financial and Operational Performance Representations made?

X.15.2.1 Introduction

2831 The first step is to ascertain whether the matters relied upon by Cargill Australia were capable of conveying, and did or would have (subject to the matters raised by the Viterra Parties) conveyed, the representations as alleged. If not, then there is no need to consider the Sale Process Disclaimers or the other matters raised in opposition.[1976]

2832 With some very minor exceptions, there could be no real dispute about what was stated and disclosed, and what was not disclosed, to Cargill as part of the sale process. This was because most of the Financial and Operational Performance Representations pleaded were based either on written statements or oral statements the substance of which was reduced to writing and agreed between the parties as part of the Acquisition Agreement, or were based on the non-disclosure of certain information in those written or oral statements and the other materials provided to Cargill.[1977] In other words, there were a large number of contemporaneous written records which recorded what was or was not disclosed, the contents of which could not be disputed.

2833 Following on from this, most of the allegations made by Cargill Australia concerning what was expressly stated have been determined in their favour. With the exception of 2 representations alleged to have been made during the Operations Call (1 of which was not proven as pleaded at all and the other was only established in part),[1978] Cargill Australia has been successful in proving the allegations which were alleged to give rise to the Financial and Operational Performance Representations.

2834 On this premise, it is necessary to address each of the alleged representations separately, but before doing so, some general observations should be made. The

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1976 This approach was not adopted by the Viterra Parties in their closing submissions, in which they considered this question last (after making submissions about the other matters relied upon). The ultimate question as to whether or not the Financial and Operational Performance Representations were made in light of the various matters relied upon by the Viterra Parties necessarily means those matters must also be considered before any final determination on the issue can be made. However, in my view, the more efficacious approach was first to identify the statements that were made and determine whether they were capable of giving rise to the representations alleged to have been implied.

1977 As to the exception to the written record, see par 737 above.

1978 See pars 2152-2158 above.

parties agreed, correctly, that in considering whether the Financial and Operational Performance Representations were made, the overall context needed to be considered. Naturally, particular words used in a particular context may have a different meaning if those same words were used in another context. Further, broadly speaking, the contents of the Information Memorandum and the Management Presentation Memorandum (together with what was stated at the Management Presentation) were largely directed towards stating why Joe White had been able to perform in the manner in which it had, including as a basis to present what the "normalised" position was. In addition, this largely historical presentation was used as a base to indicate what Joe White's prospects were of performing satisfactorily in the short-to-medium term future. As was recorded in the document prepared by Merrill Lynch in October 2012, and explained by King in his evidence, these sales documents were marketing material employed as part of the marketing strategy to sell the Joe White Business.[1979]

X.15.2.2 The submissions based on the matters pleaded by Cargill Australia and the conclusions as to whether those matters were capable of conveying the Financial and Operational Performance Representations

2835 The first implied representation, that *the production, sales and earnings figures stated in the Financial and Operational Information were based upon strict quality control procedures and analysis* was alleged to have been implied from the Information Memorandum by the matters set out in paragraph 2146(2), (12), (13), (14), (15), (16), (18), (24) and (25) above, and the Management Presentation by the statements referred to in paragraph 2168(4) and (11) above.

2836 The Viterra Parties submitted that the statements in question were plainly general statements about business "aspirations" which should not be interpreted as specific statements about business practices. It was contended that Cargill Australia's allegation ignored the difference between a statement of aspiration, which was said to describe Joe White's aspirations to give effect to a particular business model, and a contrasting statement of fact concerned with describing details of production, sales and earnings figures that Joe White actually achieved. It was submitted that the

1979 See pars 371-373 and fn 364 above.

statements relied upon only represented that the business model was based on strict quality control procedures, rather than the statements being a reflection of production, sales or earnings figures. Further, it was submitted that there was no representation that the production, sales and earnings figures resulted from the business model being successfully achieved.

2837 The Viterra Parties' closing submissions continued:

> On a reasonable reading of those *general, aspirational statements* about Joe White's business model, the statements did not convey the far more specific representation that Cargill Australia now alleges in respect of Joe White's production, sales and earnings figures.
>
> (Emphasis added.)

2838 During oral closing submissions, the Viterra Parties' lead senior counsel was asked whether "aspirational" was the correct word in this context. In response, the court was frankly told that he had a recollection of seeing the word (when reading a draft of the submissions) and "thought it had been dealt with". In short, the court was told the passage set out above should be read without any reference to the statements being aspirational. It was correct to make this adjustment to this submission. On no view could statements made about the "proven effective business model", which was said to have been underpinned by a commitment to quality, be properly characterised as aspirational. Further, the statements relied upon by Cargill Australia in this context were not confined to the business model, but were also directed to Joe White's production function, technical analysis, strict quality control procedures and stringent internal protocols.

2839 The Viterra Parties further submitted it was important that none of the passages relied upon appeared in the section of the Information Memorandum headed "Key Financial Highlights". It was submitted that, to the extent that the Information Memorandum made any statements about the factors that underpinned the key financial highlights or the production, sales and earnings figures, it was made by the statement that earnings performance was achieved through expansion of malt margins and a

disciplined approach to cost reduction.[1980] However, such a statement did not exclude other factors which might be said to have contributed to production, sales and earnings figures. To speak in terms of expansion of malt margins and a disciplined approach to cost reduction was not inconsistent and said nothing to undermine the other statements made about how the Joe White Business was operated and how it achieved its results.

2840 Similarly, the Viterra Parties referred to page 41 of the Information Memorandum which recorded that the financial information for the forecast period had been used by a "bottom-up, plant-by-plant approach, including …". The various matters referred to did not include "strict quality control procedures and analysis". By reason of this, it was submitted that Cargill was told the production, sales and earnings figures had not been based on matters of quality control and analysis. For the same reason the previous submission was rejected, an inclusive and non-exhaustive statement about some of the matters that were part of a bottom-up, plant-by-plant approach did not exclude quality control procedures or analysis procedures. Quite the contrary, a description of using a bottom-up, plant-by-plant approach sat comfortably with strict quality control procedures and analysis being in place across the operations of Joe White.

2841 In addition, the Viterra Parties submitted that the only statements made in the Information Memorandum about "strict quality control procedures" were statements made in respect of the business model. Various examples were given. However, statements about what the business model was focused upon did not detract from the unequivocal statements made about quality control procedures and analysis. The first example referred to by the Viterra Parties illustrated this. The sentence in the Information Memorandum, "Business model focused on developing relationships with key global and regional brewers underpinned by Joe White's high-quality product and tailored service offering", contained within it the statement of fact that Joe White had high-quality product. This was not an aspirational statement, but was

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1980 See par 492 above.

a representation about something that was said to be in existence and to actually underpin the business model.

2842 In another example, the Viterra Parties referred to the following:

> Focus on Quality and Technical Capability Underpins the Business Model … Quality and Technical Capabilities Underpin the Business Model
>
> Joe White has an unrelenting focus on quality across all areas of its business to ensure it meets customers' requirements
>
> …
>
> Technical analysis and strict quality control procedures ensure customer specifications are consistently met.

2843 The Viterra Parties submitted "[t]his statement was expressed in aspirational terms (ie so as to convey Joe White's aspiration of consistently meeting its customers' requirements)". It was further submitted that this was clear from the fact that "the statement" was made under a heading and a subheading both expressed to be about Joe White's business model.

2844 There are a number of responses to this submission. *First,* what was quoted did not represent a single statement. The last sentence of the passage set out above appeared under the further headings "Production" and "Best-in-class manufacturing facilities consistently produce high-quality malt". *Secondly,* this last sentence was not in aspirational terms, but was a statement of fact about the analysis and procedures actually in place and their ability to "ensure" customer specifications were consistently met. *Thirdly,* although what was contained in this part of the Information Memorandum was concerned with Joe White's business model, the headings and the other content on this page reported that existing quality and technical capability resulted in customers' specifications and requirements actually being met.

2845 It is unnecessary to deal with the other examples provided by the Viterra Parties. The substance of the submissions were the same. In short, for the reasons stated, the attempt by the Viterra Parties to characterise the statements relied upon as aspirational or general, or both, and as strictly confined to the business model, is rejected.

2846 In relation to the Management Presentation Memorandum, the Viterra Parties correctly observed that it was relevantly in the same terms as the Information Memorandum. Similar submissions were made concerning the statements being attributable only to the business model.

2847 The Viterra Parties relied upon the fact that the first statement concerning Joe White having best-in-class manufacturing facilities was to be found in a page of the Management Presentation headed "Business Model". The opening words under the heading read, "Joe White's business model is focused on ensuring customers receive the highest quality malt to meet their exact specifications and requirements". The page was then divided into 4 boxes with headings "Sales and Marketing", "Procurement", "Production" and "Quality & Technical".[1981] Under the heading "Sales and Marketing", it was stated: "Top-down approach to understand each customer's unique requirement". Under the heading "Procurement", it was stated: "Selection of and access to high-quality barley that best meets customer specifications". Under the heading "Production", it was stated: "[B]est-in-class manufacturing facilities producing consistently high quality malt". Under the heading "Quality & Technical", it was stated: "[Q]uality and technical capabilities underpin each operating function".

2848 The Viterra Parties submitted that the statements that appeared diagrammatically on this page should be interpreted as a statement about Joe White's business model rather than assumptions upon which Joe White's actual and forecast financial and operational performance was or would be premised. While the subject matter of this page was undoubtedly concerned with Joe White's business model, the statements made in each of the boxes entitled "Procurement", "Production" and "Quality & Technical" were unequivocal statements of fact. The circumstance that they appeared on a page concerned with the business model did not alter this.

2849 The Viterra Parties' submissions then referred to a number of other statements in the

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1981 There was an arrow running from the Sales and Marketing box to each of the Procurement box and the Production box, but not to the Quality & Technical box.

Management Presentation Memorandum, but these further statements were not relied upon by Cargill Australia in order to seek to establish this particular representation. Accordingly, as they were not relied upon by Cargill Australia these submissions will not be addressed in any detail here. It suffices to say, the content of those statements did not affect the conclusions otherwise reached in relation to this allegation.

2850 In relation to the statements concerning risk management that were relied upon by Cargill Australia, the Viterra Parties submitted that the statements identified were not capable of conveying that Joe White's production, sales and earnings figures were in any way referable to Joe White's risk management procedures, or the extent to which Joe White had managed to implement any such procedures. It was submitted that the statement concerning risk management strategies to manage risks associated with barley varieties and specifications did not entail or imply any statement about the frequency with which Joe White encountered those risks. Accordingly, it was submitted, such a statement could therefore not have entailed or implied any statement about the extent to which Joe White's financial or operational performance depended upon those risk management strategies. Further, it was submitted that there was no basis for Cargill Australia to have inferred that describing risk management strategies concerning barley sampling was describing Joe White's "strict quality control procedures and analysis".

2851 The Viterra Parties were correct in submitting that the statements relied upon did not identify how often Joe White encountered the operational, business and financial risks, or the operational risk of being unable to source barley of the correct variety, quality and specification. However, it did not really matter that it was not stated how often these risks materialised. Whether or not the statements as made implied that the risks identified were material, the message being conveyed was that, to the extent they existed, they were well-controlled and that Joe White was able to perform accordingly. Further, these statements were not to be read in isolation, but in the context of the other statements relied upon in seeking to establish the implied representation.

2852 In addition, it was submitted that Cargill Australia could not have extrapolated from the statements identified the implied representation because Cargill Australia knew of the features of the malting industry that made such an extrapolation illogical. This submission was based in part upon the Viterra Parties' case concerning features of the malting industry in accordance with the Alleged Industry Practices (that have not been established). Further, it relied upon a memorandum produced within Cargill in January 2014, which was demonstrated on the evidence not to reflect accurately the features of the malting industry in significant respects, much less Cargill's knowledge or understanding of the malting industry.[1982]

2853 Finally, in oral closing submissions, the Viterra Parties' senior counsel asked rhetorically "What does that mean, 'based'?". It was submitted there was no attempt to make the connection between the production, sales and earnings figures stated and the strict quality control procedures and analysis. In response, the Cargill Parties submitted "based on" bore its ordinary English meaning and that "founded on" would be a synonymous expression. In my view, there was no need for direct evidence on this point to make the connection the subject of the implied representation. Naturally, production, sales and earnings figures of a manufacturing business over an extended period must be based upon the manner in which the underlying business has been operated.

2854 The statements identified by Cargill Australia, including by reference to technical analysis and the strict quality measures, unrelenting focus on quality, the disciplined approach, uniformity, consistency, the stringent internal protocols and control measures across the entire production cycle, regular compliance and audits, and the ability to produce malt to customers' exact specifications and requirements necessarily and unequivocally represented the strict and controlled basis upon which the performance of the Joe White Business, and therefore the consequential production, sales and earnings figures, was achieved; namely, through strict quality control procedures and analysis.

1982 See pars 1644-1655, 2792 above.

2855 For completeness, the meaning of "exact specifications" needed to be considered in circumstances where it was generally understood that there could be variability in test results with respect to the same batch of malt when the malt to be delivered was tested. Thus, "exact specifications" representations in the context of selling a malt business could not have been sensibly understood to mean that issues with variability and testing did not exist. Rather, the representations concerning "exact specifications" were objectively conveying Joe White exactly meeting the specifications in accordance with the terms in the customers' contracts.

2856 The second implied representation, that the *production, sales and earnings figures stated in the Financial and Operational Information were based upon customer contracts including customer specifications being complied with*, was alleged to have been implied from the Information Memorandum by the matters set out in paragraph 2146(2), (4), (5), (7), (12), (13), (14), (15), (16), (17), (18) and (23) above, and the Management Presentation from the statements in paragraph 2168(1), (3), (4), (6) and (8) above, and Hughes' statement during the Management Presentation, in response to De Samblanx's question on silo capacity, that there were no real quality issues.[1983]

2857 Similar to their submissions with respect to the first implied representation, the Viterra Parties submitted that Cargill Australia sought to turn what they submitted were aspirational statements about Joe White's business model into a representation about Joe White's actual business performance. This submission cannot be accepted for the reasons already stated.[1984]

2858 Further, they submitted that the inference that Cargill Australia asked to be drawn from the statements identified was not capable of being drawn. They submitted that "the fact of a customer's specifications 'being complied with' [was] not a simple fact whose truth or falsity [was] capable of ready, simplistic verification; and it [was] therefore not a fact on which general statements about 'production, sales and earnings figures' could be impliedly premised". This submission was made on the basis that

1983 See pars 737, 2168(12), 2169-2172 above
1984 See pars 2837-2838 above.

the process of examining customer specifications was complex and not capable of any simplistic determination. In support of this premise, the Viterra Parties referred to the evidence of French, including his suggested prevalence of the use of pencilling and his alleged knowledge of that conduct by between 85 to 100 percent of participants in the commercial malting industry.[1985] Accordingly, so it was submitted, the question of whether Joe White complied with customer contracts, including customer specifications, could only be answered in a qualified way by reference to any limitations in testing methodology or any pencilling practice, and perhaps only after using subjective analysis.

2859 In light of these matters, the Viterra Parties submitted that whether or not Joe White complied with customer contracts was "not a fact that [was] necessarily capable of easy, absolute and objective verification". They further contended that in reality the substance of the representation in the context it was made must be understood as being that Joe White's customers did not reject its malt shipments.

2860 In a similar vein, the Viterra Parties' submissions continued:

> The only statements in the Information Memorandum in relation to the frequency with which customer contracts or specifications were complied with or met were statements that Joe White's business model **aimed** to "*consistently*" (though not "*uniformly*") meet its customers' requirements.
>
> (Original emphasis.)

2861 During oral closing submissions, it was raised with the Viterra Parties' senior counsel that the Information Memorandum used the word "ensured" rather than "aimed". When it was suggested to him that the meaning of "aimed" was quite different, it was agreed that it carried a different meaning. In short, this written submission did not reflect what was stated in the Information Memorandum; the meaning sought to be attributed to the relevant words in the Viterra Parties' written submissions was significantly different and suggested an equivocality that was not conveyed by the words used.

1985 See pars 2777, 2791 above.

2862 Equally, the contention that the substance of the representation about meeting customers' exact specifications could only be understood as suggesting Joe White's customers did not reject malt delivered to them sought to attribute a significantly different meaning from what was conveyed. While it may be accepted that it was implied that Joe White's customers were satisfied with the malt delivered to them, the reason given for this in the Information Memorandum was that Joe White met the exact specifications and requirements of its customers. Plainly, what was stated went much further than simply implying customers did not reject malt shipments from Joe White. Further, the submission made in this regard was largely premised on French's evidence, with respect to the Alleged Industry Practices concerning pencilling and the prevailing knowledge of such conduct throughout the industry, which evidence has not been accepted.[1986]

2863 In relation to the Management Presentation Memorandum, the Viterra Parties submitted the only statements made about customer contracts or specifications being complied with were statements about Joe White's reputation. They referred to the statement at page 22 of the Management Presentation Memorandum that Joe White had a "[r]eputation for production uniformity, consistency and ability to meet exact specifications". This was a curious submission in light of the fact that this particular statement was not relied upon by Cargill Australia in seeking to establish this implied representation. Further, reference to Joe White meeting exact specifications and requirements and obtaining barley that best met customer specifications was made elsewhere in the Management Presentation Memorandum.[1987]

2864 In any event, dealing with the submission made, it was contended that to state that Joe White had a reputation for meeting exact specifications did not state that the reputation was well-founded. Further, it was submitted that even if it did imply that it was well-founded, the statement made was that Joe White had *the ability* to meet exact specifications, rather than stating that it uniformly, consistently or with any other frequency, did so; or that Joe White's production, sales and earnings figures

1986 See pars 2775-2779 above.
1987 See, for example, pars 716, 718 above.

depended upon it doing so.

2865 There was no substance to the suggestion that the statement in question was implying anything other than the reputation referred to was well-founded. This conclusion is based on the reference to Joe White's representation in the context of the full sentence,[1988] and in the Management Presentation Memorandum more broadly. Plainly, Joe White was being presented in very positive terms to demonstrate the reputation was objectively very well-founded. Further, "the ability to meet exact specifications" was preceded by reference to production uniformity and consistency. When read in its context, the statement concerning exact specifications was not referring to some mere possibility, but was making reference to a reputation for actually performing in such a manner. Nevertheless, to reiterate, whatever the position might have been with this particular statement, it was not relied upon by Cargill Australia in order to establish this implied representation.

2866 It was submitted that the Management Presentation Memorandum was silent as to Joe White's actual operational performance in respect of customers' contract requirements. Further, the submissions concerning page 41 of the Information Memorandum were repeated.[1989] For the reasons already stated, a non-exhaustive statement about matters relied upon did not exclude other matters also forming the basis of the production, sales and earnings figures.[1990]

2867 Finally, the Viterra Parties made submissions about the Operations Call, the Commercial Call and other matters not responsive to the basis upon which Cargill Australia put this aspect of the case. Accordingly, it is unnecessary to respond directly to these submissions here.

2868 In responding to the Viterra Parties' submissions on this point, the Cargill Parties submitted that it was an astonishing claim that the statement about compliance with customer specifications was not a simple fact of truth or falsity which could be

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1988 See par 727 above.
1989 See par 2840 above.
1990 See pars 2839-2841 above.

verified, and thereby was incapable of providing a premise for the implied representation. The Cargill Parties contended that, in essence, such a submission amounted to adopting a position that despite the fact that Joe White's customers required Joe White to meet specifications, and stipulated as much in their contracts, that was not what Joe White did; and that this was successfully managed with their customers so as to not impede Joe White's ability to make a profit; and that all of this ought to be understood from what was stated in the Information Memorandum. Further, the Cargill Parties submitted that arguing that customer specifications could not be met was an illegitimate means of undermining what was said in very plain terms about Joe White, which was far more than simply that Joe White kept its customers happy.

2869 Turning to the statements relied upon themselves, they contained assurances about stability, long-term customer relationships and long-term contracts, the ability of Joe White to meet customer specifications and that Joe White ensured exact specifications and requirements were met. Again, for the reasons discussed with respect to the first implied representation, it was implicit that the production, sales and earnings figures as stated in the Financial and Operational Information must have been based upon such matters.

2870 Before leaving this implied representation, a further submission of the Viterra Parties should be addressed briefly. As a result of the Warranties agreed upon for the purposes of the Acquisition Agreement,[1991] the Viterra Parties contended that Cargill accepted the risk concerning Joe White in relation to whether there had been a breach of any non-material contracts, a non-material breach of any Material Contracts, historical defaults of any Material Contracts (where the default no longer subsisted as at the date the Warranty was given), a breach of a material contract not known to Viterra Malt, and whether Joe White's assets were sufficient for it to be conducted in a way different from the way Joe White had been operating in the year leading up to the Acquisition Agreement.[1992] Thus, it was submitted that Cargill knew Viterra made

1991 See par 1034 above.
1992 See Warranties 6.1(e), 7.3: ibid.

no representation in relation to any of these matters and therefore knew Viterra was not conveying any representation to the effect that the production, sales and earnings figures stated in the Financial and Operational Information were based upon customer contracts including customer specifications being complied with.

2871 Obviously, all surrounding circumstances need to be considered. However, the negotiations at the 11th hour in relation to what the Sellers were willing to make the subject of a Warranty for the purposes of the Acquisition Agreement (and the contractual obligations that flowed from such a willingness) were of marginal relevance to the question of whether or not the representation as alleged had been made as a matter of fact. In the way in which the negotiations and bidding process unfolded in this case, the existence of any Warranty of the kind identified could not have had the effect of vitiating the clear and unequivocal position previously conveyed that Joe White met its customers' specifications in achieving the production, sales and earnings figures as reported as part of the sale process.

2872 The third implied representation, namely that the *production and sales figures stated in the Financial and Operational Information had been properly and lawfully achieved*, was said to follow from the matters alleged as the basis of the 2 preceding implied representations.

2873 The Viterra Parties submitted there was no basis for the pleaded allegation. It was submitted that no statement had been made in the Information Memorandum or the Management Presentation Memorandum about the propriety or lawfulness of the way in which Joe White achieved its figures. They also referred to Warranty 7.3 of schedule 4 of the Acquisition Agreement[1993] as a means of demonstrating that the parties agreed that Cargill had no protection in respect of any default by Joe White which was outside Viterra Malt's knowledge.

2874 It was correct to submit that no express statement was made about propriety or lawfulness, however that did not address whether or not a representation was implied

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1993 See par 1034 above. See also issue 43 below.

from what was in fact said. Further, what was subsequently agreed to form part of the Acquisition Agreement pursuant to negotiations held in late July and early August 2013, many weeks after the statements in the Information Memorandum and the Management Presentation Memorandum had been made, was not relevant to whether the implied representation alleged was made by the 2 documents at the time they were disseminated.

2875 The Cargill Parties simply submitted that the references to strict quality control procedures and analysis, and complying with customer specifications implied that things were being done properly and lawfully.

2876 In my view, it is plain that a representation in the terms alleged was made, given the statements made about quality, control, compliance, auditing and the like. There was nothing in the statements made to suggest that the Joe White Business was being conducted other than properly and lawfully. Quite the contrary, there were numerous positive statements that indicated the Joe White Business was conducted in a strict and controlled manner, and in compliance with customers' contracts. It must follow from that that the production and sales figures were also represented to be properly and lawfully achieved.

2877 The fourth implied representation alleged to have been made was that *Joe White had not withheld or concealed material information from customers*. In part, this was said to be implied from the statements alleged to have been made during the Operations Call. To the extent that those statements have been found not to have been made as pleaded,[1994] they will not be taken into account in determining whether this implied representation was made. By reference to the statements that have been established, Cargill Australia relied upon the Information Memorandum and the matters set out in paragraph 2146(6), (8), (12), (13), (15), (16), (17), (18), (20), (21), (22) and (23) above, the Operations Call Statements in paragraph 2149(b)(i), (ii), and (iv) in part, each of the Commercial Call Statements set out in paragraph 2165 above, and statements made during the Management Presentation as set out in paragraph 2168(6) and (10)

1994 See par 2152-2158 above.

above. Cargill Australia also referred to the fact that at no time before 4 August 2013 did any of the Viterra Parties withdraw or qualify any of the statements made in the Information Memorandum, the Data Room, the Management Presentation, the Operations Call or the Commercial Call; which was submitted to have reinforced the fourth implied representation.

2878 On the basis that neither the Information Memorandum nor the Management Presentation Memorandum stated that it contained any statement as to the completeness of the information that Joe White had provided to its customers, the Viterra Parties submitted there was no basis to plead that Joe White had not withheld or concealed material information from them.

2879 In my opinion, statements made to the effect that Joe White identified and focused on a detailed understanding of specific customer requirements, that Joe White met customers' exact specifications and requirements, and that it had established long-term relationships with customers, in the context in which they were made, necessarily implied that Joe White was not withholding or concealing material information from its customers. Indeed, in such circumstances as represented, it was difficult to perceive a basis upon which it might be said that material information might have been withheld. To put it another way, it must follow that it is highly likely, if not inevitable, that withholding or concealing *material* information from a customer would mean that its requirements were not being met.

2880 For completeness, establishing that this alleged implied representation was made was not dependent upon Cargill Australia proving that each of the alleged statements in the Operations Call was made. In my view, the implied representation was necessarily made as a result of the matters relied upon by Cargill Australia other than those in the Operations Call that were not established.

2881 In seeking to establish the fifth implied representation was made, namely that the *assets of the Joe White Business were sufficient for Joe White to sell malt in the volumes and for returns stated in the Financial and Operational Information*, Cargill Australia also relied

upon the statements alleged to have been made in the Operations Call. Again, the statements that have not been found to have been made as pleaded will not be taken into account.

2882 In support of this allegation, Cargill Australia referred to the Information Memorandum and the matters set out in paragraph 2146(9), (10), (11), (12), (13) and (14) above, the Operations Call and the matters set out in paragraph 2149(b)(i), (ii), and (iv) in part, and statements made during the Management Presentation as referred to in paragraph 2168(4) and (8) and paragraph 2169 above.

2883 The Viterra Parties submitted there were 2 reasons why this implied representation was not made. *First,* none of the statements relied upon referred to *sufficiency* of the assets of Joe White, but were confined to their relative modernity compared to other facilities. *Secondly,* it was submitted that if the first submission was not accepted, nothing said to Cargill would have provided a viable basis for an implication that any statement about sufficiency of assets could have been a statement about the way in which the assets could enable malt to be sold either in a particular volume or for any particular amount of returns.

2884 Essentially, the Viterra Parties contended that statements about the need for only limited future capital investment said nothing about the sufficiency of the assets because any statement about sufficiency was necessarily relative to the particular standard by which the assets could be measured as sufficient. Further, if any measure was referred to, it was submitted it was confined to capital investment necessary to ensure that the facilities remained modern, state-of-the-art, best-in-class or well-maintained and capitalised. In short, it was contended that none of these measures, to the extent that they might have been referred to (contrary to the primary submission), represented that the assets of the Joe White Business were sufficient for the volumes and the returns stated.

2885 In addition, the Viterra Parties submitted that even if it were found that Hughes stated at the Management Presentation that Joe White was managing its customers well and

that there were no real quality issues,[1995] such a statement did not entail any implied statement that the business assets were sufficient for Joe White to sell malt in the volumes and for the returns stated.

2886 Finally, the Viterra Parties correctly pointed out that the contemporaneous notes of the Operations Call and the evidence more generally did not support the allegation that it was expressly stated during the Operations Call that Joe White's plants were sufficient to produce malt to customer specifications.[1996]

2887 The Viterra Parties' submissions on this point sought to artificially confine any implied representation to what was strictly said expressly.

2888 In broad summary, in the statements identified Cargill Australia was told that Joe White had a particular annual production capacity for each of the financial years from 2010 to 2013. Obviously, that annual production capacity had been able to be achieved with the assets that Joe White had at the relevant times. In addition, it was stated that the assets of Joe White were of a very high standard and operational efficiency which underpinned Joe White's production and its ability consistently to meet customers' specifications, and that there were low future capital needs in the short to medium term. It was implicit from such statements that the assets of the Joe White Business were sufficient to sell malt in the volumes and for the returns stated.

2889 The sixth implied representation, that *Joe White had low capital expenditure needs in the short to medium term*, was based on 4 statements which have been established to have been made. Cargill Australia relied upon statements in the Information Memorandum set out in paragraph 2146(9), (10) and (11) above, and in paragraph 2168(9) above with respect to the Management Presentation.

2890 The Viterra Parties referred to 2 statements made in the Information Memorandum in which it was stated that Joe White had low future capital needs in the short to medium term, and then noted that similar statements were made in the Management

1995 As it has been: see par 737 above.
1996 See issue 2 above.

Presentation Memorandum. They also referred to the fact that it was stated during the Operations Call that Joe White's plants (except for Sydney) had malt storage that was more than sufficient for their requirements.

2891 Having made these observations, the Viterra Parties then submitted that the statements that were made only related to the way in which Joe White was operating at the time. They further submitted that Cargill knew Joe White was engaging in the Alleged Industry Practices and that Cargill did not intend to permit Joe White to engage in those practices after it had completed the Acquisition.

2892 For reasons stated above,[1997] submissions based upon Cargill knowing of the Alleged Industry Practices cannot succeed. Further, while it was correct to submit that Cargill had no intention of permitting Joe White to engage in practices similar to the Alleged Industry Practices after Completion, such a submission was not to the point in circumstances where Cargill was not told, and did not know, of the Viterra Practices (or even the Operational Practices).

2893 It follows from this that the submission based upon how Joe White was operating at the time necessarily fell away. Further, how Cargill might have intended to operate Joe White in the future did not affect the nature of the representation being made about Joe White's capital expenditure needs as it was then being conducted.

2894 In summary, statements to the effect that Joe White had low future capital needs in the short to medium term were expressly made, as well as being implicit in the statements identified concerning well-capitalised, state-of-the-art, best-in-class facilities.

2895 Significantly, in oral closing submissions, the Viterra Parties' lead senior counsel expressly acknowledged that the sixth implied representation had been made. This acknowledgement, which was unqualified and plainly correct, also implicitly acknowledged that the Sale Process Disclaimers did not have the effect of resulting in

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1997 See issue 13 above.

no representations being made at all.

2896 The seventh implied representation, that *when procuring barley, Joe White gave priority to obtaining barley that best met its customers' specifications and requirements*, was alleged to have been implied from statements in the Information Memorandum set out in paragraph 2146(19), (20), (21), (22) and (23) above, the Commercial Call Statements set out in paragraph 2165 above, and the Management Presentation as set out in paragraph 2168(3) and (7) above.

2897 In addressing this alleged implied representation, the Viterra Parties did not submit that an analysis of the express statements relied upon, in themselves, did not give rise to the implied representation. Rather, they made 2 submissions as to why the implied representation should not be found to have been made.

2898 *First,* it was noted that this allegation was not made by Cargill Australia until the Statement of Claim was amended in August 2018, more than 5 years after the events in question and a number of weeks after the trial had commenced. *Secondly,* the Viterra Parties referred to matters about which Cargill was informed during the Due Diligence.

2899 In relation to the first of these matters, although a delay in making the allegation may give rise to issues concerning reliance and causation, it did not affect an exercise of determining whether, objectively, an implied representation was made by reason of a series of express statements.

2900 As to the second matter, a number of issues were raised.

2901 The Viterra Parties referred to the statement in the Management Presentation Memorandum that an operational risk for Joe White was the ability to source barley of the correct variety, quality and specification. However, this statement needed to be read in the context where, under the heading "Risk Management Discipline", it was stated that this exposure was managed.

2902 Next, the Viterra Parties referred to Goldman Sachs' summary of the Management

Presentation, which recorded that Joe White's ability to service key accounts was limited by "the fact that it could not get its desired barley varieties out of New South Wales". The note actually recorded that Joe White could not "currently" get the desired varieties out of New South Wales.[1998] There was no suggestion that it was an ongoing or more general problem.

2903 Next, the Viterra Parties referred to what was stated during the Commercial Call about the ability of Joe White to compete in Japan, which was negatively affected by the quality of the barley available in Australia. However, such a representation, particularly when understood in the context that it was made,[1999] was entirely consistent with an implied representation that Joe White gave priority to obtaining barley that best met its customers' specifications and requirements.

2904 Next, the Viterra Parties referred to Cargill being provided with a spreadsheet setting out Joe White's barley purchasing contracts.[2000] This spreadsheet indicated "around half" of Joe White's contracts for the purchase of malting barley did not specify a particular variety. In addition to this point, the Viterra Parties referred to Cargill being informed about the purchase of significant quantities of non-grade 1 malting barley, and of "thousands of tonnes of non-malting barley each year for the past 3 years" (which was presumably a reference to Hindmarsh).

2905 In relation to the disclosure of Hindmarsh in Joe White's inventory, it has been found that, with the possible exception of Purser,[2001] this did not put Cargill on notice of Joe White using non-malting barley.[2002] Further, there was no indication from the fact that the barley variety (as distinct from the grade of barley) was often not specified in purchasing contracts, nor from the purchases of non-grade 1 malting barley, that

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1998 See fn 520 above.

1999 See par 914 above. The full agreed summary on this issue stated that, in substance, historically Joe White's ability to compete in Japan was significantly limited due to sourcing of quality barley when compared to Canadian competitors. Further, the construction of the Minto plant had been designed specifically to target the North Asian and Japanese markets. Furthermore, Joe White had a good working relationship with brewers in Japan and had worked with Kirin for several years. Moreover, new barley varieties in Australia would see an improvement in Australia's competitiveness in this market.

2000 See par 952 above.

2001 But, as to her position, see pars 955, 2716 above.

2002 See pars 2715-2717 above.

customer specifications were not being met or that Joe White was not obtaining barley that best met the requirements and specifications. Absent the express statements as identified by Cargill Australia, such facts may have suggested that position was a possibility, but in the context where such express statements had been made Cargill was not informed otherwise by this information.

2906 A review of the statements that were made, namely that Joe White consistently had access to, was focused upon selecting, and purchased, barley which was of high quality, which barley best met customers' specifications, also represented that this was the manner in which Joe White conducted its operations. It was implicit in such statements that Joe White gave this priority when procuring barley.

2907 The eighth implied representation, that *Joe White employed technical analysis and strict quality control procedures to ensure that the malt it produced consistently met its customers' specifications*, was alleged to have been implied from statements in the Information Memorandum as set out in paragraph 2146(12), (13), (14), (16), (18) and (24) above, and the Management Presentation as set out in paragraph 2168(2) and (5) above.

2908 The Viterra Parties again emphasised that this alleged implied representation did not find its way to the Statement of Claim until August 2018. Be that as it may, the submissions dealing with the substance of the allegation stated that the Viterra Parties relied upon earlier submissions addressing what was said to be the flaws inherent in seeking to interpret general statements of aspiration as specific statements of fact, and conflating a statement as to Joe White's reputation with the statement as to Joe White's actual operations. As these submissions have been addressed above,[2003] nothing further needs to be added in rejecting them.

2909 It was plain that such a representation was implied from the statements pleaded by Cargill Australia, which included that Joe White utilised technical analysis and strict quality control procedures to ensure that the customer specifications were consistently met.

2003 See pars 2836-2845, 2863-2864 above.

2910 The ninth implied representation, that *a central reason for Joe White's ability to achieve the performance described in the Information Memorandum was its ability to produce malt that met its customers' exact specifications and requirements, and its focus on doing so*, was alleged to be implied from the statements in the Information Memorandum set out in paragraph 2146(6), (8), (12), (15), (16), (17), (18), (20), (21), (22) and (23) above, and in the Management Presentation as set out in 2168(1), (3) and (10) above.

2911 Again the Viterra Parties identified that this allegation was not made until August 2018. More substantively, they submitted that no statement was made about any central reason for Joe White's ability to achieve the performance described in the Information Memorandum. It was submitted that such a representation ought not be implied from the material provided to Cargill in light of the "subjective terms" in which any statement about customer specifications would necessarily be made. This was a reference back to an earlier submission,[2004] which has already been rejected.

2912 Further, the Viterra Parties submitted there were 2 reasons why the statements relied upon concerning Joe White's reputation could not be the basis of the implied representation. These were in substance a repetition of earlier submissions which have been rejected.[2005]

2913 The statements identified by Cargill Australia demonstrated that Cargill was told repeatedly how Joe White was able to meet its customers' exact specifications and requirements, and its focus upon doing so. The implied representation was made.

2914 Finally, the tenth implied representation that the *Undisclosed Matters did not exist* was alleged to have been arisen from the failure of the Viterra Parties to disclose the Undisclosed Matters during the Due Diligence, coupled with the statements made in the Information Memorandum as set out in paragraph 2146(4), (7), (8) and (17) above, and in the Management Presentation as set out in paragraph 2168(2), (6), (7) and (10) above. Cargill Australia also relied upon the fact that at no time prior to 4 August 2013 did any of the Viterra Parties withdraw or qualify the statements made in the

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2004 See par 2858 above.

2005 See pars 2863-2864 above.

Information Memorandum, the Data Room, the Operations Call, the Commercial Call and the Management Presentation.

2915 The Viterra Parties emphasised that this allegation was not simply concerned with silence or a failure to disclose information. They submitted the manner in which this allegation was pleaded required the court to find the representation as identified was made.[2006] In response, the Cargill Parties submitted that the positive representation and the non-disclosures were 2 sides of the 1 coin as the true state of affairs could not sit compatibly with the positive representations. It was submitted that the relevant non-disclosures were correctly described as representations in the situation where the making of positive representations impliedly represented that an incompatible state of affairs did not exist. It was submitted the Undisclosed Matters went to the very heart of the Joe White Business and were completely and utterly incompatible with the positive statements made.

2916 It has already been found that the Undisclosed Matters existed and that they were not disclosed.[2007] The Undisclosed Matters were material to the Joe White Business as they went to the very basis upon which Joe White was able to achieve the financial results that it did leading up to 4 August 2013. By making the positive statements in the Information Memorandum and the Management Presentation as referred to by Cargill Australia, including concerning the effectiveness of the business model, the strong track record, the long-term relationships and contracts in place and the ability to meet customer specifications and requirements, and not disclosing information during the Due Diligence which indicated to a prospective purchaser a material, indeed fundamental, means of operations by which these things were achieved or purported to be achieved (as the case may be), it was implicitly represented that there were no practices in existence that would have undermined or falsified the ability of Joe White to meet customer specifications and requirements, such as the Viterra Practices.

2917 In summary, Cargill Australia has established that each of the Financial and

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2006 In making this submission, the Viterra Parties' senior counsel of his own volition said he conceded the case had not been run the way it had been pleaded: see issues 15.3.6-15.3.7 above.

2007 See issues 10 and 12 above.

Operational Performance Representations was made.

X.15.3 The effect of the Sale Process Disclaimers, Acquisition Agreement Liability Terms and the Alleged Industry Practices

X.15.3.1 The submissions

2918 The Cargill Parties submitted that precisely how the matters relied upon by the Viterra Parties were said to modify the statements made during the course of negotiations was not clear.

2919 By reference to the manner in which the Viterra Parties opened their case, the Cargill Parties submitted that nothing said in any of the disclaimers or similar terms of other documents operated to affect the meaning conveyed by the representations made.

2920 In relation to issue 15 as formulated referring to certain terms of the Acquisition Agreement despite not having been pleaded,[2008] the Cargill Parties referred to this fact, before submitting that nothing contained in those terms could affect the meaning conveyed by the various matters relied upon.

2921 With respect to the Alleged Industry Practices, the Cargill Parties submitted that any industry practices were incapable of negating the representations made to the effect that Joe White met customers' exact specifications. However, as the Alleged Industry Practices have not been found to have existed,[2009] it is unnecessary to address this submission.

2922 The primary submission made by the Viterra Parties was that, as a matter of fact, only Glencore made the statements contained in the Information Memorandum and only Glencore provided the Financial and Operational Information. For reasons already discussed,[2010] the underlying bases of such a submission have been rejected. In circumstances where it was expressly stated that both the Information Memorandum and the Management Presentation Memorandum had been prepared by Glencore and its subsidiaries (being Viterra) as a means of providing background to assist a recipient

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2008 See par 2829 above.
2009 See issue 13 above.
2010 See pars 475-483 above.

in deciding whether to further consider the acquisition of Glencore's and its subsidiaries' interest (being Viterra's interest) in the malt business, the Information Memorandum Statements and the Management Presentation Statements were made by both Glencore and Viterra. In addition, to the extent Hughes or Argent made statements that formed part of the basis of the Financial and Operational Performance Representations, those statements were also made on behalf of both Glencore and Viterra.[2011]

2923 They further submitted that it was incorrect to allege that none of the Undisclosed Matters were disclosed before the Acquisition Agreement was entered into. This has also been rejected.[2012] Furthermore, it was submitted as the Viterra Parties were unaware of the Undisclosed Matters before the Acquisition Agreement was entered into, "any failure" to disclose them should be found to be incapable of giving rise to misleading or deceptive conduct.

2924 Moreover, the Viterra Parties submitted there were 3 independent reasons for finding that the Financial and Operational Performance Representations were not made.

2925 *First,* they submitted that the Sale Process Disclaimers and Acquisition Agreement Liability Terms relied upon by the Viterra Parties made it clear to Cargill Australia that the statements relied upon by Cargill Australia were not capable of giving rise to the Financial and Operational Performance Representations.

2926 *Secondly,* it was submitted that, if the Financial and Operational Performance Representations were made to the extent that they were, then the context in which they were provided ensured Cargill knew the statements made were not made as statements of fact capable of being used to draw further inferences of fact, but rather as statements that were capable of being used as no more than the starting point for any investigation into the facts. During oral closing submissions, the Viterra Parties' senior counsel stated that the Information Memorandum was a starting point "in the sense that it could be relied upon" for the purpose of an indicative offer, and that was

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2011 See issue 11 and pars 475-476 above and pars 3106-3108, 3110-3111 below.

2012 See issue 12 above.

what "everything says". However, it was contended that thereafter, Cargill was permitted to conduct its own due diligence and had stated that it would rely exclusively on its own investigations and assessments.[2013]

2927 *Thirdly*, it was submitted that the statements relied upon were not capable of conveying the implied representations as alleged. This was contended to be the case especially given Cargill's significant expertise and decades of experience in the malting industry and its knowledge of the Alleged Industry Practices. On this basis, it was submitted that Cargill must have understood that the statements made provided an unreliable basis from which any inferences could be drawn.

2928 Working backwards, in relation to the third reason given, this submission has been rejected for the reasons already stated.[2014] Further, the fact that Cargill had significant expertise and experience in the malting industry did not equate to having knowledge of Joe White's financial or operational performance, nor did not alter the representations that were in fact conveyed or the objective meaning conveyed by the making of the Financial and Operational Performance Representations. There was nothing about Cargill's position or knowledge to suggest Cargill would have understood the Financial and Operational Performance Representations in a way which was different to the objective meaning.

2929 With respect to the second reason put forward, this can be dealt with succinctly. The submission as to when, or the extent to which, the contents of the Information Memorandum could be relied upon carried with it an acceptance that it could be relied upon at least up to a particular point. Thus, even on the Viterra Parties' approach, it was accepted statements were made with the intention they could be relied upon for the purpose of formulating an indicative bid. In my view, this acceptance of representations having been made for at least this purpose (which was plainly correct) amounted to an acceptance that conduct had been engaged in in trade or commerce such that it was open to consider whether the Financial and Operational Performance

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2013 See further par 3047 below. See also issue 105 below.

2014 See pars 2835-2916 above.

Representations were made even for the limited purpose for which the Viterra Parties contended. Whether they were made (or continued to be made) beyond Phase 1 may be considered separately.[2015]

2930 Before the first reason of the Viterra Parties and the remainder of the Viterra Parties' submissions on this issue are addressed, it is necessary to refer to the relevant legislation relied upon by Cargill Australia together with the principles applicable to the construction and operation of that legislation.[2016]

X.15.3.2 Legislation and related principles

2931 Cargill Australia alleged that the making of the Financial and Operational Performance Representations was conduct in trade or commerce of Glencore or Viterra, or both, that was misleading or deceptive in contravention of section 18 of the Australian Consumer Law. Section 18(1) provides:

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

2932 To the extent that the Financial and Operational Performance Representations were representations as to future matters, Cargill Australia also relied upon section 4 of the Australian Consumer Law, which provides:

> (1) If:
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> (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
>
> (b) the person does not have reasonable grounds for making representation;
>
> the representation is taken, for the purposes of this Schedule, to be misleading.
>
> (2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:

2015 As was observed in *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* [2004] VSCA 232, [29], once conduct is engaged in, subsequent events cannot change what has occurred (Nettle JA, with whom Batt and Vincent JJA agreed).

2016 To be clear, the issue of whether the making of the Financial and Operational Performance Representations was misleading or deceptive is dealt with in issue 16. However, the authorities relevant to that issue are also relevant to whether or not a representation was in fact made or not made by reason of a disclaimer or disclaimers.

(a) a party to the proceeding; or

(b) any other person;

the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

(3) To avoid doubt, subsection (2) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making representation; or

(b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.

(4) Subsection (1) does not limit by implication the meaning of a reference in this Schedule to:

(a) a misleading representation; or

(b) a representation that is misleading in a material particular; or

(c) conduct that is misleading or is likely or liable to mislead;

and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

X.15.3.3 Disclaimers

2933 Very broadly speaking, this proceeding involved 2 separate types of clauses that the parties collectively referred to as "the disclaimers". The first category comprised disclaimers as to the accuracy of information provided to Cargill. The second comprised clauses termed "no reliance" clauses, by which Cargill agreed to accept information on the basis that it would not rely on statements made or other information provided to it in the course of the transaction (outside of the contractual Warranties).

2934 A disclaimer as to accuracy goes towards whether the conduct complained of can be considered misleading or deceptive. The question for resolution is whether, considering the whole of the conduct including the existence and wording of any disclaimer, the conduct in question is misleading.

2935 By contrast, ordinarily "no reliance" clauses are particularly relevant when considering causation.[2017] The question to be answered is whether a "no reliance" clause agreed to by a person receiving information[2018] is evidence that that party *in fact* did not rely on representations made by the other. This type of "disclaimer" is considered below.[2019] It suffices to say for present purposes that, generally speaking, no reliance clauses would not alter the conduct (or the proper characterisation of the conduct) engaged in, such as the making of a representation,[2020] but rather they may be relevant to whether any loss suffered was "because of" the relevant conduct.[2021]

2936 As discussed below, the cases clearly demonstrate that the role of disclaimers in a context of claimed misleading or deceptive conduct is primarily, if not exclusively, evidentiary.[2022] The existence or otherwise of disclaimers may give rise to an inference as to the relevant party's or parties' actual state of mind at the time the transaction was concluded, or be relevant to determining what a reasonable person in the position of the recipient would have done or understood. However, they are not in and of themselves exhaustively legally determinative of whether a plaintiff has an enforceable claim based on a contravention of section 18 of the Australian Consumer Law.

X.15.3.4 Disclaimer as to accuracy

2937 A key case concerning the effect of disclaimers as to accuracy, *Butcher v Lachlan Elder Realty Pty Ltd*,[2023] concerned a claim for misleading or deceptive conduct arising out of a contract for the sale of land. The real estate agent had produced a brochure that reproduced a survey diagram of the land, which was provided to the purchasers before sale. The survey diagram depicted a pool on the property as being above the

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2017 See, for example, *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 320-321 [30]-[31] (French CJ).

2018 Such an agreement may be before, simultaneous with, or after, the provision of the information.

2019 See issue 20 below.

2020 Compare *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 612-613 [69] (Gleeson CJ, Hayne and Heydon JJ).

2021 See Australian Consumer Law, s 236(1)(a).

2022 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 320-321 [28]-[32], 341-342 [102], 348 [130] (Gummow, Hayne, Heydon and Kiefel JJ).

2023 (2004) 218 CLR 592.

mean high water mark when in fact it was not. The real estate agent stated in the brochure that although it believed the information contained within it was reliable, it had been produced by others and its accuracy could not be guaranteed.

2938 The plaintiffs' case was run on the basis that the agent itself had made positive misrepresentations as to the title to the land and that the swimming pool on the property lay above the high water line.[2024] The fact that the pool was below the high water mark meant that the purchasers were unable to relocate the pool as planned. The purchasers only discovered this fact after signing a contract and paying a deposit of $200,000.

2939 There were 2 disclaimers on the brochure, on the front and on the back of the double-sided single sheet. They contained substantially similar language. The disclaimer on the front page stated:[2025]

> Lachlan Elder Realty Pty Ltd ACN 002 332 247. All information contained herein is gathered from sources we believe to be reliable. However we cannot guarantee it's (sic) accuracy and interested persons should rely on their own enquiries.

2940 Gleeson CJ, Hayne and Heydon JJ held that, considering all of the conduct of the agent and other circumstances which might qualify its character, including the nature of the parties, the character of the transaction and the contents of the brochure itself, the agent "did no more than communicate what the vendor was representing, without adopting it or endorsing it".[2026]

2941 After referring to the principle that a corporation which purports to do no more than pass on information supplied by another (which information turns out to be false) need not have engaged in misleading or deceptive conduct if the corporation has made it apparent that it is not the source of the information and disclaimed any belief as to its truth or falsity,[2027] their Honours stated that it was important the agent's

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2024 Ibid, 603 [32].
2025 Ibid, 596-597 [7]. See also at 597 [10].
2026 Ibid, 605 [40].
2027 Ibid, 605 [38], referring to *Yorke v Lucas* (1985) 158 CLR 661, 666 (Mason ACJ, Wilson, Deane and Dawson JJ).

conduct be viewed as a whole. They continued:[2028]

> It is not right to characterise the problem as one of analysing the effect of its "conduct" divorced from "disclaimers" about that "conduct" and divorced from other circumstances which might qualify its character. Everything relevant the agent did up to the time when the purchasers contracted to buy the … land must be taken into account.

2942 Considering the question of whether the purchasers saw the disclaimers, their Honours stated:[2029]

> The Court of Appeal declined to "accord [the disclaimers] decisive significance", but they do have some significance. If the "conduct" of the agent is what a reasonable person in the position of the purchasers, taking into account what they knew, would make of the agent's behaviour, reasonable purchasers would have read the whole document, given its importance, its brevity, and their use of it as the source of instructions to professional advisers.
>
> (Citation omitted.)

2943 They concluded it would have been plain to the reasonable purchaser, in the position of the plaintiffs, that the real estate agent was not the source of the information that was said to be misleading, as the agent had done nothing more than pass on the information supplied by others and had both expressly and impliedly disclaimed any belief in the truth or falsity of that information.[2030]

2944 Their Honours' reasons went on to consider earlier cases dealing with disclaimers in the context of a misleading or deceptive conduct claim, and specifically where the disclaimers stated that information conveyed to purchasers had been obtained from other sources. Further, they referred to the level of analysis of the wording of disclaimers, and stated that the appropriate level might vary from case to case.[2031] On the facts of the case, they found that it was not inappropriate to closely consider the contents of the brochure in determining whether the agent had made a representation.

2945 Importantly, their Honours distinguished *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*,[2032] where the Full Court of the Federal Court held that a

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2028 Ibid, 605 [39].
2029 Ibid, 608 [50].
2030 Ibid, 609 [51].
2031 Ibid, 616 [76].
2032 (1993) ATPR 41-249 (Davies, Heerey and Whitlam JJ).

disclaimer as to the accuracy of information relating to real estate in a brochure distributed by the real estate agent did not prevent a successful claim for misleading or deceptive conduct. In that case, the disclaimer, which appeared on the inside of the back cover, provided:[2033]

> The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case *we have no reason to doubt its completeness or accuracy*.
>
> However, *neither John G Glass Real Estate Pty Limited, its employees or its clients guarantee the information* nor does it, or is it intended, to form part of any contract. Accordingly, all i*nterested parties should make their own enquiries to verify the information as well as any additional or supporting information supplied* and *it is the responsibility of interested parties to satisfy themselves in all respects*.
>
> (Emphasis added.)

2946 The agent had held itself out in the brochure to be "consultants to institutional investors and to developers of major properties". The Full Federal Court had held that such an agent "would not be regarded by potential purchasers of properties as merely passing on information about the property 'for what it is worth without any belief in its truth or falsity'".[2034] Further, the alleged misleading conduct in that case was a misstatement of the net lettable area of a commercial property – a matter the Full Federal Court considered was 1 of "hard physical fact".[2035] It was upon these bases that Gleeson CJ, Hayne and Heydon JJ held that that case was not comparable with the situation before them. The agent in *Butcher v Lachlan Elder Realty Pty Ltd* had not claimed to have any special expertise and the location of the water line was not necessarily easily ascertainable.[2036]

2947 Further the majority stated that a finding of fact of the Full Federal Court in that case was questionable in light of the terms of the disclaimer. In so doing, the following observation was made:[2037]

2033 Ibid, 41,358 col 1.4.

2034 Ibid, 41,359 col 1.4, paraphrasing *Yorke v Lucas* (1985) 158 CLR 661, 666, which was referred to in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 611 [64].

2035 Ibid, 41,359 col 2.1.

2036 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 611-612 [64]-[65].

2037 Ibid, 612 [67].

> It does not seem quite correct to describe an estate agent which says it has no reason to doubt the accuracy of information but says it does not guarantee it, advises interested parties to make their own inquiries, and says interested parties have the responsibility of satisfying themselves in all respects, as making an ''express assertion'' of belief in the information.

2948 After discussing this and various other cases, their Honours held that the agent in *Butcher v Lachlan Elder Realty Pty Ltd* had not engaged in misleading or deceptive conduct.

2949 By contrast, McHugh J decided that the agent's conduct had been misleading or deceptive and the disclaimer did not result in the agent avoiding liability.[2038] Although McHugh J was in dissent on the facts of the case, his Honour's statements as to the effect of disclaimers generally are useful and have been cited in subsequent cases as statements of authority.[2039] In relation to disclaimers, his Honour said:[2040]

> Where a corporation passes on information supplied by another, one circumstance that may preclude a finding of a contravention of s 52 [being the predecessor of section 18 of the Australian Consumer Law] is where the corporation *expressly or impliedly disclaims any belief in the truth or falsity* of the information. Another circumstance is where the corporation expressly or impliedly *disclaims personal responsibility* for what it conveys. The presence and impact of a disclaimer are *particularly relevant where the impugned conduct is alleged to have induced a particular course of conduct by the complainant*.
>
> …
>
> … the intent of the corporation is not relevant for the purposes of s 52. As a result, a disclaimer as to the truth or otherwise of a representation does not, of itself, absolve the corporation from liability.
>
> This is not to say that a disclaimer should be ignored for the purposes of assessing whether a contravention of s 52 has occurred. As Miller notes in *Miller's Annotated Trade Practices Act*, the conduct must be considered as a whole. This requires consideration of whether the conduct in question, including any representations and the disclaimer, is misleading or deceptive or is likely to mislead or deceive. *If a disclaimer clause has the effect of erasing whatever is misleading in the conduct, the clause will be effective, not by any independent force of its own, but by actually modifying the conduct*. However, a formal disclaimer would have this effect only in rare circumstances.

2038 In writing a separate judgment, Kirby J also found that the agent had been engaged in misleading or deceptive conduct.

2039 See, for example, *Jewelsnloo Pty Ltd v Sengos* [2016] NSWCA 309, [63] (Macfarlan JA, with whom Beazley ACJ and Payne JA agreed). In this case, it was noted that the trial judge correctly had not treated a disclaimer (being a "no reliance" clause) as an absolute bar to the plaintiff succeeding on its misleading or deceptive conduct claims.

2040 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 638-639 [150]-[152].

(Emphasis added, citations omitted.)

2950 In concluding that the agent ought to be held liable for misleading or deceptive conduct, his Honour stated:[2041]

> … once misleading or deceptive conduct is shown, the [Trade Practices] Act prevails over the disclaimer. It would be contrary to the consumer protection objects of the statute and to public policy for disclaimers to deny a statutory remedy for offending conduct under the Act.

X.15.3.5 Additional case law

2951 There are, unsurprisingly, a surplus of cases considering the efficacy or otherwise of disclaimers in the context of claims for misleading or deceptive conduct. It is unnecessary to give a discursive account of the many cases that have considered the issue over the last 4 or so decades. As is plain from what it set out above, ultimately the issue for the court is a question of fact and "everything must depend on an appropriately detailed examination of the specific circumstances".[2042] That said, there are some further cases that are of some assistance to the issues presently before the court.

2952 In *Downey v Carlson Hotels Asia Pacific Pty Ltd*,[2043] Keane JA considered the impact of a disclaimer that stated that the information provided by the owners of a hotel chain to the plaintiffs was "given as a guide only and no responsibility will be taken for any errors or omissions".[2044] Quoting both McHugh J and the majority in *Butcher v Lachlan Elder Realty Pty Ltd* respectively, his Honour observed:[2045]

> It has been recognised, however, that disclaimers can be effective "if the clause actually has the effect of erasing whatever is misleading in the conduct"; in other words, if the effect of the disclaimer is to make clear something that, if allowed to remain vague or ambiguous, could have led a person into error. Disclaimers had this effect in *Butcher* where it was held that the effect of reading an entire brochure, including the disclaimers, was *to make it clear that the survey report included in the brochure had not been prepared by the producer of the brochure but was simply being passed on* without any representations being made

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2041 Ibid, 641 [160], citing *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535, 557 (Burchett J); *Henjo Investments v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 561.4 (Lockhart J, with whom Burchett J agreed and Foster J relevantly agreed).

2042 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 615 [74] (Gleeson CJ, Hayne and Heydon JJ).

2043 [2005] QCA 199.

2044 Ibid, [81].

2045 Ibid, [83].

> as to its truth or falsity. It is apparent that if a disclaimer is to function in this way it must be worded unambiguously, feature prominently and it must be communicated to the reader that the disclaimer is relevant to the information it is seeking to qualify. As Jacobson and Bennett JJ noted in *National Exchange*:[2046]
>
> > Where the disparity between the primary statement and the true position is great it is necessary for the maker of the statement to draw the attention of the reader to the true position in the clearest possible way.
>
> (Emphasis added, citations omitted.)

Ultimately, Keane JA held that the respondent had engaged in misleading or deceptive conduct, despite the inclusion of the disclaimers in the promotional material, by reason of a representation made about the prospects of the proposed development.[2047]

2953 The legal principles outlined above are of broad application, but dealt with factual circumstances that were materially different to the present case. In both *Butcher v Lachlan Elder Realty Pty Ltd* and *Downey v Carlson Hotels Asia Pacific Pty Ltd*, the plaintiffs were couples (although in the former case the High Court noted that the couple in question were intelligent, shrewd and self-reliant, and had the benefit of professional advice about their purchase).[2048] The nature of the parties in this case as sophisticated commercial multinationals, with Cargill as proposed purchaser being extensively experienced and knowledgeable of the malting industry,[2049] and the amount of the purchase price for Joe White, are relevant considerations to be taken into account when considering the whole of the conduct in the context of the relevant surrounding circumstances.

2954 Equally, these cases were distinguishable because this proceeding was not concerned with a person who was merely an agent purporting to convey the position of the owner for whom the agent was acting. Glencore, itself, was the ultimate owner of the

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2046 A reference to *National Exchange Pty Ltd v Australian Securities and Investments Commission* (2004) 49 ACSR 369, 381 [55].

2047 [2005] QCA 199, [85]-[90] (Williams JA and Atkinson J agreeing).

2048 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 605-606 [41], 607 [45] (Gleeson CJ, Hayne and Heydon JJ); compare 648 [188]-[189] (Kirby J, dissenting).

2049 Though, not all aspects of the Australian malting industry specifically.

business being sold. Further, the information it disseminated was expressly stated to have been prepared by it and its subsidiaries (as was the fact), which entities were the owners of the shares and assets being sold. These were shares and assets that the subsidiaries had owned for a number of years, a fact which was disclosed on the face of the Information Memorandum. In short, for these and other reasons, the facts of this proceeding were far removed from those discussed in the authorities referred to above.

X.15.3.6 Refraining from doing an act

2955 In identifying "conduct" for the purposes of section 18, the Viterra Parties also relied upon section 4(2) of the *Competition and Consumer Act*, which provides:[2050]

> In this Act:
>
> (a) a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including …;
>
> (b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), shall be read as a reference to the doing of or the refusing to do any act, including …;
>
> (c) a reference *to refusing to do an act* includes a reference to:
>
> (i) *refraining (otherwise than inadvertently) from doing that act*; or
>
> (ii) making it known that that act will not be done; and
>
> (d) ...
>
> (Emphasis added.)

2956 The Viterra Parties contended that any non-disclosure of the Undisclosed Matters was not relevant by reason of section 4(2)(c)(i).[2051] In so submitting, they referred to McHugh J's dissenting judgment in *Butcher v Lachlan Elder Realty Pty Ltd* "in a passage of obiter with which the majority did not disagree", as follows:[2052]

> Section 4(2) imposes one important limitation on the meaning of "conduct". Inadvertent refraining from doing an act does not constitute conduct for the purposes of s 52 [of the *Trade Practices Act 1974 (Cth)*]. Section 4(2) requires

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2050 The Australian Consumer Law contains s 2(2) which is in substantially the same terms (the differences are of no materiality). It is convenient to simply refer to s 4(2) of the *Competition and Consumer Act*.

2051 See also s 2(2)(c)(i) of the Australian Consumer Law.

2052 (2004) 218 CLR 592, 622-623 [101].

actual knowledge for a failure to disclose to be actionable.

2957 The Viterra Parties also referred to 2 earlier decisions in support of the contention that before Cargill Australia could rely upon any non-disclosure it was required to prove by evidence that the Viterra Parties had actual knowledge of the Undisclosed Matters.[2053]

2958 In considering this issue, it is useful to keep in mind the manner in which section 4(2) operates in the legislative scheme concerning section 18. As Gummow J stated nearly 3 decades ago in *Demagogue Pty Ltd v Ramensky*:[2054]

> "Conduct" within the meaning of s 52 *includes* refusing to do an act and refusal to do an act includes a reference to "refraining (otherwise than inadvertently) from doing that act": s 4(2). But *in any case where a failure to speak is relied upon* the question must be whether in the particular circumstances the silence constitutes or is part of misleading or deceptive conduct. *The expanded meaning* given by s 4(2) to "conduct" *should not distract attention from the fundamental issue* in the case at hand.
>
> (Emphasis added.)

2959 Equally, conduct for the purposes of section 18 may be a combination of what was stated as well as what was left unsaid. In objectively assessing whether this combination was conduct that was misleading or deceptive, such conduct that would otherwise be misleading or deceptive does not cease to have that character because the representatives of a company engaged in that conduct did not have knowledge of the undisclosed facts.[2055] That said, knowledge may be relevant where something was left unstated, which in the particular circumstances the failure to disclose may have conveyed the implication that what was not stated was not known.[2056] Such an implication might be conveyed when it would reasonably be expected in the

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2053 *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322, 339-340 [58] (Hodgson JA, with whom Mason P and Stein JA agreed); *Semrani v Manoun* [2001] NSWCA 337, [62] (Beazley JA, with whom Mason P and Ipp AJA agreed). Later in their written submissions, in the context of issue 18, reference was also made to *Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Ltd* (2014) 146 ALD 278, 303 [112] (Perry J), however in this last case there was no dispute that the respondents had both engaged in conduct within the meaning of s 18 of the Australian Consumer Law.

2054 (1992) 39 FCR 31, 40.2.

2055 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, 591 [66] (French J, with whom Beaumont and Finkelstein JJ agreed); *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452, 467E (Black CJ, von Doussa and Cooper JJ), citing *Parkdale Custom Built Furniture Pty Ltd v Puxu* (1982) 149 CLR 191, 197 (Gibbs CJ).

2056 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, 591 [66].

circumstances that the undisclosed fact or facts would be disclosed if they were known.[2057] However, if there was a failure to disclose a fact which, in the circumstances of the case would reasonably be expected not to exist absent disclosure, then that non-disclosure might have conveyed the misleading impression that the fact did not exist.[2058]

2960 Returning to the cases relied upon by the Viterra Parties, as was effectively acknowledged by them, the observation made by McHugh J in *Butcher v Lachlan Elder Realty Pty Ltd* in no way represented binding authority. In addition to it being obiter dictum and in a dissenting judgment, the statement made was very broad. It may be said without fear of contradiction that whatever his Honour intended by his observation, he could not have intended to brush aside many established authorities about what amounts to conduct for the purposes of section 18.

2961 Further, in addressing this issue, a review of the other 2 cases referred to is instructive.

2962 *Semrani v Manoun,*[2059] a decision of the New South Wales Court of Appeal in 2001, concerned a claim of misleading or deceptive conduct arising out of a sale of manufacturing machinery. The appellant, Semrani, had offered to purchase the machinery for under $60,000 from a defunct partnership through his agent, Williams. Semrani then represented to the respondent, the claimant Manoun, that the machinery was worth in excess of $1 million (amongst other representations). In reliance on that representation, Manoun invested $200,000 in a business venture that it was anticipated would use the machinery.

2963 A meeting was held between Semrani, Manoun and Williams. Manoun told Williams that Semrani claimed the machinery was worth more than $1 million, and Williams did not query or contradict this claim. At the request of Semrani and Manoun, Williams drafted an expression of agreement relating to the proposed business venture that recorded the value of the machinery as $1 million, which was the amount

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2057 Ibid.
2058 Ibid, 592 [70].
2059 [2001] NSWCA 337.

it was agreed the investment vehicle would pay to Semrani. Williams said nothing at that meeting about the value of the machinery, even though he had been involved in Semrani's offer to purchase the machinery for under $60,000.

2964 The trial judge held that the conduct of both Semrani and Williams was misleading or deceptive. Semrani appealed on the basis that the trial judge had applied the incorrect test for causation, which was dismissed. Williams also appealed, based on the premise that his silence at the meeting as to the value of the machinery was not misleading or deceptive conduct. It was also dismissed. In relation to silence, it was held that:[2060]

> The combined effect of the Act and the authorities therefore, is that for Williams' silence to be actionable, he must have had actual knowledge of a matter which he intentionally refrained from telling Manoun in circumstances where there was either a duty to disclose or where Manoun had a reasonable expectation that such information would be disclosed to him.

2965 There was no direct evidence at trial that Williams had knowledge that the machinery spoken about at the meeting as being worth in excess of $1 million was the same machinery that he knew Semrani had proposed to buy for around $60,000. The trial judge drew an inference that Williams did in fact know it was the same machinery, and the Court of Appeal held that inference was open and should not be disturbed.[2061] The Court of Appeal upheld the decision that Williams' omission at the meeting was advertent, and he had engaged in misleading or deceptive conduct.[2062]

2966 In *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd*,[2063] decided the following year by the New South Wales Court of Appeal, the appellant Peninsula, a developer, and the respondent Abigroup, a construction company, had entered into a contract by which Abigroup agreed to perform construction works on a development project

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2060 Ibid [62] (Beazley JA, with whom Mason P and Ipp AJA agreed).

2061 Ibid [80].

2062 Ibid [81]. Other cases citing *Semrani v Manoun* include *Rema Tip Top Asia Pacific Pty Ltd v Grüterich* [2019] NSWSC 1594, [661] (Ward CJ in Eq); *Kowalczuk v Accom Finance Pty Ltd* (2008) 77 NSWLR 205, 283 [355]-[361] (Campbell JA, with whom Hodgson and McColl JJA agreed); *Ibrahim v Pham* [2005] NSWSC 246, [173] (Levine J); *Rupert Company Limited v Imperial One Limited* [2004] NSWCA 257, [113] (Santow JA); *Whittle v Filaria Pty Ltd* [2004] ACTSC 45, [93] (Crispin J); *Metcash Trading Ltd v Hourigan's IGA Umina Pty Ltd* [2003] NSWSC 683, [57]-[62] (Young CJ in Eq); *Regis Towers Real Estate v The Owners - Strata Plan 56443* [2002] NSWSC 1153, [72] (Macready AJ).

2063 (2002) 18 BCL 322 (Hodgson JA, with whom Mason P and Stein JA agreed).

carried on by Peninsula. The contract stated a "superintendent", to be appointed by Peninsula, was empowered to give directions to Abigroup and to determine various claims arising out of the performance of the contract; including in relation to variations to the construction works, defects in the works, insolvency and delays beyond the specified completion date. The superintendent was required to act honestly and fairly and arrive at a reasonable measure or value of work, quantities or time.[2064]

2967 The superintendent that Peninsula appointed under the contract was a related company that had entered into a project management agreement with Peninsula in relation to the development. Peninsula did not disclose to Abigroup that the superintendent appointed under the construction contract was at all material times its agent, and therefore not an independent third party.

2968 The construction works were beset by delays and the contract was ultimately terminated by Peninsula. In the litigation that followed, Abigroup claimed Peninsula had engaged in misleading or deceptive conduct by failing to disclose the nature of its relationship with the company appointed as superintendent. This misleading or deceptive conduct claim was upheld at trial but was subsequently overturned.

2969 On the appeal, Peninsula submitted that the trial judge had made no finding of intentional non-disclosure and, relying on *Semrani v Manoun*, contended "in the absence of a finding of intentional non-disclosure, there was no basis for a finding of misleading or deceptive conduct".[2065] Counsel for Abigroup submitted:[2066]

> [T]his was not a case of Peninsula refusing to do an act but rather one of Peninsula doing an act, that is entering into the building contract without disclosing the project management agreement, thereby representing that the nominated superintendent was clear of any inhibition from acting impartially other than being a related company. Accordingly, the requirement that the withholding of information be intentional, suggested in *Semrani*, had no application.

2970 It was held that Peninsula had not engaged in misleading or deceptive conduct,

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2064 Ibid, 325 [8].
2065 Ibid, 337 [41].
2066 Ibid, 337-338 [46].

primarily because there was no requirement to make disclosure of the project management agreement between Peninsula and the superintendent and its non-disclosure did not give rise to misleading or deceptive conduct.[2067] After referring to problems Abigroup faced with causation, the issue of non-disclosure by silence was addressed in the following terms:[2068]

> In my opinion, there is also a difficulty faced by Abigroup arising from the referee's *failure to find that the non-disclosure was intentional*. I accept [Peninsula]'s submission that, in so far as what is alleged to be misleading or deceptive conduct arises from Peninsula's refraining from disclosing the project management agreement, Abigroup needs a finding that this refraining was not inadvertent … [I]n my opinion, the requirement in s 4(2)(c) that a refraining be otherwise than inadvertent *requires that there be actual advertence to the question of whether something should be done or not and the formation of an intention that it not be done. I think this is in accordance with the decision in* Semrani.
>
> (Emphasis added.)

2971 Also in rejecting Abigroup's submission that the "conduct" in question had not been silence or "refraining" but "doing" (that is, entering into the contract without disclosing the project management agreement), because Abigroup had not identified how this conduct was alleged in and of itself to be misleading, it was stated:[2069]

> In my opinion, if Abigroup wished to rely on the positive conduct as being misleading, it would have been necessary to allege and prove what representation was conveyed by the positive conduct. For example, Abigroup could have alleged and sought to prove that the positive conduct conveyed that…there was nothing inhibiting [the superintendent] from performing its duties as superintendent honestly and impartially. Abigroup gave no evidence as to what it understood to have been conveyed or represented by the positive conduct, but only gave evidence that if some disclosure had been made, it would have acted differently. That evidence, in my opinion, was appropriate to a case of "refraining", but not of "doing".

2972 Notably, it was not held that this alternate way of putting the case had not been a possibility (if the facts had supported it). Instead, it was emphasised that Abigroup had not adequately pleaded their case or given evidence in this manner at trial.

2973 In response to the submissions based on these decisions, the Cargill Parties referred to

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2067 Ibid, 339 [54]-[55].
2068 Ibid, 339-340 [58].
2069 Ibid, 340 [59].

a later decision of the Victorian Court of Appeal, *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd*.[2070] This case concerned a contract by which the appellant agreed to provide an airship for the purpose of Primus advertising during the Sydney Olympic Games in 2000. A "non-refundable" deposit of $400,000 was paid by Primus. At the time the contract was entered into, the appellant had no airship, nor any arrangements in place by which it could obtain an airship in time for the Sydney Olympics. The appellant failed to supply the airship and Primus accepted that conduct as a repudiation of the contract and sued for recovery of the deposit. In addition to contractual and restitutionary claims, Primus sued the appellant for misleading or deceptive conduct, in essence on the basis that the appellant remained silent about its inability to secure an airship in time for the Olympic Games.

2974 Relevantly, Primus alleged representations were made that: (1) the airship would be available for use by Primus at the Olympics; and (2) if the deposit were paid, the appellant would be able to guarantee the delivery of the airship.[2071]

2975 In dismissing the appeal, Nettle JA observed that section 52 of the *Trade Practices Act* did not strike at the traditional secretiveness and obliquity of the bargaining process in pre-contractual negotiations. By reference to earlier authority,[2072] his Honour confirmed that a purpose of the legislative provision was to ensure that such a bargaining process was not seen as a licence to deceive.[2073] More specifically to the issue at hand, both on the facts and the law his Honour rejected the appellant's submission that silence could not constitute actionable misleading or deceptive conduct unless that silence was intentional. In so doing, he stated:[2074]

> As to the law, the misleading and deceptive quality of remaining silent inheres in the non-disclosure of information; not in any refusal to provide it. Consequently, it does not follow from the fact that a failure to act must be intentional in order to be actionable, that silence must be intentional in order

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2070 [2004] VSCA 232 (Nettle JA, with whom Batt and Vincent JJA agreed).

2071 The second of these representations was alleged to have been implied, the detail of which is not necessary to refer to: ibid, [22]-[24].

2072 *Poseidon Ltd v Adelaide Petroleum NL* (1991) 105 ALR 25, 26 (Burchett J).

2073 *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* [2004] VSCA 232, [33]. See also *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 369-371 [20]-[22] (French CJ and Kiefel J).

2074 Ibid, [34].

> to be actionable. It is plain in principle and authority that it is not necessary that silence be intentional in order that it may constitute misleading and deceptive conduct for the purposes of s 52.

2976 Thus, what was stated in this passage was in direct conflict with the 2 New South Wales decisions referred to above insofar as they related to intention. However, it must be noted that there was no issue in *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* that the appellant knew of the matters about which it remained silent.

2977 Interestingly, in *Green* v *AMP Financial Planning Pty Ltd*,[2075] Hammerschlag J rejected the proposition that silence cannot constitute misleading or deceptive conduct within the meaning of section 52 unless it is intentional. His Honour noted that this proposition had been derived from a certain construction of section 4(2)(a) or (b) and (c) of the *Trade Practices Act*, and that that proposition had been expressly rejected by the Victorian Court of Appeal in *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd*. His Honour considered himself bound to follow that decision, noting that far from being convinced that the decision was wrong, it seemed to him that it was correct.[2076]

2978 Similarly, in *Tuggeranong Town Centre Pty Ltd v Brenda Hungerford Pty Ltd (No 2)*,[2077] Refshauge ACJ noted that "[t]he weight of authority is now in favour of the approach that the non-disclosure need not be intentional".[2078] In addition to noting that he considered himself bound by *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd*, his Honour also nevertheless considered it correct.

2979 And in the same vein, in *Clarkson Williams Partners Pty Ltd v Vaughan*,[2079] it was noted *Semrani v Manoun* and some subsequent authority held that a defendant must have actual knowledge of a matter "which he intentionally refrained from telling the

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2075 [2008] NSWSC 1164.
2076 Ibid, [143]-[148].
2077 [2017] ACTSC 88.
2078 Ibid, [950]-[956].
2079 [2016] ACTCA 1 (Penfold, Burns and Rangiah JJ).

plaintiff".[2080] However, reference was also made to *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* as well as *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd*,[2081] before stating:[2082]

> The issue is fairly arguable either way, but we respectfully agree with the view taken in *CCP Australian Airships* and *Owston*. An inadvertent failure to disclose relevant information is capable of being just as misleading or deceptive as the deliberate withholding of the same information. It seems unlikely that there was a legislative intention to restrict the reach of [the equivalent of section 18] to the latter situation.

2980 Another later case relevant to this issue was *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd*.[2083] The first plaintiff, the college, leased land from the defendant, Bankstown Airport, to operate a school on the site proximate to the airport. The second plaintiff was the principal of the school. Before a lease was negotiated between the parties, the defendant's agent brought to the attention of the plaintiffs difficulties with their proposal to use the site to operate a school, including noise issues and a lack of services. In discussions with the agent, the prospect of construction on the site was raised if the plaintiffs were ultimately able to secure a long term lease. However, the defendant did not bring to the plaintiffs' attention that the site had soil contamination issues, despite being in possession of an environmental report indicating contamination that predated the lease. The defendant's agent did not know of the report. As a result of the contamination, the college was unable to develop the site and was forced to move.[2084] Broadly, the losses associated with the need to move were claimed.

2981 The plaintiffs claimed that the defendant had engaged in misleading or deceptive conduct by leasing the site to them without disclosing the contamination. It was held that if permanent buildings were to be constructed for the college, construction costs would have been significantly greater than those applicable to an uncontaminated

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2080 Ibid, [75].
2081 (2011) 248 FLR 193 (McLure P, Pullin and Murphy JJA).
2082 [2016] ACTCA 1, [78].
2083 (2005) 215 ALR 625 (Hoeben J).
2084 Some trench work had been carried out before the college became aware of the contamination issues: 645-646 [113].

site.

2982 The lease signed by the parties contained a number of disclaimers, including "non-reliance" clauses to the effect that the college had not relied on any representations as to how the premises might have been used and that it had made its own appraisal of the land and its suitability for a school.

2983 Hoeben J held that the defendant did not make any positive misleading or deceptive statements about a lack of contamination of the land to the plaintiffs. However, his Honour held that the defendant certainly knew of the contamination, by reason of its possession of the environmental report (and regardless of the fact that its agent who negotiated the lease did not know of it).[2085] The question was therefore whether the defendant's silence was misleading.

2984 The defendant relied on a number of cases in submitting that in order for its silence to be misleading it must have been deliberate.[2086] Referring to *Fraser v NRMA Holdings Ltd*,[2087] his Honour expressed doubt that "such a broad proposition were correct".[2088] He noted in any event that the defendant had knowledge of the contamination.

2985 Considering *Costa Vraca Pty Ltd v Berrigan Weed and Pest Control Pty Ltd*,[2089] his Honour observed that Finkelstein J's reasoning in that case was premised on the words "refusing to do any act" included "refraining (otherwise than inadvertently) from doing an act".[2090] His Honour further noted that in the circumstances of that case on the basis of those definitions it was decided that unintentional non-disclosure did not amount to a breach of section 52.[2091] However, his Honour continued:[2092]

2085 His Honour stated that he did not understand the defendant to argue that it was not aware of the environmental report disclosing the contamination. However, he stated that if such an argument was sought to be made it was rejected on the basis that the defendant's environmental personnel (none of whom were called) were aware of its contents before the lease was entered into: see 638 [86].

2086 These cases included *Costa Vraca Pty Ltd v Berrigan Weed and Pest Control Pty Ltd* (1998) 155 ALR 714, 722 (Finkelstein J); *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477, 489 (Bowen CJ).

2087 (1995) 55 FCR 452, 467 (Black CJ, von Doussa and Cooper JJ). See also par 2959 above.

2088 (2005) 215 ALR 625, 656 [185].

2089 (1998) 155 ALR 714.

2090 (2005) 215 ALR 625, 656 [186].

2091 Ibid.

2092 Ibid, 656 [187].

> As has been pointed out by Colin Lockhart in *The Law of Misleading or Deceptive Conduct*…this exclusionary construction of the definition of "conduct" sits uneasily with the principle that proof of intention is generally not required in order to establish that s 52 has been contravened. As that author demonstrated, it was not unusual for the alleged breach of s 52 to arise out of a course of conduct, *including both positive conduct and non-disclosure*. It was by no means clear how such conduct was to be assessed pursuant to the restrictive approach to the definition of "conduct". To require that conduct "must have been deliberately engaged in" in order for it to amount to a contravention of s 52 required proof of intention wherever a breach was alleged by conduct that included non-disclosure with the effect that accompanying positive conduct was also subject to the intention requirement.
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> (Emphasis added, citation omitted.)

2986 Hoeben J then referred to *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* concerning the absence of any need for a person who made a misleading representation to have knowledge of the undisclosed facts for the conduct in question to be misleading.[2093] He then adopted a passage from Colin Lockhart's work concerning the expanded meaning of conduct in section 4(2),[2094] including that "the impugned actor's intention or knowledge will be *a relevant, but not decisive consideration* in the determination of whether a contravention by non-disclosure has occurred" (emphasis added).[2095]

2987 His Honour then stated:[2096]

> It seems to me that the qualification suggested by Merkel J in *Johnson Tiles Pty Ltd v Esso Australia Ltd* … is correct, namely that the requirement for conduct to be deliberately engaged in only applies where "silence alone" is relied upon as constituting the misleading or deceptive conduct. That is not the situation here. What is relied upon by the plaintiffs is the combination of the full disclosure by [the defendant's agent] of disadvantages affecting the proposed lease site of which she was aware that is lack of services and noise combined with the absence of any mention of the risk of the site being contaminated.[2097]

2093 (2000) 104 FCR 564, [66] (French J, with whom Beaumont and Finkelstein JJ agreed); see par 2959 above.

2094 C Lockhart, *The Law of Misleading or Deceptive Conduct* (2nd ed, 2003), [5.3].

2095 See also *OXS Pty Ltd v Sydney Harbour Foreshore Authority* [2016] NSWCA 120, [214]-[216] (Gleeson JA, with whom Macfarlan and Leeming JJA relevantly agreed).

2096 (2005) 215 ALR 625, 657 [190].

2097 As to issues in relation to the approach of seeking to discern cases involving "silence alone", see, for example, *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* (2011) 248 FLR 193, 206-208 [54]-[66] (McLure P, Pullin and Murphy JJA agreeing that there had been no misleading conduct); *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32.3 (Black CJ). In the circumstances of this case where there could have been no suggestion that silence alone was engaged in, it is unnecessary to consider this line of authority. See also *Fabcot Pty Ltd v Port Macquarie-Hastings Council* [2011] NSWCA 167, [209(iii)] (Sackville AJA, with whom Beazley and Campbell JJA agreed).

(Citation omitted.)

2988 The plaintiffs' claim based on misleading or deceptive conduct was upheld, including on issues of causation.[2098]

2989 For completeness, reference should also be made to *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*.[2099] In that case, it was held that there was no misleading or deceptive conduct when the fact that an insurance policy was not cancellable was not disclosed by a broker in details supplied to a financier providing premium funding. In the joint judgment of French CJ and Kiefel J, their Honours referred to "refraining (otherwise than inadvertently) from doing that act" as part of "refusing to do any act" in the definition of "conduct" in section 4(2).[2100] In so doing, they expressly referred, with apparent approval, to the relevant passages of the decisions of *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*[2101] and *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd*.[2102] Further, they noted that in relation to inadvertence no issue had been agitated in the case before them concerning unintentional or unknowing non-disclosure.[2103]

X.15.3.7 Conclusion

2990 In my view, there are a number of reasons why the operation of section 4(2) is not determinative of the issues in this case.

2991 *First and foremost*, the Financial and Operational Performance Representations were positive representations as to the state of the Joe White Business in and of themselves whether or not there was any disclosure of the Undisclosed Matters. These were positive acts that were conduct for the purposes of section 18, and the issue of refraining did not arise in determining the question of whether conduct had been engaged in.[2104] By way of example, the first implied representation in question, that

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2098 (2005) 215 ALR 625, 657-658 [191]-[195].
2099 (2010) 241 CLR 357.
2100 Ibid, 368 [14] (French CJ and Kiefel J).
2101 (2000) 104 FCR 564, 591 [66] (French J, with whom Beaumont and Finkelstein JJ agreed).
2102 (2005) 215 ALR 625 (Hoeben J).
2103 (2010) 241 CLR 357, fn 46.
2104 See, for example, *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* (2011) 248 FLR 193, 208 [64]-[66] (McLure P, Pullin and Murphy JJA agreeing that there had been no misleading conduct).

the production, sales and earnings figures stated in the Financial and Operational Information were based upon strict quality control procedures and analysis,[2105] was a positive representation about how control procedures and analysis were implemented which was implied from a series of positive statements about the Joe White Business. It was a representation that was made (and either was misleading or it was not), regardless of any refraining from disclosure of other information relevant to the issue.[2106] In other words, whether or not a representation was made (or to use the language of the provision, conduct was engaged in) was not in any way dependent upon or relevantly connected to non-disclosure or any refraining, inadvertent or otherwise, from doing an act. The same observation may be made in relation to each of the first 9 of the other Financial and Operational Performance Representations.[2107] In short, each of those implied representations was alleged to have been made, and has been found to have been made, based upon positive statements made in relation to the Joe White Business rather than upon the Viterra Parties refraining from any act.

2992 In relation to the tenth Financial and Operational Performance Representation, that *the Undisclosed Matters did not exist*,[2108] the position was more nuanced. The implied representation as alleged, and found to have been made, was different because it expressly incorporated the fact of non-disclosure of the Undisclosed Matters. However, it was the positive statements made that were the relevant conduct. In other words, the non-disclosure of the Undisclosed Matters was not the factor which meant that the conduct that would otherwise not be misleading was in fact misleading by reason of the non-disclosure. That is, each of the statements relied upon that were actually expressly made was positive conduct for the purposes of section 18. In

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2105 See par 2835 above.

2106 Obviously, if further information relevant to the issue had been disclosed beyond what was contained in the Information Memorandum or other relevant conduct, it would have to be considered in determining what had been conveyed by the statements relied upon.

2107 See pars 2856-2913 above. In relation to the fourth implied representation (see par 2877 above), an additional factor was introduced, namely it was pleaded that the representation was implied in part because none of the statements relied upon were withdrawn or qualified. However, this additional particular did not introduce any issue about refraining from the disclosure of any particular fact or matter.

2108 See par 2914 above.

essence, the silence in not disclosing the Undisclosed Matters was positive or affirming, in that it confirmed there was nothing to prevent the representations from arising based on the positive statements about the Joe White Business.[2109]

2993 To elaborate, the Information Memorandum Statements and the Management Presentation Statements identified in alleging the tenth implied representation were, broadly speaking, to the effect that Joe White had a strong track record in relation to customer contracts, in supplying high-quality malt and in meeting its customers' specifications. The making of these statements was plainly conduct which did not involve any refusal to act or refraining from any act. That conduct did not cease to be conduct for the purposes of section 18 simply because the Viterra Parties did not disclose the Undisclosed Matters.

2994 *Secondly,* and in any event, for reasons discussed below,[2110] it has been found that there was no inadvertence in the refraining from disclosing the Undisclosed Matters, including the non-disclosure of the Viterra Practices and the Viterra Policies.

2995 *Thirdly*, even if it were accepted that knowledge of each of the Undisclosed Matters could not be attributed to Glencore and that Glencore was in complete ignorance of them, when considering the position of the Sellers, any lack of knowledge on Glencore's part was not determinative of whether or not the relevant conduct was misleading on the part of the Sellers.[2111]

2996 *Fourthly*, to the extent that authority in this jurisdiction was inconsistent with New South Wales authority, naturally I am bound to follow the Victorian Court of Appeal. Therefore, the Viterra Parties' submissions concerning the need for intention to refrain for "otherwise than inadvertently" not to apply for the purposes of section 4(2)(c)(i) must be rejected.[2112]

2109 See *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* (2011) 248 FLR 193, 206-208 [54]-[66] (McLure P), and the authorities there referred to.

2110 See issues 22, 23 below.

2111 *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* (2005) 215 ALR 625.

2112 See par 2975 above. See also *Cityrose Trading Pty Ltd v Booth* [2013] VSC 504, [102]-[104] (Emerton J).

2997 For those familiar with the relevant authorities, it will be apparent that the above discussion does not include any relevant reference to authorities concerned with whether objectively a reasonable expectation arose for there to be disclosure of any of the Undisclosed Matters.[2113] In circumstances where it has been found that the Viterra Parties positively made the representations as alleged, it is unnecessary to discuss this line of authority concerned with this objective "aid to characterising non-disclosure" here.[2114]

2998 However, if I am incorrect, in my view such an expectation arose in this case. Whether it arose at the time when the Information Memorandum was first disseminated, or at some later time in the sale process, need not be decided. The expectation arose before the completion of the Due Diligence. This finding reflects the evidence of Glencore's own witness, King,[2115] a person who was presented as an expert in mergers and acquisitions.[2116]

2999 The circumstances requiring such disclosure were heightened by a number of further matters. Without being exhaustive, they included: (1) the conscious strategy of Glencore to present the Joe White Business in a manner that created massive competitive tension between prospective purchasers, including Cargill;[2117] (2) the information concerning the Viterra Practices never being disclosed despite being implemented routinely as part of Joe White's usual operations, and thus material to Joe White's operations;[2118] (3) Glencore expressly representing that the Information Memorandum and the Management Presentation Memorandum had been prepared

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2113 See, for example, *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 369-371 [19]-[23] (French CJ and Kiefel J), 385-386 [95]-[96] (Heydon, Crennan and Bell JJ). See also *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd* [2015] NSWCA 94, [173] (Barrett JA, with whom Bathurst CJ and Beazley P agreed). See also pars 3382-3384 below.

2114 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 370 [20].

2115 See pars 365, 496 above. See also par 484 above.

2116 See par 110 above. His evidence as to his expertise was not challenged. Further, his evidence reflected that of a person who had had considerable experience in this field.

2117 See pars 110, 766 above.

2118 This fact is to be contrasted with the facts in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, where the information was available in the documentation but the claimant financier did not read it: 371-372 [26] (French CJ and Kiefel J), 386 [96] (Heydon, Crennan and Bell JJ).

by Glencore and its subsidiaries, it being a known fact that these subsidiaries included the Viterra entities which had owned and been involved in the conduct of the Joe White Business for a number of years;[2119] (4) the levels of control exercised by the Viterra Parties in the sale process at the direction of Glencore, including the regulated manner in which Cargill was able to get access to relevant information about the Joe White Business and the requirement for Cargill to keep all information it was supplied confidential; and (5) the Operational Practices (forming part of the Undisclosed Matters), which on any view of the evidence involved dishonest business practices that, in the absence of any notice, could not have reasonably been anticipated by a prospective purchaser.[2120] Further, although the wording of the Sale Process Disclaimers was relevant to any consideration of whether a reasonable expectation of disclosure existed, when materially misleading representations were positively made in relation to the underlying operations of the Joe White Business in such a context,[2121] the language of the Sale Process Disclaimers could not remove the statutory requirement of disclosure in circumstances where the misleading or deceptive conduct was being engaged in.

X.15.3.8 Other matters

3000 In closing submissions, the Viterra Parties referred to the fact that Glencore acquired Joe White as part of the Viterra acquisition in December 2012 and intended to sell without any vendor due diligence, in submitting the position was analogous to a person who was selling a used car which she or he had inherited from a family member's estate. It was contended that Glencore effectively stated to the prospective purchasers that, "Look, this is it. Don't know anything about it. You'll have to make your own enquiries. I can tell you some things that I know about it, but don't rely on them."

3001 There were a number of obvious problems with this analogy. *First,* no one had died or was otherwise unavailable; the owner of the assets being sold was alive and well,

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2119 See par 2954 above.

2120 Each Operational Practice involved the deception of Joe White's customers. Indeed, both the Varieties Practice and the Gibberellic Acid Practice inherently involved Joe White deliberately deceiving its customers.

2121 See par 2954 above.

fully operational and still in control. *Secondly*, Glencore stated, as was the fact, that it had had the benefit of access to its subsidiaries in preparing the relevant information. *Thirdly*, Glencore was not the direct owner who was actually going to sell the asset. *Fourthly*, not only Glencore, but also the owners, Viterra, were providing the information to assist potential purchasers in their considerations as to a possible acquisition.[2122] *Fifthly*, in the suggested analogy given, the owner had not been driving the car for 4 years.[2123] *Sixthly*, the sale of the car apparently did not involve any due diligence on the part of the purchaser before acquisition, pursuant to which the purchaser would be provided with further information in response to its requests.

3002 In these circumstances, little assistance can be derived from the analogy given.

3003 The existence of disclaimers as to accuracy or absence of personal responsibility, separately or in combination, are important when considering the nature of the conduct as a whole. However, although a disclaimer may alter or modify the conduct or its correct characterisation, it cannot operate to "correct" or transform conduct that was otherwise misleading or to avoid the operation of the Australian Consumer Law. For public policy reasons, the courts will not give effect to a disclaimer that purports to exclude liability for conduct that has been found *in fact* to be misleading or deceptive. To put it another way, a clause which states (in whatever form) that a discloser of information shall not be engaging, or has not engaged, in certain conduct immediately before or after that conduct has actually been engaged in as a matter of fact will not operate to lead to a finding that the conduct has not been engaged in if in fact it has. Presumably, the authors of the Information Memorandum Disclaimers and

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2122 See pars 475, 711 above.

2123 The Viterra Parties sought to make much of Glencore's lack of experience in the malting industry. They even suggested in closing submissions that Cargill was not only aware of this but that Cargill knew Glencore would be reliant upon information provided by Joe White. This submission completely ignored the involvement of Viterra for the 4 years leading up to the Acquisition. Further, it ignored the evidence of Hawthorne, who said Cargill expected information to be provided (including questions to be answered) by a mix of Joe White, Viterra and Glencore personnel, as well as their advisers. Equally, while Eden acknowledged Glencore's recent acquisition of Joe White and its limited knowledge of the malting industry, the evidence that he expected information to come from within the Joe White Business did not exclude Viterra from being a source of information: see par 513 above. Similarly, Van Lierde acknowledged Glencore's ownership of Joe White through its acquisition of Viterra was recent in 2013, but did not make any assumption about Glencore's lack of knowledge of the Joe White Business.

the Management Presentation Memorandum Disclaimers were fully aware of this by seeking to exclude the making of or responsibility for any representation to the maximum extent permitted by law rather than to provide that no representations were being made at all (when they clearly were) or that there could be no liability in relation to any misleading representations made (when that would be contrary to law).

X.15.3.9 The English position

3004 The Viterra Parties referred to several cases in the United Kingdom concerning alleged misrepresentations in commerce, including in particular *IFE Fund SA v Goldman Sachs International*,[2124] *Taberna Europe CDO II plc v Selskabet AFI*[2125] and *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc*.[2126]

3005 Before discussing these cases, the Viterra Parties' submissions emphasised this case was dealing with a "Wall Street" deal.[2127] While they acknowledged that some commercial dealings may involve a person unaware of, or unable to, protect its rights, they submitted this particular transaction was far removed from that situation. In making this point, it was noted that the transaction involved some of the world's largest and most sophisticated corporate entities utilising well-resourced internal acquisition teams as well as high-quality external advisers. They submitted that such entities should be free to use legalistic disclaimers based on common assumptions and practices[2128] to determine where the risks and liabilities that arise out of a transaction should lie. They also referred to King's evidence to the effect that receiving an information memorandum was like getting a brochure for a house being sold, in that a prospective purchaser would ordinarily visit the house and get a survey done to get a better understanding of the house and the property rather than just relying upon the

2124 [2007] 2 Lloyd's Rep 449 (Waller, Gage and Lawrence Collins LJJ).

2125 [2017] QB 633 (Moore-Bick LJ, with whom Tomlinson and Simon LJJ agreed).

2126 [2011] 1 Lloyd's Rep 123.

2127 Le Binh gave evidence that the transaction (with major banks involved) was talked about on Wall Street, New York, and that he would call it "a Wall Street deal".

2128 In alluding to such assumptions and practices, reference was made to *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 370 [20] (French CJ and Kiefel J) and that Cargill had used similar disclaimers in the sale of Cargill Malt.

brochure.[2129]

3006 Then the Viterra Parties referred to the above cases in support of a submission that the pre-contractual disclaimers, such as those included in the Information Memorandum, could not have their relevance marginalised by being characterised as "boilerplates". It was contended that the English courts were likely to have had cause to interpret disclaimer statements in the context of 2 "large, super-resourced multinational companies more frequently [than] our High Court".

3007 The Viterra Parties submitted that these cases stood for the principle that English courts are eager to ensure that parties are free to strike their own bargains and it is the role of the courts to interpret fairly the words that have been used.[2130] In a somewhat proleptic submission, they also submitted that the English courts have been stronger about disclaimers than the Australian courts, and commended the English approach.

3008 The Viterra Parties' submissions accurately reflected the English approach, but, even leaving aside issues relating to stare decisis, the cases cited by the Viterra Parties were not on all fours with the issues at hand.

3009 In *IFE Fund SA v Goldman Sachs International*,[2131] the Court of Appeal held that disclaimers in a syndicate information memorandum were effective to prevent any misrepresentation (express or implied) having been made in circumstances where relevant information had not been provided to IFE about the true financial position of the entity seeking the funding. The memorandum had been provided by Goldman Sachs as arrangers and underwriters of a syndicated loan.

3010 At trial, Goldman Sachs' counsel had established, during cross-examination of a

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2129 King gave this evidence under cross-examination (in accepting the proposition that it was not "all about the Information Memorandum" and that 1 had to look further to what was revealed during the Due Diligence and at what was said "on behalf of the vendor[s]" during the Management Presentation in order to know what was going on by way of operational practices in Joe White), and volunteered an analogy; perhaps it was just a coincidence that the example he gave in evidence happened to coincide with the facts in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592.

2130 *Taberna Europe CDO II plc v Selskabet AFI* [2017] QB 633, 647 [23] (Moore-Bick LJ, with whom Tomlinson and Simon LJJ agreed).

2131 [2007] 2 Lloyd's Rep 449 (Waller LJ, with whom Gage and Lawrence Collins LJJ agreed).

member of IFE's senior management, that the standard terms that were contained in Goldman Sachs' information memorandum were in fact the exact same standard terms adopted by IFE when it acted as an arranger or underwriter in other transactions. This fact led to a number of concessions from this senior manager, who was the person who signed the relevant agreement on behalf of IFE.[2132] These included that he understood Goldman Sachs had not made any representations upon which he could rely; that he understood Goldman Sachs had stated it would have no legal responsibility, including for any loss suffered by reason of the transaction; and that he proceeded with the transaction on that basis, it being perfectly standard and acceptable.[2133] In those circumstances, both the trial judge[2134] and the Court of Appeal[2135] held that IFE could not have disregarded contractual disclaimers that it itself regularly used and that no misrepresentation was made.[2136]

3011 In *Taberna Europe CDO II plc v Selskabet AFI*,[2137] the Court of Appeal held that disclaimers contained in an investor presentation on a website for subordinated loan notes issued by a bank were effective in and of themselves to exclude reliance.[2138] It was held that the defendant was entitled to rely on them as an answer to the plaintiff's claim.

3012 The issues as pleaded were wide-ranging, but on appeal the main issues were confined to: (1) whether a representation had been made about non-performing loans; (2) if so, whether the investor was entitled to recover under section 2(1) of the *Misrepresentation Act 1967* (UK) in the amount paid for the loan notes; and (3) if so, whether the loss ought to have been apportioned under section 1 of the *Law Reform (Contributory Negligence) Act 1945* (UK) because the plaintiff was partly to blame for

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2132 Ibid, 454 [14]-[15]; 457 [33].
2133 Ibid, 454 [14].
2134 Ibid, 456 [16].
2135 Ibid, 457-458 [29]-[37].
2136 For completeness, IFE could not establish any duty of care owing to it and accordingly any case based on a misrepresentation was based on s 2(1) of the *Misrepresentation Act 1967* (UK) (ibid, [30]), which was in terms fundamentally different to s 18 of the Australian Consumer Law: see pars 3019-3020 below.
2137 [2017] QB 633 (Moore-Bick LJ, with whom Tomlinson and Simon LJJ agreed).
2138 The disclaimers were not incorporated into the subsequent contract: ibid, 645 [16].

its loss.[2139] This statutory scheme was markedly different to the relevant provisions of the Australian Consumer Law.

3013 On the first issue, in considering whether a duty of care arose, the Court of Appeal upheld the trial judge's decision that the bank had actively invited potential investors in a secondary market to make use of information, originally produced for a different purpose, and could hardly complain that it was so used.[2140] In those circumstances, it was held that representations had been made to the plaintiff.

3014 Further, it was held that the plaintiff must have been aware that the effect of the relevant disclaimers was that, fraud apart, the bank was not willing to accept liability for the accuracy of the document's contents.[2141] It was then observed that, in principle, there was no reason why a person should not be able to publish investment-related information on the basis that it is not willing to take responsibility for it (if reasonable to do so) if the publisher's position is made clear.[2142]

3015 In order to demonstrate how different the statutory regime being considered was, it is necessary to set out the relevant provisions. Sections 2 and 3 of the *Misrepresentation Act* relevantly stated:

> **2 Damages for misrepresentation**
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> (1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.
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> …
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> **3 Avoidance of provision excluding liability for misrepresentation**

2139 Ibid, 640 [4].

2140 Ibid, 643 [9]-[11]. The wording in the investor presentation stated it was only directed to investors who participated in a "non-deal roadshow" and were persons who had professional experience in matters relating to investments (641 [5]), and, although the plaintiff was experienced professional investor (see 645 [16]), it belonged to the secondary market.

2141 Ibid, 645 [16].

2142 Ibid, 647 [22].

(1) If a contract contains terms which would exclude or restrict –

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the *Unfair Contract Terms Act 1977*; and it is for those claiming that the term satisfies that requirement to show that it does.

(2) This section does not apply to a term in a consumer contract within the meaning of Part 2 of the *Consumer Rights Act 2015* (but see the provision made about such contracts in section 62 of that Act).

3016 Section 3 was concerned with attempts to exclude liability for misrepresentation after the event, and not with the question as to whether a misrepresentation had in fact been made.[2143]

3017 Section 11(1) of the *Unfair Contract Terms Act 1977* (UK) stated:

11 The "reasonableness" test

(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the *Misrepresentation Act 1967* and section 3 of the *Misrepresentation Act (Northern Ireland) 1967* is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

3018 Part 2 of the *Consumer Rights Act 2015* (UK) relevantly stated:

61 Contracts and notices covered by this Part

(1) This Part applies to a contract between a trader and a consumer.

3019 The combined effect of the above provisions is that the statutory scheme provided for the legal validity of disclaimers purporting to exclude liability for pre-contractual misrepresentations, provided that:

(1) the party attempting to enforce the term was able to discharge the onus

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2143 Ibid, 646 [20].

of proving that the term was reasonable in all the circumstances; and

(2) the term was not a term in consumer-to-trader contracts (that is in substance, the term was in a contract negotiated between businesses).

3020 The Australian Consumer Law contains no such exemptions. This context is important in considering the statement extracted in the Viterra Parties' closing submissions.[2144] The relevant passage, which follows Moore-Bick LJ's detailed analysis of the content of the exclusion clauses in the context of s 3 of the *Misrepresentation Act*, read in its entirety:[2145]

> In the past judges have tended to invoke the contra proferentem rule as a useful means of controlling unreasonable exclusion clauses. The modern view, however, is to recognise that commercial parties (which these were) are entitled to make their own bargains and that the task of the court is to interpret fairly the words they have used. The contra proferentem rule may still be useful to resolve cases of genuine ambiguity, but ought not to be taken as the starting point…

3021 In the above passage, Moore-Bick LJ was not making a generalised observation about the intentions of parties applicable to all exclusion clauses negotiated by commercial parties or how those clauses might operate come what may. Instead, in the context of section 3 of the *Misrepresentation Act* and contractual exclusion clauses, his Lordship was discussing whether judges ought to construe potentially unreasonable exclusion clauses against the party that drafted them. In any event, more significantly, the analysis conducted in his Lordship's reasons related to questions which are fundamentally different to the question of whether, in fact, a person has engaged in conduct that was misleading or deceptive or likely to mislead or deceive.

3022 Similarly, *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc*[2146] concerned whether or not a particular exclusion clause fell within section 3 of the *Misrepresentation Act*.[2147] In that case, Clarke J made the following observation:[2148]

> If sophisticated commercial parties agree, in terms of which they are both

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2144 See par 3005 above.
2145 [2017] QB 633, 647 [23].
2146 [2011] Lloyd's Rep 123.
2147 Ibid, 172 [272].
2148 Ibid, 177 [314].

> aware, to regulate their future relationship by prescribing the basis on which they will be dealing with each other and what representations they are or are not making, a suitably drafted clause may properly be regarded as establishing that no representations (or none other than honest belief) are being made or are intended to be relied on. Such parties are capable of distinguishing between statements which are to be treated as representations on which the recipient is entitled to rely, and statements which do not have that character, and should be allowed to agree among themselves into which category any given statement may fall.

Clarke J considered whether or not particular exclusion clauses were "unreasonable" for the purpose of determining whether or not they were void by operation of the statute, and concluded they were not.[2149] In that context, the commercial nature of the parties was important for determining whether or not the clause was likely to be reasonable.[2150] His Honour's reasons did not extend beyond the confines of the particular statutory provision.

3023 Further, the passage quoted above as a general proposition for a satisfactory means of doing business between sophisticated commercial parties, whatever its status,[2151] or its general commercial appeal or otherwise, does not provide a basis for this court to decline to adopt the required approach; namely, to carefully analyse both the terms of the relevant disclaimers and the circumstances in which they were agreed or imposed, in the overall context (including the various points in time and the different means) in which the relevant information was disclosed and (if it be the fact) relied upon.

3024 Some of the submissions of the Viterra Parties appeared to suggest the court could look at the terms of the disclaimers and the circumstances in which they were agreed or imposed, and end the enquiry there if it was satisfied that the disclaimers were intended to operate strictly according to their terms. In my view, such an approach would be entirely contrary to the principles identified over a number of years by Australian courts, including the High Court.

2149 Ibid, 179 [327].
2150 Ibid, 177 [314].
2151 See also *Wilkie v Gordia Runoff Ltd* (2005) 221 CLR 522, 529 [17] (Gleeson CJ, McHugh, Gummow and Kirby JJ).

3025 As a result of the High Court handing down its decision in *Price v Spoor*,[2152] the Viterra Parties made a further submission in relation to the treatment of disclaimers. They submitted that the court should have regard to this decision in determining the terms, meaning, enforceability and effect of the parties' bargain in this proceeding.[2153] In that case, the principal issue for determination was whether an agreement to contract out of rights conferred by the *Limitation of Actions Act 1974* (Qld) was unenforceable as contrary to public policy. It was held that the *Limitation of Actions Act* in no way prohibited contracting out, and rather achieved its policy objective of ensuring finality in litigation by conferring an individual right on a defendant to elect to plead a limitation period.[2154] The Viterra Parties drew further attention to Steward J's comments in relation to parties' freedom of contract.[2155] Noting that freedom of contract remains "an important attribute of the law",[2156] and that exceptions from freedom of contract require good reason to attract judicial intervention,[2157] his Honour quoted *Sidhu v British Airways Plc*[2158] for the proposition that:[2159]

> Any person is free, unless restrained by statute, to enter into a contract with another on the basis that his liability in damages is excluded or limited if he is in breach of contract. Exclusion and limitation clauses are a common feature of commercial contracts …

3026 The findings in *Price v Spoor* are of little relevance to the present context. Principally, the legislative scheme and public policy underpinning the *Limitation of Actions Act* is materially different to that of the Australian Consumer Law. As the reasoning of the High Court in *Price v Spoor* demonstrates, each legislative scheme must be considered separately to discern the public policy applicable, if any, to the particular circumstances of the case.[2160]

3027 To reiterate, Australian courts have held that it is not possible to automatically exclude

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2152 [2021] HCA 20.
2153 See also par 3007 above.
2154 Ibid, [12]-[20] (Kiefel CJ and Edelman J), [38]-[41] (Gageler and Gordon JJ), [82]-[95] (Steward J).
2155 Ibid, [96]-[98]. Reference was also made to [51] (Gageler and Gordon JJ).
2156 Ibid, [96].
2157 Quoting *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656, 669 [32] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ); see also *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525, 553 [54] (Kiefel J), 578 [156] (Gageler J), 604 [250] (Keane J).
2158 [1997] AC 430.
2159 Ibid, 453 (Lord Hope, with whom Lords Browne-Wilkinson, Jauncey, Mustill and Steyn agreed).
2160 See also *The Commonwealth v Verwayen* (1990) 170 CLR 394, 404.7, 405.6 (Mason CJ dissenting).

the operation of the Australian Consumer Law (or other consumer protection legislation formerly in effect, such as the *Trade Practices Act*), on the basis that to allow contracting parties to do so would impermissibly undermine the public policy of the legislation. Whatever commercial parties might agree to, none of them is entitled to engage in conduct in trade or commerce that is misleading or deceptive or likely to mislead or deceive. This approach is distinct from that taken in the United Kingdom, where the legislation, as interpreted by the courts, allows for the exclusion of liability for misrepresentation so long as the contracting parties are commercial and the operative disclaimers are reasonable.

3028 In short, the English cases referred to above are neither factually nor legally of much assistance in determining the issues in this case.

3029 On a final note, and related to the topic of these English authorities, the Viterra Parties made the broader submission that Cargill, being sophisticated and well-advised, was fully cognisant of the fact that Glencore was not familiar with the Joe White Business and nonetheless agreed to an allocation of risk which involved Cargill accepting financial responsibility for any matters falling outside the scope of the Warranties.[2161] They contended that this proceeding was nothing more than an attempt by Cargill Australia to overturn an allocation of risk effected by agreements between the parties. The Viterra Parties submitted that this situation bore resemblance to *Minera Las Bambas SA v Glencore Queensland Limited*,[2162] which recognised that "[t]here is no inherently right or reasonable allocation of the risk" in the sale of a business, and accordingly that "[w]ithin very wide limits, English law leaves the parties free to make their own bargain and affords them the respect, when they have entered into a formal, professionally drafted and commercially negotiated agreement, of treating them as having meant what they said".[2163]

3030 There could be no dispute with the proposition that it is not within the remit of the

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2161 As to the factual accuracy of this submission, see the fifth point in par 3001 above. See also par 3190 below.

2162 [2019] EWCA Civ 972.

2163 Ibid, [89] (Leggatt LJ, with whom Longmore LJ and Vos C agreed).

court to undermine a fairly agreed bargain between sophisticated commercial parties. However, that is not the beginning and the end of the issues raised in this proceeding. Generally speaking,[2164] the concepts of freedom of contract and any allocation of risk do not provide a platform for parties to act contrary to the law, whether by contravention of the Australian Consumer Law or by deceit.[2165]

X.15.4 Summary and general observations

3031 For the reasons set out above, both Glencore and Viterra made each of the Financial and Operational Performance Representations as alleged in paragraph 27 of the Statement of Claim.

3032 In light of the Viterra Parties' submissions concerning section 4(2), it must be noted that the Viterra Parties made a series of very positive statements about the financial and operational performance of Joe White. Without being exhaustive, in substance these included that Joe White produced high-quality product, understood its customers' specifications and requirements and met them consistently and exactly, had stringent controls in place, and that the Joe White Business had limited capital expenditure requirements in the short term. The making of each of the statements, amongst others, that collectively referred to such a financial and operational performance was plainly conduct in trade or commerce.

3033 Finally, if the submissions of the Viterra Parties were accepted in relation to the absence of "conduct" for the purposes of section 18, it would give rise to a most unsatisfactory position. It would mean that a parent company (including a large multinational like Glencore with substantial resources and expert advice) could decide to remain in ignorance of the relevant facts and make various representations about a business and simply fall back on section 4(2) of the *Competition and Consumer Act* to contend that its conduct was not conduct for the purposes of the Act no matter how misleading the representations or statements, provided that the parent company did not intentionally or knowingly fail to disclose relevant matters. Such an approach

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2164 The issues pertaining to releases and like agreements are discussed below: see issue 84 below.

2165 See further issue 144 below.

and outcome would be entirely inimical to the public policy underlying the legislation and also to the direct answer to the basal question of whether, in light of all the relevant circumstances, there has been conduct which was misleading or deceptive or likely to mislead or deceive.

X.16 Were the Financial and Operational Performance Representations false for the reasons pleaded in paragraph 30 of the Statement of Claim, including in light of the Sale Process Disclaimers, the Acquisition Agreement Liability Terms, and the Alleged Industry Practices and did Glencore and/or Viterra thereby engage in misleading or deceptive conduct within the meaning of section 18 of the Australian Consumer Law?

X.16.1 Introduction

3034 As seen in issue 15, Cargill Australia relied predominantly on the written record when it pleaded that various statements made, and consequentially matters represented, including matters not disclosed, which comprised the "Financial and Operational Performance Representations".[2166] Although there could be no real issue about what was written, a key difference between the parties was what each contended arose from the context and basis upon which certain statements were made or not made. The competing characterisations of these circumstances formed a large part of why the Cargill Parties contended that the Financial and Operational Performance Representations were misleading or deceptive, and the Viterra Parties contended that (if they were made) they were not.

3035 By paragraph 30 of the Statement of Claim, Cargill Australia alleged that the Financial and Operational Performance Representations were false because certain matters followed by reason of the alleged facts pleaded in paragraph 19 of the Statement of Claim, namely:

(1) The production, sales and earnings figures stated in the Financial and Operational Information were based upon Joe White supplying malt to

2166 See par 2826 above.

customers that did not comply with relevant customer contracts, and could not be achieved if Joe White complied with the relevant customer contracts.

(2) By reason of the matter pleaded in the preceding subparagraph, the production, sales and earnings figures stated in the Financial and Operational Information had not been properly and lawfully achieved.

(3) Joe White had concealed from customers its inability and failure to comply with customer contracts, including contractor specifications.

(4) The assets of the Joe White Business, particularly: (a) the plant and equipment; (b) Joe White's malt inventory, malt supply contracts and customer relationships; and (c) Joe White's barley inventory and barley supply contracts, were insufficient for Joe White to produce and sell malt in the volumes and for the returns stated in the Financial and Operational Information that complied with the specifications of its customers.

(5) Joe White needed to invest capital expenditure in storage and blending capacity to achieve the production, sales and earnings figures stated in the Financial and Operational Information consistent with the terms of the relevant customer contracts.

(6) When procuring barley, Joe White did not in fact give priority to obtaining barley that best meet its customers' specifications and requirements.

(7) Joe White did not in fact employ technical analysis and strict quality control procedures to ensure that the malt it produced consistently met customer specifications.

(8) Joe White's ability to achieve the performance described in the Information Memorandum was not in fact centrally attributable to its ability to produce malt that met its customers' exact specifications and requirements.

3036 The particulars to paragraph 30 were extensive and included numerous references to

the particulars to paragraph 19 of the Statement of Claim. These particulars are referred to in some detail below as part of the conclusion on this issue.[2167]

X.16.2 The Cargill Parties' submissions

3037 The Cargill Parties referred to the fact that the Viterra Parties made positive statements about the state of the Joe White Business while, at the same time, they withheld material facts underlying its financial and operational performance. They submitted that the Undisclosed Matters went to the heart of the Joe White Business and that the silence concerning the Undisclosed Matters undermined most of the information provided about the state of the Joe White Business, including the positive representations relied upon.

3038 The Cargill Parties acknowledged that both Cargill, Inc and Glencore were large multinational corporations worth billions of dollars, and that both corporations devoted considerable resources to the transaction. However, they submitted that relevantly that was where the similarities ended.

3039 As for Glencore's role, the Cargill Parties submitted that Glencore was not a mere conduit of information but rather was actively involved in the sale of the Joe White Business "and its practices". Alternatively, they submitted that whatever role Glencore played, Viterra was plainly responsible for the representations made as it had owned and operated the Joe White Business for years, and it had also been intimately involved in the sale process.

3040 The Cargill Parties referred to Glencore's decision, contrary to advice received, not to conduct a vendor due diligence. It was submitted that, by doing so, Glencore consciously accepted the risk that there might be questionable or improper practices which would be discovered later that would expose it to liability.[2168] Having made this decision, it was submitted that the Viterra Parties provided historical and forecast financial operational information dealing with the Joe White Business' performance.

2167 See pars 3062-3075 below.

2168 See par 394 above.

The Cargill Parties submitted that, as a matter of fact, such information was provided by the Viterra Parties so that Cargill could rely upon it to determine the value of the Joe White Business.

3041 The Cargill Parties accepted that Cargill carried out its own assessment of the Joe White Business, but submitted that the key sources of information available to Cargill contained the misleading representations. Further, it was submitted that Cargill had no way of knowing or discovering the true position and that as a result Cargill was simply not able to accurately assess the Joe White Business or determine its true value.

3042 In addition, the Cargill Parties submitted that the fact that Cargill was relying upon information provided to it was demonstrated by the Warranties sought as part of the Acquisition Agreement. Those Warranties included that: the records of the Joe White Business were complete and maintained in good faith and did not contravene any law; the Joe White Business assets were sufficient to enable the effective conduct of its business after Completion; the Data Room Documentation was true and accurate and no material information had been omitted; and the Joe White Business had been conducted in a proper and efficient manner, and in accordance with applicable laws and the International Organisation for Standardisation's standards.[2169]

3043 In light of all the circumstances, including the non-existence of the Alleged Industry Practices, the Cargill Parties submitted that Cargill's experience in the malting industry and the comparative lack of experience of Glencore was irrelevant because Cargill's experience did not enable it to identify the falsity of the information provided to it. By reason of the manner in which the information was provided and the responses Cargill received with respect to its questions during the Due Diligence, it was submitted that Cargill could not have discovered the matters that were concealed from it.

X.16.3 The Viterra Parties' submissions and why they are rejected

3044 The Viterra Parties' primary position was if, contrary to their submissions the

[2169] See Warranties 4.2, 6.1(e), 12, 13.4 and 17(a) in par 1034 above.

Financial and Operational Performance Representations were made, they were not misleading or deceptive or likely to mislead or deceive and ought not be found to be false because Cargill Australia had not established the Undisclosed Matters existed. As it has been found in issue 10.14 above that the Undisclosed Matters did in fact exist, the basis of this submission is contrary to the court's findings.

3045 Further, the Viterra Parties submitted that the court ought to infer from the fact that he was not called as a witness that Hughes, as the executive manager of Joe White at all relevant times, was therefore, on Cargill Australia's case, likely to have been aware of the Undisclosed Matters if they existed. They further submitted it should be inferred that he believed at the time that each relevant statement was made that it was true and correct. Although Hughes may have been defensive of what was stated and what was not disclosed if he had given evidence, and may have also sought to justify the implementation of the Viterra Practices,[2170] the inference suggested by the Viterra Parties shall not be drawn as it would be entirely contrary to the objective facts before the court. Furthermore, it was surprising that such a blanket submission was made when the evidence and admissions belatedly made by the Viterra Parties demonstrated unequivocally that some of the statements underlying the issues related to the Undisclosed Matters were patently incorrect.[2171]

3046 Alternatively, the Viterra Parties submitted that each of the Financial and Operational Performance Representations needed to be understood in the context in which it was made and that, on that basis, even if it were found that the Undisclosed Matters existed, each such representation "remain[ed] accurate". In seeking to make good this submission, the Viterra Parties repeated their contention that each of the Financial and Operational Performance Representations was a starting point statement only and that section 18 of the Australian Consumer Law did not require every representation to be accurate, but only as accurate or reliable as it was represented to be. It was

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2170 See par 2126 above.

2171 Consider by way of example only, the statement made on numerous occasions that Joe White met its customers' exact specifications and requirements when it was uncontroversial that (leaving aside the frequency) Joe White engaged in each of the Reporting Practice in relation to results beyond 2 standard deviations, the Varieties Practice and the Gibberellic Acid Practice: see further par 3278 below.

submitted that it could only be said that they were capable of being misleading or deceptive if the evidence established that the Financial and Operational Performance Representations were useless for Cargill as a starting point for its investigations. Having made this submission, the Viterra Parties noted that Cargill Australia did not allege that Cargill conducted futile investigations that inevitably caused Cargill to fail to discover facts they should have discovered during the Due Diligence.[2172]

3047 During oral closing submissions, the concept of whether or not making statements only as a starting point could be misleading or deceptive was explored. A question put to the Viterra Parties' senior counsel was whether the success or otherwise of Cargill Australia's case came down to the Confidentiality Deed Terms and the Information Memorandum Disclaimers (which disclaimers were replicated in the Management Presentation Memorandum Disclaimers). In response, senior counsel stated that the case may come down to that and that it was the basis upon which the case was opened and was being closed. However, when it was suggested to him that the contents of the Information Memorandum concerning the Joe White Business on their own would have been misleading if there had been no reference to the Information Memorandum Disclaimers or to the Confidentiality Deed Terms that preceded its dissemination, it was submitted that this was not correct. As part of this discussion, the Viterra Parties submitted that the Information Memorandum was provided to enable a recipient to consider making a non-binding offer, and that it had no other purpose.[2173] The following exchange then took place:

> Let me just test that. That's not an inexpensive exercise, to go through that process [of evaluating the information provided and providing a non-binding indicative offer]. Making representations that Joe White was meeting the exact specifications of its customers, I think I can safely say on the evidence before me, that was incorrect, leaving aside whether it was misleading or not in the context in which it was given. But, absent the way in which the document was to be used as explained in the disclaimers, surely some of the contents of some parts of that Information Memorandum would have been misleading.
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> MR MYERS: As it was explained in the [Phase 1 Process Letter] without

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2172 However, this was the substance of the Cargill Parties' closing submissions: see par 3043 above.

2173 The Viterra Parties acknowledged that the Information Memorandum could be relied upon by a prospective purchaser for the purpose of formulating and submitting an indicative offer as part of Phase 1: see par 2926 above.

> disclaimers, without [the] Confidentiality Deed, it was put forward – … "Thank you for your interest in the possible acquisition of [Joe White] and the assets used exclusively in connection with the Joe White Business and for executing the Confidentiality Deed." So it says that. "This letter is an invitation to submit a non-binding indicative proposal. On the basis of the indicative bids received, Glencore intends to select a short list of parties who will be invited to participate in Phase 2 of the proposed transaction." This is just to get through the gate.

3048 As may be seen, none of the responses really grappled with the underlying question as to whether any of the representations made in the Information Memorandum (either expressly or implicitly) were, in themselves,[2174] misleading because they were not correct or were an inaccurate statement in relation to the Joe White Business. In short, when the Viterra Parties were given the opportunity to explain why it might be that the representations in the Information Memorandum identified by Cargill Australia were a true reflection of the Joe White Business, that opportunity was not taken.[2175]

3049 In making this observation, no criticism is intended. On the evidence, and given the concessions properly made by the Viterra Parties with respect to the existence of each of the Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice, it could not have been responsibly contended by counsel that, by way of example only, it was accurate to state that Joe White supplied the highest quality malt or that Joe White met the exact specifications and requirements of its customers.

3050 Also on the question of whether or not the Financial and Operational Performance Representations were misleading or deceptive, the Viterra Parties relied upon their submissions concerning Cargill's alleged knowledge of the Alleged Industry Practices. They contended that such knowledge ought to have alerted Cargill to the fact that Cargill needed to use the Due Diligence to conduct investigations to

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2174 Acknowledging that this is not the ultimate question for determination as the context must also be considered.

2175 Naturally, the ultimate question as to whether any representations were misleading or deceptive must be considered in the context of the surrounding circumstances as a whole, including the entirety of the contents of any document said to contain the representations, but that still left the question as to whether the statements themselves, either individually or collectively, or any implied representations based on such statements, were correct or accurate.

determine the validity of any of the assumptions about Joe White's use or non-use of the Alleged Industry Practices.

3051 As it has been found that the Viterra Parties failed to establish the existence of the Alleged Industry Practices,[2176] this submission has largely become otiose. However, for completeness, it should be noted that the knowledge of some Cargill employees of very limited examples in the industry of unsatisfactory conduct consistent with or similar to an Alleged Industry Practice only went so far. Effectively, Cargill was on notice that some limited number of employees or organisations in the industry acted dishonestly or unethically. But such knowledge did not put Cargill on notice, or give Cargill a reasonable basis to suspect, that such conduct was likely to be occurring at Joe White or that, absent discovering something during the Due Diligence indicating to the contrary, it ought to have been on the lookout with an expectation of finding such unsatisfactory conduct was being engaged in. All the more so when Joe White was a well-established company of good reputation that had been presented to Cargill in such glowing terms by its existing owners and stakeholders.[2177]

3052 Finally, the Viterra Parties submitted that the representations, made as starting point statements, not only had to be seen in the context in which they were made including the Alleged Industry Practices, but also suggested that the failure to identify any inaccuracies with the Financial and Operational Performance Representations was the fault of Cargill because it failed to properly complete its investigations as part of the Due Diligence. For reasons discussed elsewhere,[2178] it has not been found that Cargill failed to take reasonable care in conducting the Due Diligence before the execution of the Acquisition Agreement.

3053 In summary, none of the Viterra Parties' submissions on this issue have been accepted.

X.16.4 Conclusion

2176 See issue 13 above.

2177 The language of owners and stakeholders is used to distinguish between Viterra, collectively the owners for a number of years of what was sold pursuant to the Acquisition Agreement, and Glencore as the ultimate holding company and the entity driving the sale.

2178 See par 1018 above and issue 80 below.

3054 The Financial and Operational Performance Representations were misleading or deceptive conduct within the meaning of section 18 of the Australian Consumer Law. Speaking generally, each of the representations made portrayed a misleading position as to the financial and operational performance of Joe White.[2179] Put simply, the Viterra Practices were utilised to underpin the production, sales and earnings figures stated in the Financial and Operational Information, as well as give the false appearance of compliance with customers' contracts, including their specifications. It followed that most of the Financial and Operational Performance Representations were necessarily misleading as a result of these circumstances.

3055 Before turning to paragraph 30 of the Statement of Claim, it is instructive to consider the individual representations themselves. The first 3 implied representations were misleading for the reason stated in the preceding paragraph, including that Joe White did not have strict quality control procedures, Joe White's figures were not the result of compliance with customer contracts and the Viterra Practices were improper and unlawful. It barely needs to be said that conduct that involved deliberately misrepresenting a barley variety or barley varieties used, or representing that gibberellic acid had not been used when it knowingly had been in circumstances where the customer expressly prohibited its use, was both improper and unlawful. Further, for reasons explained in issues 9, 10 and 13 above, the Reporting Practice was improper and unlawful.

3056 In relation to the fourth implied representation, each of the Operational Practices involved material information being withheld and concealed from customers. With respect to the Reporting Practice, the visibility of the Viterra Policies to customers and auditors was deliberately obstructed.[2180] Further, by definition the Varieties Practice and the Gibberellic Acid Practice were not disclosed to customers. Any representation to the contrary was plainly misleading.

3057 As to the fifth implied representation, the evidence indicated overwhelmingly that the

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2179 See par 2826(7)-(16) above.
2180 See pars 90, 287-292 above.

assets of the Joe White Business were not sufficient for Joe White to sell malt in the volumes and for the returns stated in the Financial and Operational Information.[2181] A representation to the contrary effect was misleading.

3058 With respect to the sixth implied representation, the future capital expenditure needs were not low.[2182] Accordingly, this representation was misleading.

3059 With regard to the seventh implied representation, in circumstances where Joe White routinely used non-approved barley varieties (including barley not approved for malting) and represented otherwise to its customers as its means of doing business, a representation to the effect that, when procuring barley, Joe White gave priority to obtaining barley that best met its customers' specifications and requirements was necessarily misleading.[2183]

3060 In relation to the eighth and ninth implied representations, there was no ability of Joe White to meet its customers' exact specifications. Any representation to the effect that Joe White's technical analysis and strict quality control procedures ensured the malt it produced consistently met its customers' specifications was patently misleading when the evidence demonstrated that from 2010 to 2013 Joe White rarely met all the specifications of its customers when a batch of malt was delivered.[2184] In such circumstances, Joe White's ability to produce malt that met customers' specifications was not a reason for the performance described in the Information Memorandum, let alone a central reason.

3061 Finally, in relation to the tenth implied representation, as it has been found that at all material times the Undisclosed Matters existed,[2185] this representation was also

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2181 See, for example, pars 1216, 2599 above.

2182 See, for example, pars 436, 536, 1216 above. This conclusion is not ignoring the choice of words "relatively low", as the objective fact was that King considered management's estimate of $30 million to be of sufficient materiality that it would have been likely to result in a reduction in any purchase price of $3.5 million. On the issue of capital expenditure needs, see also issue 73 below.

2183 As to the lack of priority in seeking to meet the barley varieties required, see, for example, pars 82, 170, 410, 415, 1335 above.

2184 See issue 10 above; and in particular pars 2381-2392 above, together with the conclusions derived from that evidence at pars 2400-2414 above.

2185 See issue 10 above.

misleading.

3062 Accordingly, each of the Financial and Operational Performance Representations have been found to be false and misleading in light of the evidence adduced in this proceeding. I now turn to consider whether Cargill Australia has established the falsity of the Financial and Operational Performance Representations as alleged, by reference to paragraph 30 of the Statement of Claim.[2186]

3063 In relation to the first to third implied representations,[2187] there was little divergence between the pleadings and the findings as set out above. Cargill Australia pleaded that each was proved by an extensive range of facts in support of the propositions that Joe White variously saved costs, increased production volumes, decreased production times and maximised sale volumes and earnings by adopting and implementing the Viterra Practices. It was pleaded that the production volumes, sales volumes and earnings figures reported in the Financial and Operational Information between the 2010 financial year and 31 October 2013 could not have been made without the Viterra Practices and Policies.[2188]

3064 It has been found that the Viterra Practices underpinned the production, sales and earnings figures stated in the Financial and Operational Information.[2189] The false appearance of compliance with customers' contracts by the improper and unlawful means adopted meant that the 3 representations were misleading.

3065 In relation to the fourth implied representation,[2190] Cargill Australia relied on facts said to prove the Viterra Practices. Further to those allegations, the allegation was also

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2186 See par 3035 above.

2187 See pars 2835, 2856, 2872 above.

2188 This statement was said to be inferred from, amongst other things, the facts used to demonstrate the existence of the Viterra Practices, an analysis of out-of-specification malt after Completion between November 2013 and December 2016 (see fn 1034 above), a decline in production utilisation rates after Completion when compared to the period between 2010 and 2013 (see pars 1703, 1720, 1723, 1736, 1743, 1763, 1779-1781, (1799), 1823, 1839 above), a decline in production, sales volumes and performance after ceasing the Viterra Practices (ibid), the need for additional capital expenditure on storage (see pars 890, 1216, 1670-1671, 1673, 1718, 2599 above and issue 73.9 below), and the decreased earnings of Joe White after Completion: see pars 1626, 1704, 1721, 1756-1761, 1794, 1828, 1837 above.

2189 See issue 10.12 above.

2190 See par 2877 above.

grounded in the fact that, in relation to the Reporting Practice, the Viterra Policies were deliberately concealed from customers and auditors.[2191] Thus, for the reasons already stated,[2192] the fourth representation was misleading as alleged.

3066 In relation to the fifth implied representation,[2193] Cargill Australia's particulars of the allegation referred to Joe White's barley inventory and barley supply contracts for varieties other than those required by its malt supply contracts with its customers, and Joe White having insufficient storage, blending and production capacity to enable it to produce malt to the specifications and in the quantities required by its malt supply contracts, and for the returns stated in the Financial and Operational Information.

3067 There was a substantial volume of evidence on this topic. It demonstrated that the existing malt inventory at Completion did not have the required barley varieties so that all customers' requirements in that regard could be met, and that there was universality amongst the Joe White operational executives that the insufficiency of the required barley varieties would be an ongoing problem for many months.[2194] In relation to customer relationships, it also showed beyond controversy that the Viterra Practices were concealed from customers. Specifically: (1) the Viterra Policies were effectively hidden from customers and auditors;[2195] (2) customers who specified required barley varieties were not told that their contracts were being breached because incorrect barley varieties were being used; and (3) customers who prohibited gibberellic acid were not told that their contracts were effectively being flouted by the deliberate use of gibberellic acid in breach of contract.[2196] Thus, it was alleged that, as Joe White had maximised sales volumes and earnings by concealing the Viterra Practices, the act of revealing those practices would negatively impact customer relationships and decrease sales volumes. The negative impact on customer relationships arising from the revelation of the Viterra Practices was ineluctable, as

2191 See, for example, pars 90, 287-292 above.
2192 See also par 3067 below.
2193 See par 2881 above.
2194 See pars 1212-1213, 1216, 1218 above.
2195 See pars 90, 283-285, 287-292, 1533, 2113 above.
2196 See, for example, pars 170, 272, 281, 1129-1130, 1224, 1263, 1282, 1293, 1308, 1373(27)-(32), 1555-1556, 2544 above.

was demonstrated after Completion when Cargill had to deal with the fallout of being unable to produce malt within specifications.[2197] In relation to storage and production capacity, these matters have been addressed in relation to the first to third implied representations.

3068 In summary, the substance of each of the matters relied upon to establish the fifth representation was false was proved.

3069 In relation to the sixth implied representation,[2198] Cargill Australia referred to the memorandum prepared by Youil in February 2014, and subsequent storage constructed at the Sydney, Adelaide and Perth plants after Completion. It has been found that the Viterra Parties' awareness of future capital expenditure needs alone was sufficient to prove this representation was misleading, without regard to the subsequent capital expenditure undertaken by the Cargill Parties.[2199]

3070 In relation to the seventh implied representation,[2200] Cargill Australia referred to Joe White's barley inventory and barley supply contracts for varieties other than those required by Joe White's malt supply contracts, the Parameters Analysis and the Deviation Analysis, and various facts said to demonstrate that Joe White saved costs using off-grade and non-approved varieties of barley.[2201]

3071 Based on the evidence, there was a myriad of ways in which it has been established consistent with the pleading that this representation was false.[2202] Put simply, there were many aspects of the manner in which Joe White was operated from the 2010

2197 See, for example, pars 1601-1604, 1607, 1623-1625, 1657, 1660, 1663, 1677 above.

2198 See par 2889 above.

2199 See pars 1216, 1670 above. The capital expenditure after Completion was consistent with this conclusion, albeit with the sales volumes having dropped the amount expended was not as large as it otherwise might have been: see par 1823 above. See also issue 73.9 below.

2200 See par 2896 above.

2201 These included the development and implementation of the Malt Cost Reduction Transformation Project, the incorporation of cost savings in Joe White's 2011 budget, Joe White's practice of applying discounts to off-grade barley purchases, Joe White's adoption of the Varieties Practice and the Reporting Practice, and a range of information supplied by the Joe White executives in October 2013 and after Completion in relation to the nature, assessment of, transport, and purchase of certain varieties of barley.

2202 See, for example, pars 1211-1213, 1220-1223, 1281, 1286, 1299, 1373(11), (17)-(26), 1387, 1549, 1768, 1830 above. See also issue 10.7 above.

financial year to 31 October 2013, not least of all being the implementation of the Viterra Practices, which showed priority was not given to meeting customers' specifications and requirements. This representation was misleading because of this, despite the fact that the use of off-grade barley was disclosed to Cargill as part of the Due Diligence.[2203]

3072 In relation to the eighth implied representation,[2204] Cargill Australia pleaded that Joe White did not employ technical analysis and strict quality control to ensure malt consistently met customers' specifications, which was reflected in the Parameters Analysis. Further, Cargill Australia referred to the Reporting Practice and that Joe White was not capable of reliably producing malt within customers' specifications after ceasing to implement the Reporting Practice. This was said to be inferred from assessments made by the Joe White executives after the Malt Cost Reduction Transformation Project, and from the Customer Review Spreadsheet, Joe White's limited storage capacity, and the aftermath of ceasing the Viterra Practices and Policies after Completion. Again, the allegation that, as Joe White had maximised sales volumes and earnings by concealing the Viterra Practices, the act of revealing those practices would negatively impact customer relationships and decrease sales volumes was relied upon.

3073 It was proved that Joe White was unable to meet its customers' exact specifications to a very significant extent,[2205] and in these circumstances any representation regarding the use of technical analysis and strict quality control procedures to ensure malt complied with specifications was necessarily misleading. In any event, the Viterra Certificate of Analysis Procedure itself demonstrated that Joe White's technical analysis procedures were materially deficient and that there were not strict quality control procedures in place.[2206]

2203 That disclosure did not entail informing Cargill that this was concealed from customers or that it coincided with Joe White routinely failing to meet customers' specifications.

2204 See par 2907 above.

2205 See, for example, pars 1216, 1226, 1232, 1279, 1291, 1309, 1343, 1373(1), (4), (8), (23), (30), 1567, 1572-1573, 1601-1602, 2323, 2411-2412 above.

2206 See, for example, pars 199-201, 2237-2238 (and issue 9 more generally), 2773-2776 above.

3074 In relation to the ninth implied representation,[2207] Cargill Australia pleaded that Joe White's ability to achieve the performance described in the Information Memorandum was not centrally attributable to its ability to meet customers' exact specifications, based on the nature and effect of the Viterra Practices. In circumstances where it has been found that Joe White did not have the ability to comply with customers' specifications between the 2010 financial year and 31 October 2013, and made false statements to the contrary, it followed that the performance described in the Information Memorandum was not even remotely based on Joe White's ability to meet customers' exact specifications.

3075 There was no independent allegation in paragraph 30 of the Statement of Claim directed specifically to the tenth implied representation,[2208] which has also been found to be misleading by reason of the matters pleaded in paragraph 19 of the Statement of Claim. Presumably this was because (as pleaded in paragraph 27) the representation was alleged to have been made by the failure to disclose the Undisclosed Matters.

X.17 Were the Financial and Operational Performance Representations made in trade or commerce in Australia?

3076 The Viterra Parties accepted that if, as has been found, the Financial and Operational Performance Representations were made, then they were made in trade or commerce in Australia.

X.18 If the Financial and Operational Performance Representations or any of them were made by Merrill Lynch,[2209] Mattiske,[2210] Hughes, Youil, Argent and/or Viterra, is that conduct deemed to be Glencore's conduct under section 139B(2) of the *Competition and Consumer Act*?

X.18.1 Legislation and relevant principles

2207 See par 2910 above.

2208 See par 2914 above.

2209 It was admitted that Merrill Lynch's conduct in sending the Phase 1 Process Letter, the Information Memorandum and the Phase 2 Process Letter was deemed to be Glencore's conduct.

2210 It was admitted that Mattiske's conduct in sending the Reply Letters was deemed to be Glencore's conduct.

3077 An individual's conduct may be attributed to a corporation by the operation of section 139B(2) of the *Competition and Consumer Act*. Section 139B(2) provides:

> Any conduct engaged in on behalf of a body corporate:
>
> (a) by a director, employee or agent of the body corporate within the scope of the actual or apparent authority of the director, employee or agent; or
>
> (b) by any other person:
>
> (i) at the direction of a director, employee or agent of the body corporate; or
>
> (ii) with the consent or agreement (whether express or implied) of such a director, employee or agent;
>
> if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;
>
> is taken, for the purposes of this Part or the Australian Consumer Law, to have been engaged in also by the body corporate.

3078 Although the wording is slightly different, section 139B(2) reflects section 84(2) of the *Competition and Consumer Act*.[2211] Authorities concerned with the interpretation of section 84(2) of the *Competition and Consumer Act*, and its predecessor, the *Trade Practices Act*,[2212] are therefore relevant for the purposes of determining the meaning and scope of section 139B(2) of the *Competition and Consumer Act*.[2213] As was the position with section 84(2),[2214] the statutory test of attribution in section 139B(2) does not operate to exclude the ordinary principles of common law. Rather, it is an "enlarging provision" intended to make proving or attributing corporate responsibility for a person's conduct easier than it is at common law.[2215]

3079 Section 139B(2) can be broken down into 3 component parts, each of which must be

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2211 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), 390 [18.35].

2212 Formerly, s 84(2) of the *Trade Practices Act*: Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), 4.

2213 *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408, [280] (Gleeson J).

2214 *Trade Practices Commission v Queensland Aggregates Pty Ltd* (1982) 44 ALR 391, 404.6 (Morling J).

2215 *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270, 549 [1241] (Lindgren J). See also *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408, [281], cited in *Harvard Nominees Pty Ltd v Tiller (No 2)* [2020] FCA 604, [484] (Jackson J); *Walplan Pty Ltd v Wallace* (1986) 8 FCR 27, 38.4 (Lockhart J, with whom Sweeney and Neaves JJ agreed).

satisfied in order to attribute any of the Financial and Operational Performance Representations to Glencore (to the extent they were made by the persons identified for this issue).

3080 *First*, the court must consider whether the relevant individual (be it a person or a body corporate) engaged in conduct *on behalf of* Glencore.

3081 If this first question is answered in the affirmative, then the court must *secondly* turn to *who* engaged in the conduct. The relevant question is whether the conduct was engaged in by:

(1) A director, employee or agent of Glencore.

(2) Alternatively, any other person at the direction, or with the consent or agreement (express or implied) of a director, employee or agent of Glencore.

3082 *Thirdly*, turning to the final component of section 139B(2), the court must be satisfied that the conduct, or the direction, consent or agreement (express or implied) given, was *within the scope of authority* (actual or apparent) of the relevant director, employee or agent of Glencore.

3083 Turning to the first question, the phrase "on behalf of" has no strict legal meaning.[2216] Rather, the meaning will depend on the circumstances of a particular case and it can apply to a wide range of relationships which involve, in some way, the standing of a person as auxiliary to or representative of another person or thing.[2217] It has generally been accepted that, without being exhaustive,[2218] conduct will be "on behalf of" a

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2216 *NMFM Property Pty Ltd v Citibank Ltd* (2000) 107 FCR 270, 549 [1240] (Lindgren J); *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 37.3 (Lockhart J, with whom Sweeney and Neaves JJ agreed); *R v Portus; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428, 435.4 (Latham CJ).

2217 *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374, 386.3 (Stephen, Mason, Murphy and Aickin JJ), cited in relation to the *Trade Practices Act* in *NMFM Property Pty Ltd v Citibank Ltd* (2000) 107 FCR 270, 549 [1240]; *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 37.3, cited in relation to the *Competition and Consumer Act* in *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408, [298] (Gleeson J).

2218 *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, [55] (Keane JA, with whom Williams JA and Atkinson J agreed). See also *Bennett v Elysium Noosa Pty Ltd (in liq)* (2012) 202 FCR 72, 131 [205]

corporation if:[2219]

(1) The individual – a director, employee or agent – engaged in the relevant conduct intending to do so *for* or *as a representative of* the corporation.

(2) Alternatively, the individual engaged in the relevant conduct in *the course of the corporation's business affairs or activities*.

3084 It is sufficient that there is "some" involvement that is "real or genuine" of the individual in the relevant conduct; there is no requirement that it be significant involvement.[2220] The question may be determined objectively, in addition to considering the individual's subjective intention.[2221] That said, it is neither necessary nor sufficient that the person whose conduct is in question intended to benefit the corporation, and nor is it determinative whether or not the conduct did in fact benefit the corporation.[2222]

3085 In respect of the second part of section 139B(2), concerning "any other person" in paragraph (b), there is an additional question to be considered: whether the individual engaged in the relevant conduct at the "behest" of the corporation (ie at the behest of a director, employee or agent of the corporation).[2223]

3086 Thus, for section 139B(2) to apply the individual must be a director, employee or

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(Reeves J).

2219 *NMFM Property Pty Ltd v Citibank Ltd* (2000) 107 FCR 270, 550 [1244], cited in *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* (2016) 250 FCR 136, 153 [78]-[80] (Davies, Gleeson and Edelman JJ) and in *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408, [299]. See also *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, [55]-[59].

2220 *Bennett v Elysium Noosa Pty Ltd (in liq)* (2012) 202 FCR 72, 132 [207]; *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 37.3 (Lockhart J, with whom Sweeney and Neaves JJ agreed). See also *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408, [298]-[300] (Gleeson J).

2221 *Bennett v Elysium Noosa Pty Ltd (in liq)* (2012) 202 FCR 72, 132 [203]-[208], and the cases there cited.

2222 *NMFM Property Pty Ltd v Citibank Ltd* (2000) 107 FCR 270, 550 [1243] (Lindgren J), cited in *Bennett v Elysium Noosa Pty Ltd (in liq)* (2012) 202 FCR 72, 131 [203] and *Ackers v Austcorp International Ltd* [2009] FCA 432, [216] (Rares J); *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 38.3.

2223 *Bennett v Elysium Noosa Pty Ltd (in liq)* (2012) 202 FCR 72, 134-135 [223], where Reeves J stated that behest was "an apt and succinct way of encapsulating the words in that subsection: 'at the direction or with the consent or agreement (whether express or implied) of'", remaining mindful that it is the words of the statute itself which are to be construed and applied. See also *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 37.5.

agent,[2224] or any other person, so long as she or he is acting at the behest of a director, employee or agent of the corporation.[2225] The term "director" takes its meaning from the *Corporations Act 2001* (Cth).[2226] Neither "employee" or "agent" is defined and so their ordinary meanings will apply.

3087 Answering the third question requires the court to examine the authority of the individual (as director, employee, agent or "other person"). In short, the conduct of the director, employee or agent, or the conduct of the "other person" together with the direction, consent or agreement in question, must be within the scope of the person's *actual* or *apparent authority*, both of which take their meaning from common law. The legal principles underpinning actual and apparent authority are well established.

3088 Actual authority is established on the basis of a consensual legal relationship between principal and agent,[2227] under which the agent is conferred with authority to act on behalf of the principal.[2228] Consent may be express, or implied when it is inferred from the conduct of the principal and agent and the circumstances of the case.[2229] The scope

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2224 Thereby satisfying s 139B(2)(a).

2225 Thereby satisfying s 139B(2)(b).

2226 Section 9 of the *Corporations Act* defines "director" of a company or other body as a person who is appointed to the position of a director, or is appointed to the position of an alternative director and is acting in that capacity, regardless of the name that is given to their position. "Director" also means, unless the contrary intention appears, a person who is not validly appointed as a director if they act in the position of a director, or the directors of the company are accustomed to act in accordance with the person's instructions or wishes.

2227 *NMFM Property Pty Ltd v Citibank Ltd* (2000) 107 FCR 270, 493 [1023]; *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, 132E (Clarke and Cripps JJA); *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72, 77.2 (Gibbs, Mason and Jacobs JJ); *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 502.8 (Diplock LJ).

2228 *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982, [29]-[30] (Bromwich J); *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408, [284]-[285] (Gleeson J), quoting Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389, [177] (Allsop P, with whom Bathurst CJ and Campbell JA agreed); *NMFM Property Pty Ltd v Citibank Ltd* (2000) 107 FCR 270, 492-493 [1020]-[1023] (Lindgren J); *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, 132E (Clarke and Cripps JJA). See also *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72, 77.6-78.2, 79.5, 80.4 (Gibbs, Mason and Jacobs JJ).

2229 *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd* (2005) 220 ALR 211, 236 [124]-[127], 237 [136] (Branson, Nicholson and Jacobson JJ); *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279 (Appeal Decision, 350), 361.3-362.3 (McGarvie, Marks and Beach JJ); *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, 132E, 133E, 138B, 138D; *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, 583A (Lord Denning MR); *Australia & New Zealand Bank Ltd v Ateliers de Constructions Electriques de Charleroi* [1967] 1 AC 86, 113F-115A (Lord Pearson, on behalf of the Privy Council).

of authority is to be determined by the ordinary principles of construction of contracts, and by reference to any proper implication from the course of business between the principal and its agent.[2230] Further, not every particular act or individual piece of conduct need be authorised; if an act or class of acts (or conduct or a class of conduct) is within an agent's actual authority, the principal is bound.[2231]

3089 Apparent authority, on the other hand, is not based on a consensual relationship between principal and agent. Instead, apparent authority arises when there is an appearance or representation of authority to a third party, created by the principal in respect of her or his agent.[2232] Succinctly expressed in the context of contractual relations:[2233]

> … "apparent" or "ostensible" authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. [She or he] need not be (although [she or he] generally is) aware of the existence of the representation … The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that [she or he] is not bound by the contract.

Although this original expression of apparent authority was confined to an agent's authority to enter into contracts, the underlying principles are relevant, and have been applied, to any conduct that an agent purports to perform on behalf of her or his

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2230 *Poulet Frais Pty Ltd v The Silver Fox Co Pty Ltd* (2005) 220 ALR 211, 236 [124]; *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 502.8 (Diplock LJ).

2231 *Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Co-operative Assurance Company of Australia Ltd* (1931) 46 CLR 41, 46.6 (Gavan Duffy CJ and Starke J), 50.5 (Dixon J, with whom Rich J agreed). See further fn 3156 below.

2232 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 466-467 [36] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72, 78.4, 79.9-80.4, 80.6-81.2 (Gibbs, Mason and Jacobs JJ), citing *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 503. See also *NMFM Property Pty Ltd v Citibank Ltd* (2000) 107 FCR 270, 384 [511]-[512], 453-454 [843]. Note, apparent authority has been described as a manifestation estoppel, which operates to preclude a principal from denying her or his agent's authority when the representation has been acted upon by a third party: see *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 498.6 (Pearson LJ), 503.5 (Diplock LJ) quoted in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 466 [36]; *New South Wales v Lepore* (2003) 212 CLR 511, 554 [108] (Gaudron J).

2233 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 503.3.

principal.[2234]

3090 The scope of apparent authority therefore fundamentally relies on the representation made by the principal to a third party.[2235] Crucially, the representation must be made by the principal or a person to whom the principal has conferred actual authority.[2236] Without more, a mere representation by a person purporting to act as an agent as to that person's own authority to act on behalf of a principal is insufficient to establish apparent authority.[2237] For apparent authority to exist, the representation itself may be made through words or conduct, expressly or impliedly, or by acquiescence;[2238] and it is sufficient that the agent is placed in a position by the principal to allow her or him to give the appearance of authority.[2239] However, the scope of apparent authority is at all times limited by the third party's knowledge of limitations imposed on the agent's authority. If the third party knows that the agent is acting in violation of her or his actual authority, apparent authority cannot be established.[2240]

2234 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 172.8 (Brennan J); *Saunders v Leonardi* (1976) 1 BPR 97042, 9423.2 (Holland J).

2235 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 466-467 [36]; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72, 78.6 (Gibbs, Mason and Jacobs JJ).

2236 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 466 [36] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 173.6-174.5; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72, 78.5, 80.6; *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 504.2-505.4 (Diplock LJ).

2237 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 466 [36], citing *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 503; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 187.3 and *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72, 78.5.

2238 In the case of acquiescence, this may give rise to actual authority, the 2 concepts not being mutually exclusive (see par 3092 below): see, for example, *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, 584F (Lord Denning MR), 588F (Lord Wilberforce), 593E (Lord Pearson); *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 509.5-510.4. In the case of impliedly by a course of conduct: see, for example, *Royal-Globe Life Assurance Co Ltd v Kovacevic* (1979) 22 SASR 78, 82.7 (Walters J); or not: see *Derham v AMEV Life Assurance Company Ltd* (1981) 56 FLR 34, 51.7-55.3 (Kelly J). See also *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72, 78.5 (Gibbs, Mason, Jacobs JJ).

2239 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 467 [38], 469 [44] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

2240 *Powercor Australia Ltd v Pacific Power* [1999] VSC 110, [1224], [1234] (Gillard J), quoting *Armagas Ltd v Mundogas SA* [1986] AC 717, 777C (Lord Keith), in turn citing *Russo-Chinese Bank v Li Yau Sam* [1910] AC 174. In *Russo-Chinese Bank v Li Yau Sam*, Lord Atkinson stated on behalf of the Privy Council that "a person who deals with an agent, whose authority he knows to be limited, ... does so at his peril, in this sense, that should the agent be found to have exceeded his authority his principal cannot be made responsible": at 184.4. See also *Lysaght Bros & Co Ltd v Falk* (1905) 2 CLR 421, 430.6-432.3 (Griffith CJ), 441.5 (O'Connor J).

3091 For completeness,[2241] additional observations may be made in relation to attribution of conduct to a corporation: (1) generally, the principles of attribution are subject to a corporation's constitution, which may define or determine the authority that can be conferred on an agent;[2242] and (2) actual authority is conferred by the corporation's constitution or some antecedent act such as a resolution, or by those who have authority and are permitted to delegate this authority.[2243]

3092 Actual and apparent authority are not mutually exclusive; it is often the case they will coincide, but they can exist independently and the scope of authority of each may differ.[2244] Further, as between 2 corporations within a corporate group, the question of any relationship of principal and agent must be approached applying the relevant principles as the corporations are separate legal entities despite the connection to the same group.[2245]

X.18.2 The persons in issue

X.18.2.1 Merrill Lynch

3093 In the Statement of Claim, it was alleged that, to the extent that the Financial and Operational Performance Representations were made by Merrill Lynch, such conduct was deemed to be conduct of Glencore by operation of section 139B(2). The conduct identified in the particulars to this allegation included preparatory work for the sale process from September 2012 to February 2013, the provision of the Information

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2241 There was no issue raised in this proceeding concerning Glencore's or Viterra's constitutions or the scope of any actual authority of Glencore or Viterra consequent upon each company's constitution.

2242 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 466-467 [36] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 172.3, 173.7-174.5, 175.2 (Brennan J); *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, 133E (Clarke and Cripps JJA); *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 504.3 (Diplock LJ). See also par 2617 above.

2243 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 171.9-172.9; *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 504.7-505.3 (Diplock LJ). See also *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72, 79.8-80.5 (Gibbs, Mason, Jacobs JJ).

2244 *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, 583C (Lord Denning MR), 593E (Lord Pearson); *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 502.6.

2245 *Consolo Ltd v Bennett* (2012) 207 FCR 127, 141 [83] (Keane CJ, McKerracher and Katzmann JJ); *Khalaf Agaiby v Darlington Commodities Ltd* (1985) ATPR 40-535, 46,320.8 col 1 (Beaumont J). See also *Australian Competition and Consumer Commission v Yazaki Corporation (No 2)* (2015) 332 ALR 396, 443 [217] (Besanko J).

Memorandum to Cargill under cover of the Phase 1 Process Letter, the making of the Information Memorandum Statements, the sending of the Cargill Indicative Bid to Merrill Lynch, the forwarding of the Phase 2 Process Letter to Cargill, and the making of the Management Presentation Statements.

3094 As already noted,[2246] there was no issue that Merrill Lynch's role in preparing and distributing each of the Information Memorandum, and the Phase 1 and Phase 2 Process Letters was attributable to Glencore. Although formally not admitted on the pleadings, there could also be no issue with respect to the Management Presentation Statements. In substance, Merrill Lynch's authority and role in the preparation and dissemination of the Management Presentation Memorandum reflected that with respect to the Information Memorandum.[2247] Further, in their written submissions, the Viterra Parties accepted that the provision of the information in the Data Room by Merrill Lynch was conduct that could be attributed to Glencore.

3095 However, in contrast to what was contained in the documents provided to Cargill, there was no evidence that any representative of Merrill Lynch made any of the oral statements to the extent they were made as part of the Management Presentation Statements,[2248] the Operations Call Statements or the Commercial Call Statements. In short, that conduct involving oral representations has not been established as having been engaged in by Merrill Lynch, so the question of attribution did not arise in this regard.

3096 Nothing more need be said on this topic as there was no real issue that Merrill Lynch's involvement in the sale process was on behalf of Glencore. Both the Information Memorandum and the Management Presentation Memorandum expressly stated

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2246 See fn 2209 above.

2247 To the extent Merrill Lynch engaged in such conduct, the Cargill Parties accepted that the mere passing on of information, or collating information without more, may not amount to any representation about the accuracy of any information: see, for example, *Downey v Carson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, [46]-[47] (Keane JA, with whom Williams JA and Atkinson J agreed).

2248 Although Eden gave evidence concerning Merrill Lynch speaking at the Management Presentation, no detail was elicited and it was not relied upon to establish the Management Presentation Statements: see par 709 above.

Merrill Lynch was acting for Glencore in connection with each document respectively.[2249] Further, to the extent that the particulars in support of this allegation went beyond what was said to give rise to the Financial and Operational Performance Representations, they need not be considered.

X.18.2.2 Mattiske

3097 It was alleged that, to the extent the Financial and Operational Performance Representations were made by Mattiske, such conduct was deemed to be conduct of Glencore by operation of section 139B(2).[2250] The particulars in support of this allegation referred to Mattiske's senior position in Glencore's "working group" for the sale process,[2251] his position as managing director of Glencore Grain, and his directorships of each of the Viterra entities and of Joe White, amongst other things.

3098 Further, Cargill Australia provided particulars of Mattiske's alleged knowledge from around December 2012, including by reference to his involvement in the sale process, an email he received on 16 January 2013 from Hughes,[2252] the Customer Review Spreadsheet and the Key Recommendations Memorandum, in seeking to establish Mattiske's knowledge of the Viterra Practices. Cargill Australia alleged this knowledge, together with the knowledge obtained by Mattiske during the course of the investigations after his receipt of the Cargill 22 October Letter, was attributable to Glencore.

3099 As noted above,[2253] there was no issue that Mattiske's conduct in sending the Reply Letters was conduct of Glencore. Nor could there be any issue that, to the extent that Mattiske learnt of various matters as part of the investigations conducted in late October 2013, such knowledge was knowledge of Glencore.

2249 See pars 475, 711 above.

2250 The allegations against Mattiske also were concerned with the Pre-Completion Representations, as to which see issues 25, 28 below.

2251 See pars 367, 369-370, 440 above. Whilst the Viterra Parties admitted a working group list of various persons, including Mattiske, was prepared by Merrill Lynch in April 2013, it was contended that it was no more than a contact list for individuals and did not comprise a group of decision-makers. Save to say that not all persons on the list were decision-makers, it is unnecessary to address this peripheral issue as part of considering Mattiske's role: see pars 370, 392, 440 above.

2252 See par 375 above.

2253 See fn 2210 above.

3100 The Viterra Parties' submissions on Mattiske's conduct being that of Glencore were essentially confined to Mattiske's lack of knowledge of the Undisclosed Matters before the Cargill 22 October Letter. It was submitted that any failure by Mattiske to inform Cargill of facts of which he had no knowledge could not constitute conduct for the purposes of section 139B(2).

3101 It suffices to say that Mattiske's involvement in the preparation of the Information Memorandum and the Management Presentation Memorandum, as well as the preparation for the Management Presentation itself,[2254] was conduct that was incontrovertibly engaged in on behalf of Glencore.[2255] However, there was nothing to suggest that Mattiske knew of any of the Undisclosed Matters before 22 October 2013. In fact, the evidence made it clear he was not told before this time.[2256]

X.18.2.3 Hughes

X.18.2.3.1 The allegations and the Cargill Parties' submissions

3102 It was alleged that, to the extent the Financial and Operational Performance Representations were made by Hughes, such conduct was deemed to be conduct of Glencore by operation of section 139B(2). The conduct Cargill Australia sought to have attributed to Glencore related to Hughes' making of the Management Presentation Statements, the Operations Call Statements and the Commercial Call Statements. Further, Cargill Australia relied upon Hughes being an agent of Glencore by reason of him being a member of the "working group" from around January 2013,[2257] and because of the agreement he entered into in May 2013 to assist in the sale process and the fact that he actually assisted in accordance with that agreement.[2258]

3103 The Cargill Parties' submissions were concise. They simply referred to the fact that Hughes had been requested by Glencore to make each of the statements referred to in the preceding paragraph and to assist in the sale process, and that Hughes did so

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2254 See par 699 above.

2255 This finding does not suggest this was to the exclusion of Viterra, as Mattiske, as a director of each of the Sellers, was also acting on behalf of them: see issue 19 below.

2256 See pars 1247, 1281, 1295, 1299 above.

2257 See par 3097 above.

2258 See par 1876 above.

within the scope of their actual authority on Glencore's instructions.

X.18.2.3.2 The Viterra Parties' submissions

3104 The Viterra Parties submitted that Hughes was not acting on behalf of Glencore during the Operations Call, the Commercial Call or the Management Presentation because he was expressly representing Joe White on each of those occasions. Further, they submitted that Cargill was aware that Hughes had no authority to make any representation binding on Glencore.

3105 Further or alternatively, reference was made to the Hughes/Viterra Contract by which Hughes agreed to act ethically and honestly and in the best interest of Viterra Ltd.[2259] Noting that Glencore was the ultimate holding company of Viterra Ltd, they submitted that any conduct of Hughes was not done on behalf of Glencore and was otherwise outside the scope of his employment contract in that he did not act ethically or honestly or in the best interest of Viterra Ltd and its holding company, Glencore. On this basis, it was submitted that Hughes' conduct could not be attributable to Glencore under section 139B(2).

X.18.2.3.3 Analysis

3106 For the purpose of determining this issue, it was inconsequential whether Hughes was acting on the relevant occasions for Joe White or not. Even on the assumption that he was so acting,[2260] in making the Financial and Operational Performance Representations to the extent that he did his conduct was deemed to be that of Glencore by operation of either or both of paragraphs (a) and (b) of section 139B(2). For reasons already discussed in issue 11 above, Hughes was an agent of Glencore who was expressly authorised to make representations about the Joe White Business for the purposes of the sale process. Whatever his contractual arrangements were with Viterra, they could not alter the fact that he was authorised by Glencore to assist in the drafting and finalisation of the written statements contained in the Information Memorandum and the Management Presentation Memorandum, and to make the oral statements concerning the Joe White Business, all of which conduct gave rise to the

2259 See further issue 136 below.

2260 Findings to the contrary are made in issue 124 below.

Financial and Operational Performance Representations. Alternatively, even if Hughes was not an agent, he was clearly a person who was acting on behalf of Glencore at the direction of employees and agents of Glencore,[2261] as well as with their consent and agreement, which was within the actual authority of those employees and agents.[2262] Under any of these scenarios, section 139B(2) operated so that his conduct was taken to have been engaged in by Glencore.

3107 The Viterra Parties did not identify the specific basis upon which they contended that Cargill knew Hughes had no authority to make any representations binding upon Glencore. No evidence of any witness was referred to as part of this submission.[2263] Presumably, this was submitted in reliance upon the Sale Process Disclaimers, or at least some of them.[2264] As the authorities make plain, the mere fact that it is stated that someone is not acting as an agent is not determinative. The facts of this case were that Glencore decided to have the benefit of the services of Hughes and Argent in order to facilitate the sale for the Viterra Parties in a manner to achieve maximum and massive competitive tension.[2265] As part of Glencore's endeavours to achieve this outcome, a specific retainer was put in place to secure Hughes' services and continuity. This retainer was not between Hughes and Joe White, but was between Hughes and Viterra at the direction of Glencore.[2266] The conduct engaged in to facilitate this was being done on behalf of Glencore so that Glencore (through Viterra) could achieve its desired outcome of a sale price of US$400 million. Any disclaimer as between the Viterra Parties and Cargill that suggested to the contrary did not reflect the reality and could not thwart or override the operation of section 139B(2).

3108 Further, even if the terms of the Hughes/Viterra Contract were relevant to Glencore's position (Glencore not being a party to that agreement), it did not take the matter any

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2261 Such as Merrill Lynch, King and Mattiske.

2262 The employees of Glencore included Walt, Mostert, Roelfs, Mattiske and King and the agents included Merrill Lynch.

2263 For completeness, there was evidence that Cargill knew Hughes was in attendance at the Management Presentation because of his position at Joe White, but as explained above this did not exclude Hughes acting for Glencore or Viterra: see fn 1298 above.

2264 But see par 2670 above concerning Hughes' position as a "Discloser" and a "Representative".

2265 See pars 110, 368, 766 above.

2266 See par 1876 above.

further. Clauses to the effect that Hughes was required to act ethically and honestly and in the best interest of Viterra Ltd could not have the result that, if Hughes was authorised to engage in conduct on behalf of Glencore with respect to providing information about Joe White for the purposes of the sale process, his conduct ceased to be on behalf of Glencore whenever that conduct became misleading in such a manner that it was unethical or dishonest or not in the best interest of Viterra Ltd. If this were the position, in cases involving silence and alleged lack of knowledge, corporations could avoid the consequences of misleading conduct being engaged in by simply requiring employees or agents to enter contracts with their employer or principal requiring them to act ethically and honestly and in its best interest,[2267] while still taking the benefit of any misleading conduct which may result in a sale if that term were breached. In any event, the Viterra Parties cited no authority in support of this submission. There is longstanding authority to the contrary.[2268]

X.18.2.4 Youil

3109 For reasons discussed below,[2269] it has not been found that Youil made any of the representations or statements in trade or commerce that gave rise to the Financial and Operational Performance Representations. Accordingly, it is unnecessary to consider this issue in relation to him.

X.18.2.5 Argent

3110 In alleging that, to the extent the Financial and Operational Performance Representations were made or provided by Argent that conduct was deemed to be conduct of Glencore, Cargill Australia put forward the same reasons alleged concerning Hughes. As to Argent's conduct, Cargill Australia referred to the Management Presentation.

3111 The Viterra Parties relied upon precisely the same submissions referable to Hughes in contending that Argent's conduct should not be attributed to Glencore. For the reasons those submissions were rejected concerning Hughes,[2270] to the extent that

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2267 If such a term of employment were not already implied.
2268 See fn 3156 below.
2269 See issue 126 below.
2270 See pars 3106-3108 above.

Argent engaged in conduct which gave rise to the Financial and Operational Performance Representations, they are also rejected in relation to him.

X.18.2.6 Viterra

3112 Finally, Cargill Australia alleged that, to the extent the Financial and Operational Performance Representations were made by Viterra, that conduct was deemed to be conduct of Glencore.[2271] The conduct relevant to this allegation was the sale process itself, the preparation and provision of the Information Memorandum, the preparation and distribution of the Phase 1 and Phase 2 Process Letters, Viterra's involvement in the Due Diligence (including the Data Room Documentation and the provision of the Data Books), the Management Presentation, the Operations Call, the Commercial Call, and generally the failure to disclose the Undisclosed Matters. In alleging Viterra acted as agent for Glencore, Cargill Australia also referred to the corporate relationship between Glencore and Viterra, the Phase 1 Process Letter and the Information Memorandum (including alleging that the Information Memorandum stated it was prepared on behalf of the subsidiaries of Glencore),[2272] the fact that Viterra owned the assets that were to be sold, and finally that the sale process was managed by Mattiske, Fitzgerald and Rees who were each officers and employees of Viterra. In relation to the direction, consent or agreement by a director, employee or agent of Glencore, such direction, consent or agreement was said to be inferred by reason of the matters referred to immediately above.

3113 Without going through the matters individually, essentially the Cargill Parties contended that by reason of the incentivisation of Hughes and Argent, to the extent that either or both of them were engaged in making the Financial and Operational Performance Representations, they were made by the 3 Viterra entities, and in turn those entities were so engaged on behalf of Glencore.

3114 In the Viterra Parties' closing submissions, they conceded that Viterra's conduct in carrying out the sale process and providing the Information Memorandum, the Phase

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2271 The allegations against Viterra also were concerned with the Pre-Completion Representations, as to which see issues 25, 28 below.

2272 In fact, the Information Memorandum did not expressly state this: see par 475 above.

2 Process Letter and the information in the Data Room, was all directly attributable to Glencore. In oral submissions, the Viterra Parties accepted that to the extent that any of this conduct was done by Viterra, it was done on behalf Glencore.

3115 However, Glencore also submitted that, to the extent that it might be found that Viterra engaged in any positive conduct referable to the Management Presentation, the Operations Call and the Commercial Call, Cargill knew that no agent had authority to make any representation to Cargill that was binding on Glencore. For the same reasons as this submission was rejected in relation to Hughes and Argent,[2273] it is rejected here.

X.18.3 Conclusion

3116 For these reasons, section 139B(2) was satisfied with respect to Merrill Lynch, Mattiske, Hughes, Argent and Viterra. In short, to the extent that any of these persons engaged in conduct that gave rise to the Financial and Operational Performance Representations, that conduct was engaged in on behalf of Glencore and, by operation of section 139B(2), taken to have been engaged in by Glencore for the purposes of the Australian Consumer Law.

X.19 If the Financial and Operational Performance Representations, or any of them, were made by Merrill Lynch, Mattiske, Hughes, Youil, Argent and/or Glencore, is that conduct deemed to be Viterra's conduct under section 139B(2) of the *Competition and Consumer Act*?

X.19.1 Introduction

3117 In addition to alleging the conduct of Merrill Lynch, Mattiske, Hughes, Youil and Argent was attributable to Glencore, Cargill Australia alleged the relevant conduct of these persons was attributable to Viterra pursuant to section 139B(2). Further, it was alleged that Glencore's conduct was attributable to Viterra.

2273 See par 3107 above.

3118 An agent may act for more than 1 principal. Equally, in relation to the operation of section 139B(2), conduct may be engaged in on behalf of 2 or more bodies corporate.[2274] Naturally, whether or not a person is acting on behalf of 2 bodies corporate is to be determined on the particular facts of the case.

X.19.2 The Cargill Parties' submissions

3119 The Cargill Parties dealt with issues 18 and 19 together. In other words, for essentially the same reasons they contended each relevant person was acting on behalf Glencore, they also contended it or he was acting on behalf of Viterra. The Cargill Parties submitted that Viterra was primarily responsible for drafting the Information Memorandum Statements, as it was Viterra employees that assisted. Further, they noted that the Information Memorandum made no distinction between Glencore and Viterra as "Glencore" was defined to include Viterra. The key difference in the submissions was that, instead of referring to Glencore's requests and instructions to Hughes and Argent,[2275] the Cargill Parties referred to the fact that Mattiske was a director of each of the Viterra entities and submitted Hughes and Argent carried out the relevant tasks within the scope of their actual authority at the direction of Mattiske.

X.19.3 The Viterra Parties' submissions and determination of attribution of each person's conduct

3120 The Viterra Parties made general submissions consistent with those they made in relation to issue 18. There is no need for repetition.

X.19.3.1 Merrill Lynch

3121 While the Viterra Parties accepted Merrill Lynch's conduct was attributable to Glencore, they submitted there was no evidence Merrill Lynch was "considered to be, or in fact was, acting for any of" Viterra. It was then simply contended that accordingly the conduct of Merrill Lynch ought not be deemed to be Viterra's conduct.

2274 Cf *Cassidy v Saatchi & Saatchi Australia Pty Ltd* (2004) 134 FCR 585, 592 [31], [37] (Moore and Mansfield JJ). See also *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, noting in that case that the issue of whether or not s 84(2) was enlivened was put in the alternative to the primary position that there were 2 principals: [54] (Keane JA, with whom Williams JA and Atkinson J agreed).

2275 See pars 3103, 3110 above.

In making this submission, there was no attempt to grapple with the language of section 139B(2) or the wording of the Information Memorandum Disclaimers and the Management Presentation Memorandum Disclaimers.

3122 As to the latter, the Viterra Parties' submission that Merrill Lynch was not acting for Viterra flew in the face of the contents of the Information Memorandum and the Management Presentation Memorandum. Both these documents expressly provided that Merrill Lynch was acting for "Glencore", which was unequivocally defined to include Viterra.[2276] These express acknowledgements reflected the true position.

3123 It suffices to say that Merrill Lynch, in facilitating the provision of information to assist prospective purchasers in deciding whether to acquire assets collectively owned by Viterra, was acting with the consent or agreement (at the very least implied) of Mattiske, a director of each of the Viterra entities who was charged with responsibility of, amongst other things, ensuring that the sale process went smoothly.[2277] In the circumstances, where Viterra (at the direction of Glencore) consented or agreed to the sale process, Merrill Lynch's conduct must be taken to be engaged in on behalf of Viterra and thus be taken to be conduct of Viterra pursuant to section 139B(2).

X.19.3.2 Mattiske

3124 The Viterra Parties' submissions concerning Mattiske were confined to his lack of knowledge of the Undisclosed Matters. Obviously, his conduct was attributable to Viterra as at all relevant times he was a director of each company. As it has been found Mattiske lacked knowledge of the Undisclosed Matters before the Cargill 22 October Letter,[2278] it is unnecessary to discuss this issue further.

2276 See pars 475, 711 above. For completeness, later in the Information Memorandum it was stated that "Glencore" had retained Merrill Lynch as "its" financial adviser to assist with the proposed transaction. The reference to the singular might be said to have suggested Glencore alone rather than Glencore and its subsidiaries. The better view is that it did not, as Glencore was a defined term that plainly went beyond referring to a single entity. But even if the contrary view were taken as to the use of "Glencore" in this context, that statement was not inconsistent with the earlier statement that Merrill Lynch was acting for Glencore and its subsidiaries "in connection with this document".

2277 See pars 363, 392 above.

2278 See par 3101 above.

X.19.3.3 Hughes

3125 The Viterra Parties maintained the position that, at all times during the Management Presentation, the Operations Call and the Commercial Call, Hughes was either acting for Joe White or, if he acted other than ethically or honestly, he was acting outside his service contract or failed to act in the best interest of Viterra Ltd. They submitted that, despite the fact that Hughes was an employee of Viterra Ltd, his conduct could not be attributed to his employer. For the reasons discussed above,[2279] there was no merit in this submission.

3126 Turning to the specific allegation made, it was alleged that Hughes, as an employee of Viterra Ltd or as an agent of each of the Viterra entities, or both, engaged in the relevant conduct that conveyed the Financial and Operational Performance Representations.[2280] In circumstances where each of the Viterra entities (at the very least by their common director, Mattiske) was consenting or agreeing to the sale process being conducted in the manner that it was, including by means of the active involvement of Hughes as directed or overseen by Mattiske, King and Merrill Lynch, the relevant conduct of Hughes must be taken to be conduct of each of them.

X.19.3.4 Youil

3127 The position in relation to attributing Youil's conduct to Viterra is the same as it was in relation to Glencore. For reasons discussed below,[2281] it has not been found that Youil made any of the representations or statements in trade or commerce that gave rise to the Financial and Operational Performance Representations. Therefore, no findings on this issue are necessary.

X.19.3.5 Argent

3128 The position is identical to that of Hughes referred to above.[2282] Argent was an employee of Viterra Ltd directed to assist in the sale of the assets of the 3 Viterra entities. His conduct was plainly attributable to Viterra.

2279 See par 3108 above.

2280 This allegation as referred to in some parts of the Cargill Parties' submissions appeared to contend that Hughes only acted on behalf of Viterra Ltd and Viterra Malt, while no reference was made to Viterra Operations.

2281 See issue 126 below.

2282 See pars 3110-3111, 3126 above.

X.19.3.6 Glencore

3129 The Viterra Parties noted that the conduct alleged to be attributable to Viterra was identical to the conduct of Viterra said to be attributable to Glencore as discussed in issue 18 above.

3130 The Viterra Parties again acknowledged that Glencore's involvement in the sale process, and the provision of the Information Memorandum, the Phase 2 Process Letter and the information in the Data Room, was all conduct attributable to Glencore. However, they submitted that this conduct was not attributable to Viterra. They further submitted that the Cargill Indicative Bid was not conduct of Glencore and therefore should be disregarded for the purposes of this issue. Again, they maintained that the relevant conduct in the Management Presentation, Operations Call and the Commercial Call was conduct of Joe White and therefore there was no basis for attributing it to Viterra.

3131 The Viterra Parties referred to each of the Viterra entities being party to the Acquisition Agreement for a different and specific purpose and that the sale process was run and managed by Glencore prior to the execution of the Acquisition Agreement. They then submitted the Cargill Parties did not adduce any evidence in relation to the corporate relationship between the 3 Viterra entities and contended there was nothing to suggest there was any lack of corporate separation between them. They further contended that there was no evidence of Glencore acting as agent for Viterra or having any actual or inferred authority to make any binding representations on Viterra's behalf. Again without identifying any particular term, they submitted the Sale Process Disclaimers were inconsistent with the existence of any such authority.

3132 For the purposes of the Financial and Operational Performance Representations, it is unnecessary to determine whether Glencore was acting as an agent of Viterra.[2283] The operation of section 139B(2) is such that it is sufficient if Glencore was engaging in conduct on behalf of Viterra with the consent or agreement of a director of Viterra and

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[2283] A related issue is discussed in a different context below: see pars 3826-3832 below. See also issue 85 below where the Viterra Parties positively submitted Glencore was acting as Viterra's agent in accepting the Confidentiality Deed as executed and delivered by Cargill, Inc: see esp par 4525 below.

that consent or agreement was within the scope of the director's authority. The evidence of Mattiske, at all material times a director of each of the Viterra entities, was that he agreed with the initial strategy and the decision that the Joe White Business ought to be sold.[2284] He also consented to the sale process being conducted by Glencore.[2285] Further, Mattiske was the director of Viterra with responsibility for ensuring the sale process went smoothly.[2286] There was no evidence whatsoever to suggest that in Mattiske performing his role, wearing his various hats including that of director of each of the Viterra entities, that he was acting other than within the scope of his actual authority. On the contrary, it was plain that at all times right up until Completion, Mattiske was authorised both by Glencore and Viterra to ensure to the extent that he was involved that the necessary steps were taken for the sale to take place.

3133 Dealing with the particular submissions of the Viterra Parties, little if anything turned on whether or not the making of the Cargill Indicative Bid was conduct of Glencore (or Viterra).[2287] Obviously, conduct confined to the actual making of the Cargill Indicative Bid was not conduct of either of them. The relevance of the Cargill Indicative Bid was that it preceded the Phase 2 Process Letter being sent, which indicated that the Cargill Indicative Bid had been accepted and that Cargill was permitted to participate in Phase 2.[2288]

3134 For reasons discussed elsewhere,[2289] the making of the Management Presentation Statements, the Operations Call Statements and the Commercial Call Statements was not conduct of Joe White.

3135 In relation to each of the Sellers being party to the Acquisition Agreement for a

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2284 See par 106, 392 above.
2285 See pars 362-363, 367 above.
2286 See pars 363, 392 above.
2287 See par 3130 above.
2288 The covering email to the Phase 2 Process Letter thanked Cargill for the Cargill Indicative Bid before confirming that Cargill had been invited to participate in Phase 2.
2289 See in particular issue 124 below.

different and specific purpose,[2290] this could not serve to carve out any of them from the operation of section 139B(2) in relation to Glencore's conduct. Both collectively and individually, the Sellers had decided to sell whatever assets they owned which collectively allowed for the sale of the shares in Joe White and the Joe White Business. They had also agreed to be liable jointly and severally for any obligation or liability imposed on any of them under the Acquisition Agreement.[2291] Further, each of the Viterra entities was an active participant in Glencore presenting and facilitating the sale process. Without being exhaustive, it was represented with the knowledge of Viterra that Glencore's subsidiaries (that is, Viterra) had been directly involved in the preparation of the Information Memorandum and the Management Presentation Memorandum.[2292] As part of this, they also permitted it to be represented in both documents that Merrill Lynch was acting on behalf of each of them.[2293] Furthermore, given Mattiske's direct involvement, they agreed and consented to their interests in Joe White and the Joe White Business being offered for sale by Glencore as part of "Glencore's interest in the malt business" and to the dissemination of relevant information to facilitate that sale. As the Information Memorandum itself stated,[2294] the proposed transaction was for the sale of all the issued capital of Joe White (owned by Viterra Malt) together with any assets not owned by that entity but used exclusively in connection with Joe White.

X.19.4 Conclusion

3136 For these reasons, by operation of section 139B(2), the conduct of each of Merrill Lynch, Mattiske, Hughes, Argent and Glencore in engaging in conduct that gave rise

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2290 See par 3131 above. For completeness, as part of this submission, the Viterra Parties contended that Cargill did not adduce any evidence of the corporate relationship between the Viterra entities. Leaving aside that it was admitted on the pleadings that Viterra Ltd was the holding company of Viterra Operations and that Viterra Operations was the holding company of Viterra Malt, there was direct evidence of their corporate relationship. A current and historical extract from the Australian Securities and Investment Commission was tendered in relation to each entity. These extracts provided evidence of the relevant shareholdings, as well as the extensive overlapping of the positions held by the directors and secretaries of Viterra. There was also oral evidence at trial on this subject matter. It is unnecessary to go into the detail, but this evidence also showed this further submission contending an absence of evidence was without substance.

2291 See fn 648 above.

2292 See pars 475, 711 above. See also par 457 above.

2293 See par 3122 above.

2294 See par 500 and fn 1798 above.

to the Financial and Operational Performance Representations to the extent that each of them did is taken to be conduct engaged in by each of the Viterra entities for the purposes of the Australian Consumer Law.

X.20 Did Cargill Australia enter into the Acquisition Agreement in reliance on the Financial and Operational Performance Representations, including in light of the Sale Process Disclaimers, the Acquisition Agreement Liability Terms, and the Alleged Industry Practices?

X.20.1 A broad overview of the pleadings[2295]

3137 The Cargill Parties alleged that in reliance, at least in part,[2296] on the Financial and Operational Performance Representations Cargill Australia entered into the Acquisition Agreement.[2297] They further alleged that the Financial and Operational Performance Representations were false by reason of the same pleaded matters identified in issue 10 above.[2298]

3138 Broadly speaking, in the Defence the Viterra Parties denied these allegations and relied upon the Sale Process Disclaimers and the Acquisition Agreement Liability Terms in order to establish the absence of reliance. They further pleaded there was no reliance because of their allegations concerning the Alleged Industry Practices. As to the last of these matters, the Viterra Parties have failed to establish that the Alleged Industry Practices existed;[2299] and the related allegations need not be considered further.

3139 Further, in response to allegations concerning negligent misrepresentation, the Viterra Parties admitted that they had control over what information and documents in their possession, custody or power were disclosed to Cargill during the Due Diligence and

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2295 The summary of the pleadings set out below does not purport to be exhaustive of the matters pleaded, but rather is an overview so that the matters the subject of submissions are put in context.

2296 See also issue 49 below.

2297 The Statement of Claim also contained allegations concerning reliance upon the Financial and Operational Performance Representations as part of a claim based on negligent misrepresentation. In closing submissions, this claim was not pursued.

2298 See also issue 16 above.

2299 See issue 13 above.

prior to Completion.

3140 In the Reply, Cargill Australia alleged that the Phase 1 Process Letter was premised on the fact that Cargill, Inc would be able to make an indicative bid, and to determine the amount of any such bid, based upon the financial and operational information of Joe White provided by either Glencore or Viterra or both.[2300] Further, they alleged the Phase 2 Process Letter was premised on the fact that Cargill, Inc would make a final bid and determine the amount of any such bid based upon the financial and operational information of Joe White provided by either Glencore or Viterra or both during the Due Diligence.[2301]

3141 Reference was made to clauses 1.3, 3, 6 and 9.1 of the Confidentiality Deed[2302] in alleging that restrictions were imposed upon Cargill, Inc's ability to use or disclose, or to conduct independent investigations into the accuracy of, the Financial and Operational Information provided by Glencore and Viterra.

3142 In addition, Cargill Australia pleaded that Cargill, Inc stated that Cargill had based the Cargill Indicative Bid on the information and forecasts contained within the Information Memorandum and the Phase 1 Process Letter, that it had assumed the information provided was true and accurate and supported by due diligence findings, and that Cargill assumed Joe White was being acquired on a going concern steady-state basis without issues (as identified) or any other matters that could result in a material adverse change to the Joe White Business or significantly affect the value of Joe White.[2303]

3143 The Reply also referred to the position in late July 2013. Cargill Australia pleaded that the First Final Bid expressly stated that it was based on the Due Diligence and discussions with Joe White management, which had confirmed Cargill's view that it was an impressive business with a portfolio of top-tier assets and a strong strategic fit with Cargill, and that Cargill had conducted the Due Diligence based on information

2300 See par 466 above.
2301 See pars 639-641, 644 above.
2302 See pars 587, 590 above.
2303 See par 623 above.

provided, including a review of the information provided in the Information Memorandum, management presentations, site visits, the Data Room, the Q&A Process and some public registers.[2304]

3144 The Reply further alleged the Financial and Operational Information of Joe White was solely within the control and possession of Glencore and Viterra, that it was commercially sensitive information and that by reason of all of these matters pleaded, Cargill relied on the accuracy of the Financial and Operational Information provided and made that fact known to Glencore and Viterra.[2305]

3145 The Reply alleged the state of knowledge of Cargill in relation to matters relevant to the Operational Practices. Collectively with regard to all of the Operational Practices, Cargill Australia alleged that Cargill was never informed by the Viterra Parties and was not aware that Joe White, routinely and without informing its customers, supplied malt and Certificates of Analysis in accordance with the Operational Practices. Specifically, in relation to the Reporting Practice, the following was pleaded:

(1) Cargill was aware that the results of an analysis undertaken on malt could vary depending on the equipment used to undertake the analysis.

(2) Cargill was concerned as to how Joe White reprocessed malt that was not within customer specifications in light of its apparent storage limitations but was assured by the Viterra Parties that Joe White had a customer base with a wide range of specifications that enabled malt to be reassigned to another customer in the event it did not meet the specification of the original customer, and that Joe White plants had more than sufficient storage other than Sydney which was in the process of building 2 additional silos.[2306]

2304 See pars 976-977 above.

2305 Cargill Australia also pleaded issues concerning public policy in relation to the Sale Process Disclaimers.

2306 See issue 2 above.

3146 In relation to the Varieties Practice, the following was pleaded:

(1) Cargill was not aware that Joe White used non-approved malting barley varieties to manufacture malt supplied for customers without the customers' agreement, knowledge or consent.

(2) Cargill was informed by the Viterra Parties of certain matters during the Commercial Call.[2307]

(3) In response to a question as to whether there was a potential to achieve additional margin on barley, Cargill was informed by the Viterra Parties during the Barley Inventory Call that Joe White could blend lower and higher graded barley and up to 30 percent of non-grade 1 barley could be used.[2308]

3147 In relation to the Gibberellic Acid Practice, the following was pleaded:

(1) Cargill was aware that gibberellic acid was an additive that had the effect of speeding up the germination time of some barley.

(2) Cargill was aware that the use of gibberellic acid was not normally allowed by most international brewers but that gibberellic acid was able to be used with the agreement of the customer concerned.

(3) Cargill was informed by the Viterra Parties during the site visit to the Port Adelaide plant that Joe White used gibberellic acid in the production of malt, but only when allowed by customers.[2309]

(4) Cargill was informed by the Viterra Parties before 8 July 2013 as part of the Due Diligence that Joe White's germination and steeping time of Australian barley was approximately 5 days (with less than 1 day of

2307 See par 914 above.
2308 See par 926 above.
2309 See pars 788, 1099 above.

steeping and 4 days of germination).[2310]

(5) Cargill was aware that 1 of its customers, Heineken, required a minimum of 5 days germination for Heineken A Malt and was concerned that if Heineken was or was to become a customer of Joe White it might have been necessary to obtain a waiver of that requirement, but was subsequently informed on 18 July 2013 by the Viterra Parties that Joe White did not produce Heineken A Malt.[2311]

X.20.2 Legal principles

3148 To recover loss or damage for contravention of section 18 of the Australian Consumer Law, it must be shown that the loss or damage was "because of" the contravening conduct.[2312] Therefore, the satisfaction of causation is necessary before any entitlement to compensation arises. For causation to be satisfied it is not necessary to show that the contravening conduct is *the* cause; it is sufficient if it is *a* cause of the loss or damage claimed.[2313] The determination of this issue is a question of fact.[2314]

3149 Reliance is a "tool of analysis" that may usefully assist in determining whether the causation requirement is met.[2315] It may offer greater assistance where the impugned conduct consists of a positive representation or representations; generally it offers less assistance where the impugned conduct consists of non-disclosure.[2316] In any event, the concept of reliance must be deployed with care, and not as a substitute for the essential question of causation.[2317] The 2 concepts are not interchangeable: the

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2310 See, for example, pars 755, 819 above.
2311 See pars 789, 871, 874, 877, 884 above.
2312 Australian Consumer Law, s 236. Section 18 appears in Chapter 2 of the Australian Consumer Law.
2313 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 128 [57] (Gaudron, Gummow and Hayne JJ); *Henville v Walker* (2001) 206 CLR 459, 469 [14] (Gleeson CJ), 494 [109] (McHugh J, with whom Gummow J agreed), 509 [163] (Hayne J, with whom Gummow J agreed). See also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 356.8-357.2 (Brennan J).
2314 See, for example, *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 321 [31] (French CJ).
2315 Ibid, 341 [102] (Gummow, Hayne, Heydon and Kiefel JJ).
2316 See *Italform Pty Ltd v Sangain Pty Ltd* [2009] NSWCA 427, [42] (Macfarlan JA, which whom Hodgson JA and Sackville AJA agreed), referring to *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 341-342 [102], 351-352 [143].
2317 See *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 351 [143] (Gummow, Hayne, Heydon and Kiefel JJ).

causation requirement may, in some cases, not be met despite reliance;[2318] it may, in others, be met notwithstanding a lack of reliance.[2319]

3150 That said, as a general rule, where the impugned conduct consists of a positive representation or representations, the causation requirement will be met if the decision or other action taken by the representee which led to its loss or damage is "done by the representee *in reliance upon* the misrepresentation".[2320]

3151 In applying that general approach, some additional principles are presently relevant.

3152 *First,* the onus of establishing reliance falls on the party asserting it.[2321]

3153 *Secondly,* for *a* cause to satisfy causation, the conduct must have "materially contributed" to the representee's decision.[2322] That said, a representee may establish reliance on the impugned representation despite there being other matters upon which the representee *also* relied, and even other matters upon which the representee relied more heavily.[2323]

3154 *Thirdly,* it is not necessary that there be specific evidence of reliance.[2324] The court may, in appropriate circumstances, draw a fair inference that a representee has relied on a representation.[2325] Such an inference may be drawn where "common sense dictates" that the relevant representation played at least some part in inducing the

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2318 See, for example, *Stone v Chappel* (2017) 128 SASR 165, 240 [369], 241-242 [374]-[380] (Doyle J, with whom Hinton J agreed) and the cases there referred to.

2319 *Jafari v 23 Developments Pty Ltd* [2019] VSCA 201, [133]-[134] (Whelan and Niall JJA and Sifris AJA); *Re HIH Insurance Ltd* (2016) 335 ALR 320, 334 [42], 338 [50] (Brereton J).

2320 See *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525.8 (Mason CJ, Dawson, Gaudron and McHugh JJ).

2321 *Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG* [2014] VSCA 338, [281] (Tate, Santamaria and Kyrou JJA). See also *Gould v Vaggelas* (1984) 157 CLR 215, 219.5 (Gibbs CJ), 238.8-239.2 (Wilson J), 250.6 (Brennan J), 262.8 (Dawson J).

2322 See *Henville v Walker* (2001) 206 CLR 459, 480 [61] (Gaudron J); 493 [106] (McHugh J, with whom Gummow J agreed). See also *Semrani v Manoun* [2001] NSWCA 337, [83]-[87] (Beazley JA, with whom Mason P and Ipp AJA agreed).

2323 *Henville v Walker* (2001) 206 CLR 459, 493-495 [106]-[112] (McHugh J, with whom Gummow J agreed).

2324 *Smith v Noss* [2006] NSWCA 37, [26]-[27] (Giles JA, with whom Beazley and Ipp JJA agreed).

2325 *Jafari v 23 Developments Pty Ltd* [2019] VSCA 201, [131]-[132] (Whelan and Niall JJA and Sifris AJA); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 657 [55] (French CJ, Crennan, Bell and Keane JJ).

representee to make the relevant decision.[2326] This conclusion may be reached even where some relevant factors grounding such an inference go "unanswered",[2327] that is, where the representee fails to establish relevant factors underpinning the inducement.

3155 Whether such an inference is available will depend on the quality of the representation. In assessing this, it is relevant to ask whether the representation was calculated to induce the representee to do what it ultimately decided to do.[2328] It will also depend on the surrounding facts and circumstances,[2329] including: the entire course of conduct of which the representation forms a part;[2330] the parties' respective attributes and roles;[2331] the state and extent of the representor's and representee's knowledge arising from their dealings;[2332] and the underlying commercial realities.[2333]

3156 Further, there is a particular type of inference that may be available where a positive representation is said to have been relied upon by the representee in deciding to enter into a contract. The principles governing the availability of such an inference are derived from the context of a common law action in deceit,[2334] but are equally applicable in the present context.[2335] Although there is some overlap with what has already been said concerning the principles to be applied more generally, it is

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2326 *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* (2010) 31 VR 575, 603 [106] (Buchanan and Nettle JJA). See also *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 43 IPR 545, 556 [45] (Kiefel J, with whom Wilcox J agreed); *Gould v Vaggelas* (1984) 157 CLR 215, 238.5 (Wilson J); *Ricochet Pty Ltd v Equity Trustees Executors and Agency Co Ltd* (1993) 41 FCR 229, 234.3 (Lockhart, Gummow and French JJ).

2327 *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 43 IPR 545, 556 [45] (Kiefel J, with whom Wilcox J agreed).

2328 Ibid. See also *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 351-352 [143] (Gummow, Hayne, Heydon and Kiefel JJ); *Gould v Vaggelas* (1984) 157 CLR 215, 238.8-239.2 (Wilson J).

2329 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 341-342 [102], 351-352 [143] (Gummow, Hayne, Heydon and Kiefel JJ), citing *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 625 [109] (McHugh J).

2330 Ibid. See also *Lord Buddha Pty Ltd (in liq) v Harpur* (2013) 41 VR 159, 202 [191] (Vickery AJA, with whom Weinberg and Tate JJA agreed); *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* (2010) 31 VR 575, 584 [31] (Warren CJ, dissenting in part), 603 [106] (Buchanan and Nettle JJA).

2331 See *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 604-605 [37] (Gleeson CJ, Hayne and Heydon JJ).

2332 Ibid.

2333 *Jacfun Pty Ltd v Sydney Harbour Foreshore Authority* [2012] NSWCA 218, [60] (Allsop P, with whom Macfarlan and Barrett JJA agreed).

2334 *Gould v Vaggelas* (1984) 157 CLR 215, 236.3 (Wilson J).

2335 *Jafari v 23 Developments Pty Ltd* [2019] VSCA 201, [131] (Whelan and Niall JJA and Sifris AJA).

convenient to articulate, in brief terms, that those principles include:[2336]

(1) If a material representation is made which is calculated to induce the representee to enter into a contract, and that person in fact enters into the contract, there arises a fair inference of fact that they were induced to do so by the representation.[2337] This inference may be more readily drawn if the representor's business benefits if the representation is acted upon.[2338]

(2) A material representation may be treated as calculated to induce the representee to enter into a contract if it is objectively likely to do so.[2339]

(3) The inference described in subparagraph (1) above may be rebutted on the facts of the case. It will be rebutted if the representor discharges an evidentiary onus to sufficiently identify facts inconsistent with the inference. For example, the inference may be rebutted if it is established that the representee, prior to entry into the contract, had knowledge of the true facts and the truth of those facts. Alternatively, it may be rebutted if it is established that the representee expressly disavowed reliance on the material representation, such as by means of an express disclaimer of reliance, which disavowance represented the true position of the representee.[2340] In both examples, such facts may amount to evidence of non-reliance and the want of the required causal link.[2341]

2336 See also the more detailed enumeration of applicable principles in *Lord Buddha Pty Ltd (in liq) v Harpur* (2013) 41 VR 159, 197-198 [159] (Vickery AJA, with whom Weinberg and Tate JJA agreed).

2337 *Jafari v 23 Developments Pty Ltd* [2019] VSCA 201, [131] (Whelan and Niall JJA and Sifris AJA).

2338 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 657 [55] (French CJ, Crennan, Bell and Keane JJ).

2339 See *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 43 IPR 545, 556 [45] (Kiefel J, with whom Wilcox J agreed). See also *Ricochet Pty Ltd v Equity Trustees Executor Agency Co Ltd* (1993) 41 FCR 229, 234.2 (Lockhart, Gummow and French JJ).

2340 It has been observed that non-reliance or similar disclaimers cannot defeat a claim for relief from the consequences of a contravention of s 18 of the Australian Consumer Law; and that the evidentiary weight accorded to such a disclaimer may vary and may often be explained away by other evidence: *Camden v McKenzie* [2008] 1 Qd R 39, 53 [54] (Keane JA, with whom McMurdo and Douglas JJ agreed).

2341 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 321 [31] (French CJ), 348 [130] (Gummow, Hayne, Heydon and Kiefel JJ). Cf *Gould v Vaggelas* (1984) 157 CLR 215, 236.4 (Wilson J).

(4) However, the inference described in subparagraph (1) above cannot be rebutted simply by identifying inducements other than the relevant material representation. This is because the material representation need not be the sole inducement, provided it plays at least a minor part in contributing to the representee's entry into the contract.[2342]

(5) Keeping in mind that reliance is not a substitute for the essential question of causation, it remains necessary, in drawing any inference, to attend closely to all of the evidence that is adduced that bears upon whether the inference is available.[2343]

3157 Additionally, and as a consequence of these matters, causation may be established despite a lack of direct evidence in relation to the state of mind of the relevant decision-maker.[2344]

3158 *Fourthly*, the causation requirement may be satisfied notwithstanding a degree of scepticism on the part of the representee, or some doubt or distrust, in relation to the relevant representation or representations.[2345] Amongst other reasons, this is because scepticism, doubt or distrust in relation to a representation does not amount to knowledge that that representation is misleading or deceptive, or an understanding of the relevant circumstances at a level capable of breaking the causal chain.[2346]

3159 *Fifthly,* where reliance by a company is alleged, it may be necessary to establish that the relevant "decision-maker", or a relevant agent of the company, relied on the relevant representation or representations.[2347] Where the relevant decision-maker is a

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2342 *Henjo Investments v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 558.7 (Lockhart J, with whom Burchett J agreed and Foster J relevantly agreed); *Gould v Vaggelas* (1984) 157 CLR 215, 236.5 (Wilson J).

2343 *Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG* [2014] VSCA 338, [281]-[282] (Tate, Santamaria and Kyrou JJA); *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 351-352 [143] (Gummow, Hayne, Heydon and Kiefel JJ).

2344 See, for example, *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* (2010) 31 VR 575, 599-603 [96]-[106] (Buchanan and Nettle JJA).

2345 *Transglobal Capital Pty Ltd v Yolarno Pty Ltd* (2005) ATPR 42-058, 42,794-42,795 [13]-[16] (Brownie AJA, with whom Handley and Hodgson JJA agreed).

2346 Ibid. See also *Gould v Vaggelas* (1984) 157 CLR 215, 228.2 (Gibbs CJ), 262.6 (Dawson J); *Haas Timber & Trading Company Pty Ltd v Wade* (1954) 94 CLR 593, 601.7 (Dixon CJ, Fullagar and Kitto JJ).

2347 *Lescap Group Pty Ltd v Pacific Resort Holding Pty Ltd* [2012] NSWSC 580, [228]-[229] (White J).

group charged with decision-making, such as a board, then it is necessary only that there be "an available conclusion that in some fashion" the relevant conduct affected the "group's decision in some way by reference to the loss or damage suffered".[2348] It is not necessary for the relevant conduct to have a consistent effect on each of the members of the decision-making group.[2349]

X.20.3 The Cargill Parties' submissions

3160 For the purposes of their submissions, the Cargill Parties grouped the Financial and Operational Performance Representations into those concerning the production of malt with strict quality control procedures and in compliance with customer specifications and laws,[2350] those concerned with sufficiency of assets,[2351] the representation concerning the procurement of barley[2352] and the representation that the Undisclosed Matters did not exist.[2353]

3161 The Cargill Parties identified a number of bases upon which they contended the evidence established that reliance was placed by Cargill Australia upon the Financial and Operational Performance Representations.

3162 *First*, they submitted that the Financial and Operational Performance Representations were calculated to induce Cargill to enter into the transaction.[2354]

3163 *Secondly*, they submitted Cargill made a careful assessment of the relevant information. While it was accepted that Cargill executives were enthusiastic about the prospect of acquiring Joe White, they submitted Cargill's internal processes left no room for casual decision-making and required those responsible for making an investment to thoroughly justify it and retain accountability for it once made.

3164 *Thirdly*, they referred to the evidence of various witnesses to the effect that they read

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2348 *Jacfun Pty Ltd v Sydney Harbour Foreshore Authority* [2012] NSWCA 218, [55] (Allsop P, with whom Macfarlan and Barrett JJA agreed), [72]-[73] (Barrett JA).
2349 Ibid.
2350 See par 2826(7), (8), (9), (10), (14), (15) above.
2351 See par 2826(11), (12) above.
2352 See par 2826(13) above.
2353 See par 2826(16) above.
2354 This issue is addressed in relation to Viterra in issue 23 below.

and relied upon relevant parts of the documents in question. They contended that extensive cross-examination did not undermine the evidence of these witnesses.

3165 *Fourthly*, they submitted that Cargill's use of the information provided demonstrated that the Financial and Operational Performance Representations provided the foundation upon which Cargill valued the Joe White Business. In this regard, they submitted that Cargill's contemporaneous assessments of the value and desirability of Joe White, expressed in both Cargill's deal model and presentations made within Cargill, demonstrated Cargill's acceptance and reliance upon the Financial and Operational Performance Representations.

3166 *Fifthly*, they submitted that Cargill's assessment of the value of the Joe White Business and the desirability of purchasing Joe White could not rationally have been made had the Viterra Practices and Policies been disclosed. Again referring to contemporaneous documentation, the Cargill Parties submitted that the fact that Cargill considered it could reap the synergies it calculated and learn from Joe White's approach to customer relationships was demonstrable of its acceptance of the Financial and Operational Performance Representations.[2355] They submitted that reliance was demonstrated by Cargill's approach to both synergies and dis-synergies. Although it was accepted that nothing contained in any information provided by the Viterra Parties suggested any level of synergies, it was contended that Cargill's assessment of synergies and dis-synergies was founded on acceptance of the Financial and Operational Information and Cargill's assessment of the character of the Joe White Business as discerned from the Information Memorandum.

3167 *Sixthly*, reference was made to the confidentiality regime and the restrictions placed upon customer-related information, Joe White's manufacturing plants and Joe White's personnel.[2356] In this context, they referred to the enquiries made by Cargill concerning potential risks and problems and the answers Cargill was given. They contended the evidence showed Cargill pointedly raised and thoroughly pursued the

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2355 See par 558 above.

2356 See pars 468, 643-644, 650-651, 746, 750, 827 above.

relevant issues and the answers received were unambiguous in conveying in substance that there was no problem and there was nothing to undermine the confidence Cargill could have in the quality of the assets.

3168 *Seventhly*, the Cargill Parties referred to the Cargill executives' evidence that Cargill Australia would not have acquired Joe White if the Viterra Practices had been disclosed. Eden, Van Lierde, Conway and Koenig were identified as the key decision-makers, each of whom gave evidence which it was submitted supported a finding that Cargill relied upon the Financial and Operational Performance Representations and the Viterra Parties' failure to disclose the true state of affairs in deciding to proceed with the purchase of Joe White.[2357]

3169 *Eighthly*, the Cargill Parties submitted that the fact that it was accepted by Cargill's witnesses at trial that the statements made did not displace the need to conduct a due diligence did not detract from Cargill's reliance upon the Financial and Operational Performance Representations.[2358]

3170 *Ninthly*, they contended that the contemporaneous evidence objectively demonstrated that the characteristics of the Joe White Business represented in the Information Memorandum were adopted by Cargill as the foundation upon which it created its valuation of the Joe White Business. They referred to Le Binh's evidence that the first iteration of Cargill's deal model was populated with the information provided in the Information Memorandum, in combination with the preliminary analysis prepared by Cargill's deal team workstreams.[2359] In particular, Cargill's deal model for financial years 2010 to 2012 and the forecast for 2013 adopted the sales revenue, malt margin, Unadjusted Earnings (both before interest and tax, and before interest, tax, depreciation and amortisation).[2360]

3171 Further, in the first iteration Cargill built its projections for the financial years from 2014 to 2023 by applying growth rates to the historical Financial and Operational

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2357 This is discussed in more detail in issue 33 below.
2358 See, for example, pars 472, 554, 660 and fn 452 above.
2359 See pars 572-573 above.
2360 See annexure B to these reasons.

Information. In short, it was submitted that the historical Unadjusted Earnings as reported in the Information Memorandum formed the building blocks for Cargill's valuation. Furthermore, Cargill's deal model adopted a utilisation rate of 96.5 percent based on an assumption that Joe White would essentially be operating at full capacity as had been reported in the Information Memorandum.[2361] When Le Binh circulated the final version of Cargill's deal model after the Due Diligence and the day before the Acquisition Agreement was entered into,[2362] these figures remained part of the basis of Cargill's valuation of Joe White including its projections for the financial years from 2013 to 2033.

3172 Equally, in relation to capital expenditure, the Cargill management case estimate based capital expenditure at $5.1 million for the 2014 financial year increasing to $5.25 million in the first iteration of Cargill's deal model for its base case. Ultimately, the base case capital expenditure was estimated at $5.1 million on an annual basis. This figure matched the forecast given in the Information Memorandum for the 2014 financial year.[2363]

3173 *Tenthly*, the Cargill Parties referred to presentations made to the food ingredients and systems platform,[2364] the Cargill leadership team[2365] and Cargill, Inc's board.[2366] In broad summary, they submitted what was put forward in order to obtain approval for the investment demonstrated reliance upon what had been represented. They further submitted that inherent in Cargill's assessments was a belief that Joe White was using premium barley grown in the Australian region. Furthermore, they submitted the presentations demonstrated that Cargill did not discover any material risk that the Undisclosed Matters existed, including the Viterra Practices and the Viterra Policies.

2361 Ibid. In relation to capacities and volume, production capacity, production utilisation, production volumes, the sales rate based on sales volumes when compared to production volumes, and sales volumes for the financial years from 2010 to 2012 and the 2013 forecast were all adopted for the purposes of Cargill's deal model base case.

2362 See par 1010 above.

2363 See par 536 above.

2364 See pars 594-602 above.

2365 See pars 606-614 above.

2366 See pars 758-764, 838-857 above.

3174 *Eleventhly*, the Cargill Parties submitted neither the Sale Process Disclaimers nor the Acquisition Agreement Liability Terms displaced Cargill's reliance upon the Financial and Operational Performance Representations. The Cargill Parties referred to the Sale Process Disclaimers imposed either before or at the same time that the Viterra Parties provided information. They submitted that the evidence established that Cargill subsequently relied upon the information provided, notwithstanding directions or acknowledgements to the contrary. Further, they noted that no Cargill witness gave evidence that they accepted or understood in 2013 that Cargill could not or did not rely upon the Information Memorandum, the Management Presentation Memorandum, the Operations Call, the Commercial Call or any other documents provided to Cargill in the Data Room Documentation. Furthermore, they referred to the evidence of those witnesses that read the Sale Process Disclaimers to the effect that they understood Cargill could not rely solely on the material provided by the Viterra Parties but was required to independently analyse the information throughout the course of its assessment.

3175 In relation to the Acquisition Agreement Liability Terms, in particular those containing acknowledgements by Cargill Australia to the effect that it did not rely upon any representations or other conduct in entering into the Acquisition Agreement except the Warranties,[2367] they submitted that the weight of the evidence established Cargill did in fact rely upon the Financial and Operational Performance Representations in deciding to enter into the Acquisition Agreement. Apparently as a fall-back position, the Cargill Parties submitted that the non-reliance clauses in the Acquisition Agreement recognised that Cargill Australia relied on the Warranties to enter into the Acquisition Agreement. It was contended that the relevant Warranties covered material in the same subject matter as the Financial and Operational Performance Representations.[2368]

3176 *Twelfthly*, the Cargill Parties submitted neither the Sale Process Disclaimers nor the

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2367 Clause 13.4(a) and (d): see par 1029 above.

2368 The Warranties identified for the purposes of this submission were 4.2, 6.1(e), 7.3, 9.2, 12(a), (b) and (c), 13.4, 17(a): see par 1034 above.

Acquisition Agreement Liability Terms displaced Cargill's reliance upon the Financial and Operational Performance Representations.

X.20.4 The Viterra Parties' submissions

3177 The Viterra Parties identified 6 bases upon which they submitted that it was established Cargill Australia did not enter into the Acquisition Agreement in reliance on the Financial and Operational Performance Representations.

3178 *First*, it was submitted that the Pre-Execution Statements from which the Financial and Operational Performance Representations were alleged to have been made were so general that Cargill Australia could not have relied upon them as statements of fact.

3179 In this regard, the evidence of Eden was referred to. Under cross-examination Eden acknowledged that the Information Memorandum did not displace the Due Diligence and that "generalised statements about [a] proven effective business model" were what he would have expected to see before the process entered Phase 2. Eden also accepted that the Due Diligence was when Cargill would have the opportunity to test whether particular statements were true or not. While the Viterra Parties conceded Eden did not accept the proposition put to him that the statements in the Information Memorandum concerning Joe White's "proven effective business model" were highly generalised,[2369] reference was made to his evidence that there was no intrinsic measure that supported the statements contained in the Information Memorandum. Reference was also made to Eden's evidence that during Phase 1 Cargill did not expect to get a lot of information beyond what was contained in the Information Memorandum and that was why those involved in assessing the information at that stage had a commercial background rather than an operations background.

3180 The Viterra Parties also referred to De Samblanx's evidence concerning the Management Presentation.[2370] Based on that evidence, they submitted that

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2369 On the contrary, Eden's evidence was that the statements concerning Joe White's proven effective business model were very specific: see pars 504-506 above. This evidence was not challenged. Further, Eden accepted some other parts of the Information Memorandum contained generalised statements: see pars 506, 518-521 above.

2370 See pars 724, 737, 2170 above.

De Samblanx understood the underlying statements were no more than starting points or points of attention for the subsequent Due Diligence and further investigations.

3181 Based on these matters, it was submitted that Cargill did not expect the Information Memorandum or the Management Presentation to be a source of information that Cargill could rely on in respect of the operations side of the Joe White Business.

3182 *Secondly*, the Viterra Parties submitted the evidence demonstrated that Cargill conducted the Due Diligence in accordance with the Sale Process Disclaimers because Cargill proactively and independently investigated the facts on which Cargill proposed to base its decision to enter into the Acquisition Agreement. The Viterra Parties referred to the detailed assessments made by Cargill,[2371] but also noted, correctly, that Cargill did not verify all significant facts relevant to the Financial and Operational Performance Representations. They referred to evidence of Eden, Engle and Viers to the effect that they left reviewing of operational matters to others at Cargill. As to the operations investigations, the Viterra Parties submitted the Operations Spreadsheet did not verify facts relevant to the Financial and Operational Performance Representations. Further, they submitted a number of observations made in the Operations Spreadsheet were incompatible with reliance upon the Financial and Operational Performance Representations. These were submitted to include:

(1) Joe White had "no respect of processing conditions [of] customers?".

(2) References to additives being used which were not normally allowed by most international brewers.

2371 For example, in relation to Phase 1 alone, by reference to the evidence, the Viterra Parties acknowledged that Cargill: (1) undertook a detailed investigation of the estimated Accumulation and Position Margin in relation to the profit which might be made in respect of the procurement of barley for Joe White; (2) assessed the details of the administration costs that the Cargill group would incur if it were operating Joe White; (3) undertook its own assessment of estimated malt margins in Australia; (4) "carefully examined" the forecast information provided in the Information Memorandum; (5) "very carefully" looked at what capital expenditure might be needed; and (6) "carefully" looked at the safety, health and environment information in the Information Memorandum.

(3) The fact that some customers like Heineken required 5 days germination and site visits proved that most plants had 4 days germination which might have meant a process non-conformance which could be addressed either by waiver or by reducing plant capacity.

(4) References to limited storage capacity, non-independent laboratories and the possibility that Joe White might have required additional storage costs to follow Cargill's Certificate of Analysis rules.[2372]

3183 Further, it was submitted that to the extent that Cargill was interested in verifying or having a better understanding of the extent to which the Financial and Operational Performance Representations were true, that interest was exhausted upon Cargill's discovery that there was a risk they were not true, because that meant there was a risk that Joe White did not follow Certificate of Analysis rules in the way that Cargill did.

3184 Furthermore, the Viterra Parties contended Cargill failed to conduct an adequate due diligence and in particular submitted that De Samblanx did not provide documents: (1) reporting on Due Diligence findings as requested by Engle, but only provided the Operations Spreadsheet; (2) reporting on the Operations Call; (3) summarising his findings to the Project Hawk team "at the feasibility stage"; or (4) setting out many of the Due Diligence procedures that had been allocated to him.

3185 Moreover, it was submitted that other Project Hawk participants read the Operations Spreadsheet but took no steps to ensure that the risks identified had been further investigated.

3186 In summary, in light of these matters referred to, it was submitted that Cargill's failure to take steps to investigate and verify certain facts relating to the Financial and Operational Performance Representations was as a result of Cargill's decision not to take those representations into account, rather than any decision to rely upon them.

3187 *Thirdly*, the Viterra Parties relied upon each of the Sale Process Disclaimers and the

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2372 In this regard, reference was made to De Samblanx's evidence that what he stated in the Operations Sheet was what he thought at the time.

Acquisition Agreement Liability Terms. In particular, they relied upon representations of non-reliance contained in clause 8.3(c) of the Confidentiality Deed, and clauses 13.4(a) and 13.4(d) of the Acquisition Agreement, which they submitted were statements made in documents formally executed by Cargill which Cargill clearly understood. Further, it was submitted that the language used in these statements was most likely to record Cargill Australia's contemporaneous state of mind because these statements were made in legal language in a contract. It was submitted that these statements ought to be accepted over oral evidence given at trial on the basis that the statements were the best evidence of Cargill Australia's state of mind at the time it was decided to enter into the Acquisition Agreement.

3188 In addition, the Viterra Parties referred to the statement in the Information Memorandum that Cargill, Inc was accepting the document for itself and its related bodies corporate on the basis that no representation or warranty was given as to the accuracy, completeness, likelihood of achievement or reasonableness of any forecasts, projections or forward-looking statements contained in the Information Memorandum. The Viterra Parties also referred to clause 15.8 of the Acquisition Agreement in relation to capping the liability of the Sellers.[2373] They submitted that when this clause was applied in conjunction with clause 13.4(a) of the Acquisition Agreement, the cap for any "non-Warranty representations" was nil. They also submitted that clause 15.8 demonstrated that Cargill knew and understood that, unlike the claims referred to in clause 15.8(a) or the types of claims referred to in clause 15.8(b), the Financial and Operational Performance Representations (being the subject of clause 13.4(e) and therefore not the subject of clause 15.8) were not safe to be relied upon.

3189 *Fourthly*, the Viterra Parties submitted that the Refusal of Certain Terms by them established that Cargill tested whether it could rely on information provided during the Due Diligence for the purposes of the Acquisition Agreement, and further whether Cargill could rely on an assumption that Joe White was not in breach of its Material

2373 See par 1030 above and issue 77 below.

Contracts. By the Viterra Parties' conduct,[2374] they submitted they made it clear to Cargill that Cargill could not rely upon such matters. Further, in negotiating clause 31.15 and Warranty 7.3 in the manner that the parties did, it was contended that Cargill was on express notice that knowledge of the Joe White executives was not attributable to the Viterra Parties and that the Viterra Parties did not agree to be deemed to have knowledge of all material disclosed to Cargill as part of the Due Diligence.

3190 Additionally, it was contended that the outcome of the contractual negotiations was that Cargill accepted an allocation of risk which entailed Cargill accepting financial responsibility for any matters falling outside the scope of the Warranties which might have adversely affected Cargill. By reference to Warranties 6.1(e) and 7.3,[2375] it was submitted the risks Cargill accepted included whether Joe White: (1) was in breach of any non-material contracts; (2) was in non-material breach of any Material Contracts; (3) had historically been in default of any Material Contracts where that default no longer subsisted at the time the Warranty was given; (4) was in material breach of Material Contracts where such breach was unknown to Viterra Malt; and (5) had assets that were not sufficient for Joe White to be conducted in a way different to the way in which Joe White had been operating for the past year.

3191 It was submitted that Cargill's knowledge of these matters made it inherently unlikely that Cargill would or could reasonably have relied on any of the matters identified. Accordingly, it was contended it should be held that Cargill did not rely upon the Financial and Operational Performance Representations.

3192 *Fifthly*, it was submitted that Cargill would have acquired Joe White regardless of the Financial and Operational Performance Representations, as Cargill considered Joe White pivotal to its business and the missing pearl in Cargill Malt's string of pearls. The Viterra Parties contended Cargill had no intention of allowing the opportunity to pass it by regardless of any representations made. They referred to statements made

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2374 See pars 979, 989, 992 above.

2375 See par 1034 above.

by Eden and De Samblanx on 27 June 2013 that they considered there was limited, if any, ability to expand without capital investment, and that they were questioning how Joe White could carry out steeping and germination in the times suggested.[2376] They also referred to other evidence which they submitted demonstrated Cargill identified risks that Joe White might not be complying with customer specifications and that Joe White's processing conditions were not consistent with the specifications of Cargill Malt's global customers (which were also Joe White's customers).

3193 Based on these matters, the Viterra Parties submitted that, despite Cargill having this knowledge and knowing that the onus was on it to investigate each and every fact that was relevant to its decision whether or not to acquire Joe White, Cargill did not take steps to investigate the risks identified. Accordingly, it was submitted that the only credible inference that was open to be drawn was that the existence of the Undisclosed Matters was not a fact that Cargill considered to be relevant to its decision to enter into the Acquisition Agreement.

3194 *Sixthly*, it was submitted that Cargill was aware of the Alleged Industry Practices and that if it had intended to rely upon the Financial and Operational Performance Representations when deciding whether or not to enter into the Acquisition Agreement, it would have investigated whether Joe White engaged in any practices of the kind or similar to the Alleged Industry Practices. In particular, they alleged that Cargill's knowledge of the Alleged Industry Practices meant that Cargill was alerted to the fact that there was a real risk that Joe White was engaging in such practices.

3195 Further, they submitted that none of the Pre-Execution Statements alleged to give rise to the Financial and Operational Performance Representations was a statement to the effect that Joe White did not employ any of the Alleged Industry Practices. In observing that Cargill Australia's case was that because of the Pre-Execution Statements Cargill Australia assumed the Financial and Operational Performance Representations were true, the Viterra Parties submitted because of Cargill's knowledge as an industry participant it was effectively incumbent upon Cargill to use

2376 See par 755 above.

the Due Diligence to confirm for itself whether or not Joe White used any practices similar to those of which it now complains. Finally, it was submitted that by Cargill failing to use the Due Diligence to investigate its suspicions held by reason of its knowledge of the malting industry it was demonstrated that Cargill did not rely upon any of the Financial and Operational Performance Representations.

X.20.5 Analysis

3196 There is no dispute between the parties that the authorities require the question of whether or not a party relied upon representations made in entering into an agreement to be determined as a matter of fact on the evidence and in light of all the relevant surrounding circumstances. In my opinion, the answer to this factual question was clear. In numerous ways, it was demonstrated that Cargill Australia entered into the Acquisition Agreement in reliance on the Financial and Operational Performance Representations.

3197 In addressing this issue in more detail, it is appropriate to start with Conway. Conway was at the relevant times a member of the board and the Cargill leadership team who was "tagged" to Cargill Malt globally.[2377] From the time the shares in Joe White were put up for sale in May 2013, Conway was kept informed about the possible purchase.[2378] He was also 1 of the board members who had been involved in assessing the desirability of acquiring Joe White in November 2012 as pivotal, and downgrading that status to desirable in late June 2013 before any commitment had been made.[2379] Further, from the time the process of assessing the possible purchase was commenced right up until the time of Completion, Conway was told of the progress and the key issues that arose.[2380]

3198 Because of Conway's senior position, he was not fully across procedures and practices relating to how Cargill conducted Cargill Malt. For example, Conway was not aware

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2377 See par 300 above.

2378 See par 455 above.

2379 See pars 706-707 above.

2380 In relation to circumstances before the Acquisition Agreement was entered into, see pars 628, 707, 828, 842, 857, 963, 966 above and pars 3781, 3783-3790, 3798-3800 below; and from that time up until Completion, see pars 1072, 1157, 1160, 1177, 1199-1202, 1205-1206, 1409-1412 above.

of the expression "theoretical blend analysis" and it never occurred to him that Cargill might have policies affecting the preparation of Certificates of Analysis that were different to other maltsters. However, Conway knew that Cargill had policies for Certificates of Analysis that required them to be true and accurate in relation to all products that left Cargill's plants. Also because of his senior position, in 2013 Conway did not read some of the critical documents in this case. He gave evidence that he did not read the Confidentiality Deed, the Information Memorandum, or the Acquisition Agreement or any draft of it. Although it was not addressed in his evidence, it was also highly unlikely he read the Management Presentation Memorandum. The means by which Conway was kept informed was by reports made to the Cargill, Inc leadership team and the board.[2381] Those reports were prepared by persons who were directly responsible for reading the relevant documentation and for being involved in the Due Diligence.

3199 Like a number of other Cargill executives,[2382] Conway had the authority in 2013 to decide unilaterally not to proceed with the Acquisition if he had been so minded. Conway's unequivocal evidence was that if he had known in substance of the Viterra Practices before 4 August 2013 then Cargill would never have signed the Acquisition Agreement. There is always a need for caution when assessing evidence given in hindsight concerning hypothetical situations.[2383] However, Conway's evidence was not only plausible but compelling. He explained that the Viterra Practices would have had the potential to have a significant impact on the value of the Joe White Business. In addition, Conway would have been concerned about the culture of Joe White as Cargill had sent a full team down to Australia to do a due diligence and such matters had not come out during that process.[2384] Further, after the Viterra Parties had

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2381 See pars 705, 758-765, 838-857, 958-967, 975 above.

2382 See par 299 above.

2383 See, for example, *ABN Amro Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 331 [1733] (Jacobson, Gilmour and Gordon JJ); *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200, [1975]-[1977] (Jagot J); *Fabcot Pty Ltd v Port Macquarie-Hastings Council* [2011] NSWCA 167, [186]-[187] (Sackville AJA, with whom Beazley and Campbell JJA agreed).

2384 See further pars 3394, 3396-3400 below where this evidence is discussed in more detail in the context of events before Completion.

repeatedly emphasised during the earlier stages of the trial the significance of the evidence of Conway before he was called,[2385] his evidence on this point was not the subject of any challenge.

3200 Although Conway gave no evidence directly concerning the making or otherwise of the Financial and Operational Performance Representations (which was unsurprising in circumstances where he did not read the key documents the subject of the sale process), Conway's evidence alone was sufficient to establish Cargill's reliance upon them. In essence, what was reported to Conway and other members of both the board and the Cargill leadership team was the product of what had been represented in the Pre-Execution Statements and as the result of the Due Diligence. In Conway giving evidence that knowledge of the Viterra Practices alone would have resulted in Cargill not proceeding, effectively Conway's evidence was that knowledge of a subset of the Undisclosed Matters would have been enough to undermine the transaction and Cargill's interest in it.

3201 The matter did not rest there. In the hierarchy of authority concerning Cargill Malt, Van Lierde sat immediately below Conway as executive vice president of Cargill's food business division and the platform leader "tagged" to Conway. As a person who also had authority to singularly decide that the Acquisition should not proceed, Van Lierde gave evidence in the same vein as Conway.[2386] Equally, the next person in the chain of authority who also had authority to stop the transaction, Eden, gave like evidence.[2387] Further, Koenig, a person not directly in this chain of authority but who was a very senior executive involved in the transaction from its inception,[2388] gave evidence to like effect. If the evidence of any 1 of these individuals were accepted, then this would establish reliance for the same reasons as discussed above in relation to Conway. In my view, the evidence of each of them ought to be accepted.[2389]

2385 See issue 33.4 below.
2386 See further pars 3394, 3404-3407 below.
2387 See pars 3408-3411 below.
2388 See pars 343-347, 374 above and pars 3401-3403 below.
2389 See further pars 3394, 3412-3413 below.

3202 Another means by which reliance was demonstrated was the manner in which Cargill approached its assessment of the Joe White Business. As it was directed to do,[2390] Cargill based its initial valuation upon the information contained in the Information Memorandum. Then, having been invited to participate in Phase 2, Cargill made a series of enquiries and analyses in order to determine for itself to the extent that it was able whether it could rely upon the Financial and Operational Information supplied to it. Cargill had existing structures and processes in order for this assessment to take place. The contemporaneous documentation demonstrated that Cargill did in fact rely upon the information supplied by the Viterra Parties in making its assessment.[2391]

3203 By way of illustration only, based on the information provided and Cargill's assessment of the benefits to be gained from Joe White becoming part of Cargill Malt, synergies were valued at $107 million.[2392] It was implausible that Cargill would have made an assessment remotely reflecting this if the view had not been formed (after duly conducting the Due Diligence and not unearthing contrary information) that Cargill could rely on the Financial and Operational Information it had been provided. It was even more implausible that synergies would have been valued at such a level if Cargill had been made aware of *any* of the Undisclosed Matters and in particular the Viterra Practices (if any value at all could be attributed to synergies in those circumstances).

3204 In short, Cargill ultimately valued Joe White at $427 million as its base case as it had formed the view that the Joe White Business was sound and was capable of reliably producing financial and operational results in accordance with what had been represented, including in relation to quality control, compliance with customer contracts, the ability to procure the required barley, the sufficiency of assets and the absence of inappropriate practices on a routine or significant basis. In so doing, Cargill appreciated in early August 2013, at the completion of the Due Diligence, that it was

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2390 See pars 464, 466 above.

2391 See, for example, par 1010 above in relation to the latest deal model before Cargill Australia entered into the Acquisition Agreement. See also issue 80 below and annexure B to these reasons.

2392 See pars 3981, 4179 below.

paying a purchase price at the upper end of its assessment of Joe White's value, but believed it could deliver the returns as forecast in the deal model.[2393] This view would not have been formed if Cargill had not made an assessment consistent with the Financial and Operational Performance Representations.

3205 Further, on a more general level, the internal reports prepared by Cargill for the Cargill leadership team and the board spoke of the Joe White Business in positive terms that were entirely consistent with reliance upon the Financial and Operational Performance Representations.[2394] No doubt, these positive terms partly reflected the enthusiasm that Eden and others had in relation to the prospect of ownership of Joe White and the potential for benefits to Cargill Malt more broadly. However, they also reflected the manner in which the Joe White Business was presented to Cargill, and did so on a considered basis at various times based on the information that was available at the relevant time. There can be little doubt, and I so find, that if Cargill had been informed of the existence of the Undisclosed Matters or even just the Viterra Practices (being a component of the Undisclosed Matters), then the internal reports to the senior executives would have been in very different terms.[2395] It follows that the submission that Cargill was so keen to acquire Joe White that it would have entered into the Acquisition Agreement regardless of whether or not the Financial and Operational Performance Representations were made must be rejected.[2396]

3206 Neither the Sale Process Disclaimers nor the Acquisition Agreement Liability Terms alter the fact that Cargill relied upon the Financial and Operational Performance Representations. This was notwithstanding the fact that I accept the submission of the Viterra Parties that the Acquisition Agreement Liability Terms, together with the negotiations leading up to their inclusion in the Acquisition Agreement,[2397] provided probative evidence of a state of mind of Cargill Australia that was inconsistent with

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2393 See pars 1006 above.

2394 See, for example, pars 705, 758-765, 838-857, 958-967, 976 above.

2395 Assuming the transaction would not have been abandoned upon learning of the true position, before any detailed report was prepared: see issue 33 below.

2396 See further par 3411 below.

2397 See, for example, pars 979-980, 989, 992 above.

reliance upon the Financial and Operational Performance Representations *to the extent they did not fall within or overlap with the Warranty Representations*. Plainly, some aspects of what was agreed to was inconsistent with such reliance.[2398] Despite this, both the contemporaneous evidence and the evidence given at trial demonstrated overwhelmingly that Cargill did in fact rely upon the Financial and Operational Performance Representations. Taking into account all the evidence that was before the court, there was a myriad of reasons why Cargill would not have proceeded with the transaction if, as a bare minimum, it had known of the Viterra Practices.

3207 The existence of any inconsistency between clause 8.3(c) of the Confidentiality Deed and reliance upon the Financial and Operational Performance Representations was less apparent. If there was an inconsistency, the reasons in the preceding paragraph were equally applicable and the finding of reliance was not precluded by the existence of this clause. However, in my view there was no inconsistency. For the reasons discussed below,[2399] it has been found that Cargill did not breach clause 8.3(c).

3208 Further, the fact that Cargill proactively and independently conducted its own investigations and analyses during the Due Diligence did not detract from the reliance placed on the information provided by the Viterra Parties. Of course, if Cargill had discovered matters that were inconsistent with the Financial and Operational Performance Representations, then such a scenario would have severed any reliance up to that time. However, despite some initial doubts about what had been stated in the Information Memorandum and the Management Presentation,[2400] ultimately Cargill relevantly accepted and relied upon what had been conveyed.

3209 Naturally, as the Viterra Parties have failed to establish that the Alleged Industry Practices existed, their submissions premised on Cargill's knowledge of them must necessarily fail. Further, if a finding be necessary, the fact that no express statement was made to the effect that Joe White did not employ any of the Alleged Industry

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2398 See issue 98 below.
2399 See issues 87, 105 below.
2400 See, for example, pars 755, 820-821 above.

Practices did not give rise to a circumstance where Cargill ought to have assumed or suspected that Joe White engaged in practices of the nature or similar to the Viterra Practices, or for that matter the Operational Practices.[2401]

3210 In light of the findings made above, it is not strictly necessary to respond to the Cargill Parties' submission concerning whether the Financial and Operational Performance Representations were made with the intention of inducing Cargill to enter into the Acquisition Agreement. This issue is discussed in more detail in relation to Viterra below.[2402] It suffices to say that the evidence showed the conduct of distributing the information which gave rise to the Financial and Operational Performance Representations was calculated to induce Cargill to purchase the shares in Joe White by having Cargill Australia enter into the Acquisition Agreement. Nothing contained in the Sale Process Disclaimers or the Acquisition Agreement Liability Terms altered the fact that Glencore (and Viterra) intended to and did engage in the conduct of promoting the sale of Joe White in a positive manner, calculated to create massive and maximum tension between prospective purchasers, in order to induce a prospective purchaser such as Cargill to purchase Joe White and do so at a price in the order of US $400 million.[2403]

3211 Finally, reliance by Cargill on the Financial and Operational Performance Representations was reasonable in the circumstances. Given the strictures imposed by Glencore in relation to confidentiality and access to information, Cargill had little alternative other than to test the information provided to it by the Viterra Parties and, subject to appropriate investigations and analyses, rely upon the information presented in the event that those investigations and analyses did not disclose that what Cargill was being told was anything other than materially correct. Further, this was precisely what Glencore anticipated prospective purchasers, including Cargill, would do.[2404] Again, the Sale Process Disclaimers and the Acquisition Agreement

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2401 Compare par 495 above.

2402 See issue 23 below.

2403 See pars 110, 382, 402, 474, 493, 697-700, 709, 766, 816 and fn 364 above.

2404 See, for example, pars 381-382, 403-406, 427, 436, 474, 493-497, 619, 659, 766, 797-810, 943, 1019, 1454 above.

Liability Terms did not alter the fact that the Viterra Parties were the primary source of information in relation to matters relevant to whether or not to purchase Joe White and that Cargill had limited ability to obtain information about Joe White itself other than through the process as provided on the strict conditions imposed by Glencore (and Viterra).

X.21 Prior to entering into the Acquisition Agreement, did Cargill Australia and Cargill, Inc have the knowledge or state of mind pleaded in paragraph 31A of the Defence?

3212 By paragraph 31A, the Viterra Parties alleged Cargill had a certain state of mind on about 4 August 2013 and before entry into the Acquisition Agreement. This alleged state of mind related to Certificates of Analysis, barley varieties and grades of barley, gibberellic acid and the Malt Cost Reduction Transformation Project.

X.21.1 Certificates of Analysis

3213 The Viterra Parties alleged Cargill considered that: (1) analysis undertaken on malt was only correct within "the standard deviation" of the analytical equipment; (2) if Joe White did not follow the same rules in relation to Certificates of Analysis as Cargill, additional storage costs would be expected if Cargill acquired Joe White; and (3) it was necessary to ensure that Joe White's Certificates of Analysis were "reflecting reality".

3214 With respect to the first of these matters, there was no dispute that results were only as good as the equipment used to test the malt, and that there were numerous sources of analytical variance in testing malt. The Viterra Parties also correctly identified that, in August 2012, Eden was positing an alternative to seeking derogations, namely that a derogation only be sought when an actual analysis was outside the standard deviation of the analytical equipment,[2405] and that Eden was aware of maltsters having plus or minus 2 standard deviation policies or something like that.[2406] In short, Cargill

2405 See pars 329-330 above.
2406 See fn 683 above.

understood that whenever a parameter was tested, the result was always dependent on the level of accuracy that the equipment could achieve and that there must have always been a range (however small or big) within which a result (or measured value) might deviate from the "true value".[2407]

3215 In relation to the other 2 matters raised, they reflected De Samblanx's notes of questions raised in early July 2013.[2408] However, to the extent that these notes reflected doubts, they were allayed.[2409]

3216 As part of their submissions on this point, the Viterra Parties contended that it should be found Cargill considered that it was necessary to ensure the Joe White's Certificates of Analysis were reflecting reality because of the various matters raised. Although concerns were raised about the accuracy of Certificates of Analysis issued by Joe White in early July 2013, there was no basis for a finding that any real concerns in that regard continued up to the time of the execution of the Acquisition Agreement. Further, an appreciation about inherent uncertainty in measurements did not equate to, or even touch upon, some form of notice that the measured results or values were not being faithfully recorded in Certificates of Analysis.

X.21.2 Barley varieties and grades of barley

3217 The Viterra Parties alleged Cargill knew or suspected that: (1) Joe White used Hindmarsh barley; (2) Joe White purchased off-grade barley; (3) Joe White employed blending in its malting procedures; and (4) Joe White utilised or could utilise up to 30 percent of non-malt-1 varieties.

3218 In relation to the first 2 of these allegations, there was no doubt that Cargill was informed that Joe White used Hindmarsh barley[2410] and off-grade barley.[2411] In relation to Joe White blending during its malting procedures, Cargill was informed on

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2407 See, for example, pars 2209-2212 above. See also par 331 and fnns 554, 683, 708 above.
2408 See pars 772, 776 above. See also par 858 above.
2409 See, for example, pars 889, 1059-1061 above.
2410 See par 954 above, but also see pars 2715-2717 above.
2411 See pars 926, 929, 2064, 2578 above, but also see par 930 above.

numerous occasions that Joe White employed blending.[2412] That fact in and of itself was unremarkable. Finally, there was no issue that Cargill was told of the possible utilisation of up to 30 percent of off-grade barley.[2413]

X.21.3 Gibberellic Acid

3219 The Viterra Parties alleged Cargill: (1) considered there were benefits from using gibberellic acid in the production of malt; (2) suspected that some of its competitors might use gibberellic acid to improve their malt quality; (3) knew or suspected that the use of gibberellic acid was not normally allowed by most international brewers; (4) knew or suspected that customers might test malt supplied to them, but considered that testing for gibberellic acid in malt was supposedly difficult to do; (5) knew or suspected that Joe White was generally on 5 days steeping/germination time, whereas Cargill was generally on 6 to 7 days steeping/germination time; (6) knew or suspected that many Joe White plants were on 4 days steeping/germination time, which might mean a process non-conformance that could be addressed either by waiver or reducing plant capacity; (7) knew or suspected that Joe White used gibberellic acid in the production of malt for at least some of its customers; and (8) considered that there was some risk that Joe White's use of gibberellic acid would mean that the guiding principles of the Cargill Code might be compromised if Cargill Australia acquired Joe White.

3220 The matters referred to in (1), (2), (3), (4),[2414] (5) and (7) above were either not contested at all or not seriously put in issue.

3221 In relation to the sixth matter, there was no issue that Cargill knew that some of Joe White's plants only took 4 days for steeping and germination. As a result of this, Cargill was initially concerned about possible non-compliance with respect to some of Joe White's customers' requirements that, at the time this concern existed, might

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2412 See, for example, pars 730, 884, 926 above.

2413 See par 926 above.

2414 There was evidence that gibberellic acid could be detected by some: see par 2799 above.

have needed to be addressed by waiver or reducing plant capacity.[2415]

3222 In relation to the eighth matter, again at a point in time during the Due Diligence, Cargill did consider there was some risk that the Cargill Code might be compromised because of the use of gibberellic acid.[2416]

X.21.4 The Malt Cost Reduction Transformation Project

3223 The Viterra Parties alleged that Cargill knew or suspected that: (1) a transformation project was in place at Joe White to drive efficiency gains; and (2) cost reduction was a part of the Joe White Business model.

3224 There was no dispute that these matters were stated as part of the Management Presentation,[2417] but the level of detail provided was very limited.

3225 A discussion of this issue would not be complete without referring to Mattiske's evidence that, by the time Glencore acquired Viterra, all transformation projects were completed or dormant.[2418] Although this evidence has been rejected, it is of some significance that Mattiske had no appreciation of the existence of the Malt Cost Reduction Transformation project. Further, his lack of knowledge, despite being directly involved in settling the Information Memorandum and the Management Presentation Memorandum, strongly supported a finding that Cargill was not provided with any meaningful information about the details of any transformation project so as to put in doubt any of the Financial and Operational Performance Representations. I so find.

X.21.5 Conclusion

3226 The Viterra Parties have established that Cargill had the knowledge or state of mind of a substantial number of the matters pleaded in paragraph 31A of the Defence as set out above. As this issue is referred to with respect to other matters below, it should

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2415 See par 819 above.
2416 Ibid.
2417 See par 731 above.
2418 See par 147 above.

be pointed out that knowledge or suspicion of these matters neither individually nor collectively gave Cargill notice of any of the Undisclosed Matters.

X.22 Did Viterra know that the Financial and Operational Performance Representations or any of them were or was false and/or did Viterra not genuinely believe the representations were true and/or was Viterra reckless as to whether they were true or false?

X.22.1 Legal Principles

3227 The elements of deceit that a plaintiff must prove are well established.[2419]

3228 *First*, the defendant made a false representation.[2420] Ordinarily, this will be determined by how the representation would have been understood by a reasonable person.[2421] A false representation may be made by words or conduct, or by active concealment or non-disclosure of a fact which renders a fact disclosed false or misleading.[2422] However, merely proving a representation was false is not enough. The differing meanings or senses in which words or conduct were understood by both the representor and the representee must be borne in mind when considering the elements of deceit.[2423]

3229 *Secondly*, the defendant made the representation with the knowledge that the representation was false, or was "recklessly, careless" as to whether the representation was false or not.[2424] Recklessness is a state of mind established by showing an

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2419 *Magill v Magill* (2006) 226 CLR 551, 587-588 [114] (Gummow, Kirby and Crennan JJ). See also *Tresize v National Australia Bank Ltd* (2005) 220 ALR 706, 716 [38] (Sundberg J).

2420 *Magill v Magill* (2006) 226 CLR 551, 567 [37] (Gleeson CJ), quoting *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205, 211 (Viscount Maugham), 587-588 [114] (Gummow, Kirby and Crennan JJ).

2421 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 576.9-577.1 (Brennan, Deane, Gaudron and McHugh JJ).

2422 *Wood v Balfour* [2011] NSWCA 382, [7] (Giles JA, with whom Meagher JA agreed), [49]-[50] (MacFarlan JA); *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 575.2 (Brennan, Deane, Gaudron and McHugh JJ), quoting *Curwen v Yan Yean Land Co Ltd* (1891) 17 VLR 745, 751.

2423 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 576.7.

2424 *Magill v Magill* (2006) 226 CLR 551, 567 [37], 587-588 [114]; *Banditt v The Queen* (2005) 224 CLR 262, 265 [2] (Gummow, Hayne and Heydon JJ); *Derry v Peek* (1889) 14 App Cas 337, 374.3 (Lord Herschell). Note that Gummow, Kirby and Crennan JJ expressed the second element as "recklessness *or* carelessness" (emphasis added), while Lord Herschell used the words "recklessly, careless whether it be true or

"indifference to [the] truth or falsity" of the representation.[2425] It has alternatively been expressed as the absence of genuine or honest belief in the truth of the statement as it was intended to be understood.[2426] Recklessness requires the defendant to have been aware of a risk that the statement was untrue or false and to have consciously disregarded that risk.[2427] The second element may also be established where a defendant wilfully shuts her or his eyes to what would result from further enquiry as to the truth or falsity of the statement.[2428]

3230 Motive is irrelevant if fraud is proved;[2429] it does not matter that there was no intention to cheat or injure the person to whom the representation was made; and prior planning is not required.[2430]

3231 Mere carelessness, in the sense of failing to take adequate care, is not sufficient.[2431] The absence of reasonable grounds for believing the statement is true is also not enough to satisfy this element.[2432] Although this may serve as evidence of recklessness or a lack of honest belief, this evidence can be displaced by showing the representor's genuine belief in the truth of the representation.[2433] However, the grounds of belief

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false". However, there is no difference in substance. It is clear that Gummow, Kirby and Crennan JJ used "carelessness" in the sense of "not caring whether the representation was false or not", which aligns with Lord Herschell's formulation, rather than carelessness in the sense of merely not taking reasonable care, which is insufficient. As Beech J stated in *Lois Nominees Pty Ltd v Hill (No 2)* [2016] WASC 104: "Not caring is not to be equated with failing to take appropriate care; it is important not to equate negligence with fraud": at [28]. See further cases in fn 2431 below.

2425 *Roberts v Bass* (2002) 212 CLR 1, 13 [13] (Gleeson CJ), citing *Horrocks v Lowe* [1975] AC 135, 153 (Lord Diplock with whom Lords Wilberforce, Hodson and Kilbrandon agreed). See also, in other contexts, *Gillard v The Queen* (2014) 88 ALJR 606, 612-613 [26] (French CJ, Crennan, Bell, Gageler and Keane JJ); *Kane v Dureau* [1911] VLR 293, 297.2 (Cussen J).

2426 *Gillard v The Queen* (2014) 88 ALJR 606, 612-613 [26]; *Magill v Magill* (2006) 226 CLR 551, 587 [113]; *Banditt v The Queen* (2005) 224 CLR 262, 265 [2]; *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 578.7; *Derry v Peek* (1889) 14 App Cas 337, 374.5.

2427 *Giudice v Legal Profession Complaints Committee* [2014] WASCA 115, [44]-[49] (Martin CJ), [87], [95] (Buss JA).

2428 *Banditt v The Queen* (2005) 224 CLR 262, 265-6 [3] (Gummow, Hayne and Heydon JJ).

2429 *Magill v Magill* (2006) 226 CLR 55, 593 [131] (Gummow, Kirby and Crennan JJ), citing *Derry v Peek* (1889) 14 App Cas 337, 374.

2430 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 579.9-580.2 (Brennan, Deane, Gaudron and McHugh JJ), citing *Derry v Peek* (1889) 14 App Cas 337, 374; *Smith v Chadwick* (1884) 9 App Cas 187, 201.2 (Lord Blackburn, with whom Lord Watson agreed).

2431 *Giudice v Legal Profession Complaints Committee* [2014] WASCA 115, [45] (Martin CJ), [86]-[87] (Buss JA); *Nocton v Lord Ashburton* [1914] AC 932, 947.2 (Viscount Haldane LC, with whom Lord Shaw agreed). See also *Derry v Peek* (1889) 14 App Cas 337, 375.3 (Lord Herschell).

2432 *Nocton v Lord Ashburton* [1914] AC 932, 947.2. See also *Derry v Peek* (1889) 14 App Cas 337, 375.3.

2433 Ibid, 947.4; *Derry v Peek* (1889) 14 App Cas 337, 369.3, 375.8. See also, *Akerhielm v De Mare* [1959] AC

may be relevant to assessing the credibility of later assertions of belief; if the belief is destitute of all reasonable grounds it may be difficult to persuade the court it was genuinely held.[2434]

3232 In respect of a corporate defendant, the plaintiff must identify a natural person with the requisite state of mind and be able to attribute the state of mind of that person to the company.[2435] A division of function among company officers responsible for different aspects of a transaction does not relieve the company from responsibility by reference to the knowledge possessed by each of them.[2436] This may be established by relying on the principles of actual and apparent authority set out above.[2437] Accordingly, it is not necessary for a plaintiff to establish that the person with the requisite state of mind made the representation. A corporation may be liable where a representation is made with authority by a person who did not know it was fraudulent and another person whose knowledge may be attributed to the corporation knew of the making of the representation and knew it was false.[2438]

3233 *Thirdly*, the defendant made the representation with the intention that it be relied upon by the plaintiff, or a class of persons to which the plaintiff belongs.[2439] However, it need not be made directly to the plaintiff.[2440]

3234 *Fourthly*, the plaintiff acted in reliance on the false representation.[2441] The representation need not be the sole cause of the plaintiff's actions;[2442] it is sufficient

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789, 805.8-806.2, cited in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 578.8 (Brennan, Deane, Gaudron and McHugh JJ).

2434 *Derry v Peek* (1889) 14 App Cas 337, 369.4.

2435 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 582.8-583.2.

2436 Ibid, 583.2. See discussion on this topic in issue 11 above.

2437 See pars 3088-3092 above.

2438 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 583.7. See also *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 454 [136] (Edelman J, with whom Allsop CJ and Besanko J relevantly agreed).

2439 *Magill v Magill* (2006) 226 CLR 551, 587-588 [114] (Gummow, Kirby and Crennan JJ), citing *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205, 211 (Viscount Maugham).

2440 *Commercial Banking Co of Sydney Ltd v R H Brown & Co* (1972) 126 CLR 337, 343.8 (Menzies J, with whom Barwick CJ, McTiernan and Gibbs JJ agreed), 346.5 (Gibbs J, with whom McTiernan J agreed).

2441 *Magill v Magill* (2006) 226 CLR 551, 587-588 [114], citing *Redgrave v Hurd* (1881) 20 Ch D 1, 21 (Jessel MR); *Arnison v Smith* (1889) 41 Ch D 348, 369.1 (Lord Halsbury LC); *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483.4 (Bowen LJ).

2442 *Gould v Vaggelas* (1984) 157 CLR 215, 236.5 (Wilson J), 250.7-251.2 (Brennan J); *Holmes v Jones* (1907) 4 CLR 1692, 1716.3 (Isaacs J), citing *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 482 (Bowen LJ).

that the representation played some part, even if only a minor part.[2443] This is the case even if another reason for the plaintiff's actions was the plaintiff's own mistake or carelessness.[2444] Further, if the representation is made to induce the other party to enter into a contract, and the other party does enter into the contract, an inference arises (which may be rebutted) that the other party was induced to do so by the representation.[2445]

3235 *Fifthly*, the plaintiff suffered damage, which was caused by reliance on the false representation.[2446] Generally speaking, a causal connection is established if the plaintiff would not have sustained the loss if not for the defendant's wrongful conduct.[2447] However, satisfaction of the "but for" test is not always necessary, or sufficient, to show causation. The "but for" test results must be tempered by value judgments and policy considerations,[2448] and ultimately determined with a common sense approach.[2449]

3236 It goes without saying that, as a claim based on deceit involves allegations of fraud, a

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2443 See *Gould v Vaggelas* (1984) 157 CLR 215, 236.5, 238.5 (Wilson J, with whom Gibbs CJ agreed), 250.7 (Brennan J).

2444 *Amaltal Corporation Ltd v Maruha Corporation* (2007) 3 NZLR 192, 203 [23] (Blanchard J with whom Elias CJ, Tipping, McGrath and Anderson JJ agreed); *Standard Chartered Bank v Pakistan National Shipping Corporation (Nos 2 and 4)* [2003] 1 AC 959, 966-967 [14]-[15] (Lord Hoffmann with whom Lords Mustill, Slynn, Hobhouse and Rodger agreed); *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 481.1 (Cotton LJ), 485.8 (Fry LJ).

2445 *Gould v Vaggelas* (1984) 157 CLR 215, 236.5, 238.5 (Wilson J, with whom Gibbs CJ agreed), 250.7 (Brennan J).

2446 *Magill v Magill* (2006) 226 CLR 551, 567 [37] (Gleeson CJ), citing *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205, 211 (Viscount Maugham), 587-588 [114] (Gummow, Kirby and Crennan JJ), citing *Pasley v Freeman* (1789) 3 TR 51, 56 [100 ER 450, 453] (Buller J), 64 [457] (Lord Kenyon CJ); *Smith v Chadwick* (1884) 9 App Cas 187, 196 (Lord Blackburn, with whom Lord Watson agreed).

2447 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 12.8, 13.3 (Mason, Wilson and Dawson JJ); *Gould v Vaggelas* (1984) 157 CLR 215, 265.4 (Dawson J). See also, in relation to torts more broadly, *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424, 442 [39] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ); *Chappel v Hart* (1998) 195 CLR 232, 238 [8] (Gaudron J), 244 [27] (McHugh J), 255-256 [62] (Gummow J), 269 [93] (Kirby J), 282 [113]-[114] (Hayne J); *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, 6.4 (Deane, Dawson, Toohey and Gaudron JJ), 20.7 (McHugh J); *March v Stramare* (1991) 171 CLR 506, 514.8 (Mason CJ, with whom Toohey and Gaudron JJ agreed).

2448 See, in relation to torts more broadly, *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486, 511.3 (Callinan and Heydon JJ); *Chappel v Hart* (1998) 195 CLR 232, 255 [62] (Gummow J), 269-270 [93] (Kirby J); *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49, 52.4 (Brennan CJ, Dawson, Toohey and Gaudron J), 55.5 (McHugh J); *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, 6.4 (Deane, Dawson, Toohey and Gaudron JJ), 20.3 (McHugh J); *March v Stramare* (1991) 171 CLR 506, 516.8.

2449 *Chappel v Hart* (1998) 195 CLR 232, 242 [23] (McHugh J), 269 [93] (Kirby J), 285 [125], 290 [148] (Hayne J).

finding that the claim has been made out is not lightly made.[2450]

X.22.2 The Cargill Parties' submissions

3237 The Cargill Parties submitted the Financial and Operational Performance Representations were necessarily all false by reason of the existence of the Viterra Practices. By reference to the Pre-Execution Statements, Cargill identified why it was that each individual statement, and each Financial and Operational Performance Representation arising from such statements, was false. Further, they contended that each of the Financial Operational Performance Representations was based on the 44 pleaded statements all "made by Hughes" (as well as others in conjunction with Hughes with respect to some of them).[2451]

3238 In relation to knowledge of the falsity of those statements, reliance was placed upon the knowledge of Hughes, Argent, Youil and Fitzgerald. Specifically addressing Hughes, they referred to his position as an employee of Viterra Ltd and his position as executive manager of Viterra Malt,[2452] as well as his position up to December 2012 as a director of each of the Viterra entities together with Joe White.[2453] They submitted Hughes had no relationship with Joe White other than that which included his role as an executive for Viterra Malt.

3239 The Cargill Parties contended that the evidence established Hughes knew of the *existence* of the Viterra Practices. They referred to a number of matters in order to demonstrate this, including his knowledge and involvement in the Malt Cost Reduction Transformation Project, the Malt Blend Parameters Procedure, pencilling, the introduction of the Viterra Code, the genesis and ongoing implementation of the Viterra Certificate of Analysis Procedure, as well as what he stated in relation to the

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2450 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 579.4. See also fn 2456 below.

2451 Consisting of 24 Information Memorandum Statements, 12 Management Presentation Statements, 4 Operations Call Statements and 4 Commercial Call Statements. Obviously not all of them were actually made by Hughes himself. However, the relevant point was that he either made them or knew they were being made and took no exception to any of them.

2452 The Cargill Parties' submissions referred to Hughes as being a general manager of Viterra Malt, but the evidence was that he was executive manager. Nothing turned on this.

2453 See par 47 above.

Viterra Practices after the Cargill 22 October Letter.[2454]

3240 Based on this knowledge, it was submitted that Hughes could not have honestly believed the truth of the statements made to the effect that Joe White met customers' exact specifications and specific customer requirements as stated in the Information Memorandum and the Management Presentation Memorandum.[2455] Further, they contended that Hughes' statements that Joe White had long-term relationships with customers and a strong record of contract renewal, while technically correct, failed to disclose that those relationships were predicated on systemic non-compliance with customer contracts and the concealment of that fact in accordance with the Viterra Practices. They submitted it followed that Hughes suppressing this fact rendered false these technically correct statements. Furthermore, they submitted Hughes was not being honest when he said that Joe White's procurement function was focused on meeting customers' contractual requirements as to barley varieties, nor when it was stated that Joe White had sufficient production facilities and production capacity together with low future capital expenses in the short to medium term.

3241 Moreover, the Cargill Parties submitted Hughes' statements during the Operations and Commercial Calls were particularly egregious because they were answers to specific questions that, if answered truthfully, should have included disclosure of the Viterra Practices.

X.22.3 The Viterra Parties' submissions

3242 The Viterra Parties contended that if, contrary to their submissions, the Financial and Operational Performance Representations were conveyed and any of them were false, Viterra did not know of this because: (1) knowledge that could properly be attributed to Viterra did not amount to knowledge of any falsity; and (2) knowledge of those persons who had knowledge which could be said to amount to knowledge of false representations being made could not be attributed to Viterra.

2454 This included the evidence referred to in pars 73, 90, 124-126, 135-136, 145-147, 156-167, 199-204, 206, 229-249, 271, 287-292, 1279-1284 above. See also par 2676 above.

2455 See pars 438, 491, 504-505, 514, 522, 716, 718, 727 above.

3243 In addition to their submissions concerning attribution, which have been addressed in issue 11 above, the Viterra Parties submitted that a finding that a party to civil litigation is guilty of fraudulent or criminal conduct on the balance of probabilities should not be lightly made.[2456] In applying the hybrid approach,[2457] they submitted that it was necessary for the court to find that a single individual had the requisite knowledge and intent which was able to be attributed to Viterra. Thus, it was submitted it was necessary for Cargill Australia to establish that a natural person knew the Financial and Operational Performance Representations had been made, and that that person knew, or was reckless as to whether, those representations were false.

3244 The Viterra Parties submitted that based on the agreed list of issues, only the knowledge of Fitzgerald, Hughes, Argent and Youil needed to be considered. Further, by reference to the pleadings, it was submitted there was no issue which arose in relation to Argent and Youil.

3245 Regarding Fitzgerald's knowledge, it was accepted that it could be attributed to Viterra but it was submitted there was no evidence to support a finding that he knew of the Undisclosed Matters. As for Hughes, they submitted both that it had not been established Hughes knew of the Undisclosed Matters and in any event that his knowledge should not be attributed to Viterra.

3246 On the question of Hughes' knowledge, the Viterra Parties submitted the evidence did not support a finding that Hughes had knowledge of the alleged extent and effects of the Viterra Practices, namely: (1) the Operational Practices were engaged in routinely or without informing customers, or both; (2) the Financial and Operational Information was substantially underpinned by the Viterra Practices and the Viterra Policies; and (3) without the implementation of the Viterra Practices, Joe White could not have produced and sold malt - (a) in the volumes and to the specifications required

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2456 See par 2285 above. See also *Magill v Magill* (2006) 226 CLR 551, 587-588 [114] (Gummow, Kirby and Crennan JJ); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 450 (Mason CJ, Brennan, Deane and Gaudron JJ).

2457 See par 2642 above.

by customers, or (b) in the volumes and for the return as reflected in the Financial and Operational Information.

3247 Further, they submitted that, by reason of the Refusal of Certain Terms, Cargill knew Viterra's position was that the knowledge of the Joe White executives was not attributable to Viterra for the purposes of the sale of Joe White. It was submitted it followed from this that Cargill did not expect Hughes' knowledge would be attributed to Viterra. They contended that if Cargill wanted Hughes' knowledge to be attributed to Viterra, it should and would have made that request for the purposes of clause 31.15 of the Acquisition Agreement. Given the absence of such a request, it was submitted that to permit Hughes' knowledge to be attributable to Viterra would undermine the bargain that the parties had struck. Further, it was submitted that this context was relevant to, and should significantly inform, the court's consideration of whether Hughes' knowledge could be attributed to Viterra for the purposes of Cargill Australia's deceit claims.

3248 Furthermore, they submitted that by the time the sale of Joe White commenced Hughes' knowledge was no longer attributable to Viterra by reason of his position as a director as he no longer held the position. Moreover, they submitted that there was no evidence that during his time as a director of the Viterra entities he shared his knowledge with any person whose knowledge was attributable to any of the Viterra Parties during the relevant later period. Finally, in addition to the matters referred to concerning Hughes' role in the sale process,[2458] they contended that although Hughes was an employee of Viterra Ltd he had "no other function within the Viterra Group" other than his duties specifically limited to Joe White.[2459]

3249 As a further alternative to the submission that Hughes' knowledge should not be attributed to Viterra,[2460] it was submitted that even if Joe White engaged in the Viterra Practices, Cargill had not established Hughes' knowledge as to the extent of the Operational Practices, nor whether Joe White's customers were informed of them. In

2458 See par 2644 above.
2459 See pars 2640, 2658 above.
2460 See par 2645 above.

relation to any findings on these issues, it was submitted that as a result of the Hughes/Cargill Agreement and the Cargill Covenant, even if the Viterra Parties' strikeout application was unsuccessful,[2461] a series of inferences should be drawn as part of a finding that Cargill Australia had not established Hughes had the requisite knowledge. In substance, it was contended that irrespective of whether or not Hughes knew how Joe White was actually operating, this did not mean that Hughes had knowledge of the extent and the effects of the Viterra Practices. Further, the Viterra Parties submitted that because of the Hughes/Cargill Agreement, Cargill Australia interfered with Hughes' capacity to be a truthful witness of fact and the court should find Hughes would not have given evidence to support Cargill Australia's assertion that he had knowledge of the Undisclosed Matters.

3250 In this regard, the Viterra Parties referred to: (1) Hughes verifying each of the Information Memorandum Statements being true and correct;[2462] (2) Hughes engaging in the verification process in relation to the Warranties;[2463] (3) the position Hughes adopted in his initial discussions with Mattiske after the Cargill 22 October Letter had been received, in particular Hughes stating that he was convinced Joe White could deliver on the statements made in the Due Diligence, that there were new barley varieties coming which meant the use of gibberellic acid would not be needed as much in the future, that the barley varieties issue could be solved and that he did not see any risk or issues with that in the business going forward;[2464] (4) Hughes stating on 23 October 2013 that using incorrect barley varieties was a short-term issue and that after March 2014 the position would be better;[2465] (5) Hughes stating on around 23 October 2013 that the barley varieties issue was a one-off, that it should be resolved in the near future and that customers were happy;[2466] (6) Hughes stating on around 29 October 2013 that the Reporting Practice was standard industry practice and it was fine, that Cargill used different processes which might have meant that Joe White's current

2461 See pars 1862-1876 above.
2462 See pars 446-452 above.
2463 See issue 125.6 below.
2464 See pars 1250-1259 above.
2465 See par 1281 above.
2466 See par 1390 above.

processes would not be required and that Joe White engaged in far more extensive testing by comparison to Cargill, whose process involved a far narrower form of testing which might have resolved the issue;[2467] and (7) Hughes approving the final versions of the Reply Letters.[2468]

X.22.4 Analysis

3251 It has been found that: (1) Hughes was an agent of Viterra when acting by assisting in the sale process of Joe White;[2469] (2) the Financial and Operational Performance Representations were made not only by Glencore but also by Viterra;[2470] and (3) the Financial and Operational Performance Representations were false.[2471]

3252 Thus, the question for consideration is whether the Financial and Operational Performance Representations made by Viterra (including by means other than Hughes) were fraudulent because of the knowledge of Hughes as agent for Viterra such that Viterra may be liable for a claim of deceit.

3253 As has been explained above,[2472] in order to succeed in a claim of deceit against a corporation it is not necessary to establish that the person who engaged in the imputed conduct with authority was the same person who knew that the representations made or other conduct engaged in alleged to comprise the false representations. In other words, the person with authority to engage in the imputed conduct may have been entirely ignorant of any falsehood or wrongdoing, but the corporation may still be liable for deceit if another person knew false representations were being made on behalf of the corporation, as that other person's knowledge may be attributed to the corporation.[2473]

2467 See par 1393 above.
2468 See pars 1401-1404, 1513 above.
2469 See par 2660 above. For completeness, it has also been found that Hughes was acting on behalf of Viterra for the purposes of s 139B(2) of the *Competition and Consumer Act*.
2470 See issue 15 above, and in particular pars 457, 475-483, 711, 2174, 2176, 2184, 2922, 3001, 3031 above.
2471 See issue 16 above.
2472 See par 3232 above.
2473 Naturally, all elements of the cause of action of deceit must still be considered.

3254 In this proceeding, the Financial and Operational Performance Representations were predominantly made by the provision of the Information Memorandum and the Management Presentation Memorandum to Cargill, coupled with some oral representations made by Hughes and, to a much lesser extent, Argent.[2474] To the extent that they were made solely by the provision of documents, the Financial and Operational Performance Representations were not made by Hughes himself. Equally, there were some statements made by Argent that were not also expressly made by Hughes.[2475] However, by reason of his direct involvement in the drafting and finalising of both the Information Memorandum and the Management Presentation Memorandum, as well as his active participation in the Management Presentation, the Operations Call and the Commercial Call, to the extent that they were not made by Hughes, he was fully aware of all of the statements made concerning Joe White which gave rise to the Financial and Operational Performance Representations.

3255 Accordingly, the only remaining matters for determination are the extent of Hughes' knowledge of the falsehood of the Financial and Operational Performance Representations and whether that knowledge ought to be attributed to Viterra.

3256 As discussed in issue 11 above, Hughes knew of the existence of the Operational Practices.[2476] The further question is whether he was aware that they were being implemented routinely (without customers being informed) such that it ought to be concluded that he knew of the Viterra Practices. In addressing this issue, initially each of the Operational Practices will be considered individually.

3257 There were numerous matters which indicated that Hughes was fully aware of the existence and implementation of the Reporting Practice. In broad summary, over many years he advocated and required its use, including by overseeing the creation,

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2474 See issue 15.2 above.
2475 See pars 728-733 above.
2476 See par 2676 above.

development and institutionalisation of the Reporting Practice for all Certificates of Analysis issued to Joe White's customers.[2477]

3258 The position in relation to Hughes' knowledge of the Varieties Practice was straightforward. On 23 October 2013, Hughes directly acknowledged the Varieties Practice in stating that Joe White used barley varieties inconsistent with customer contracts.[2478] He referred back to events in 2010 as part of addressing this issue.[2479] He also readily attested that Joe White did not always have the barley varieties available as needed and that substantial sums could be involved in addressing this problem between October 2013 and the end of March 2014.[2480] Around the same time, Hughes approved the contents of the Key Recommendations Memorandum and the Customer Review Spreadsheet which demonstrated his full awareness of this issue. There was nothing to suggest the Varieties Practice was a recent occurrence in October 2013 or that Hughes had only just become aware of it. On the contrary, what Hughes stated, including that the issue of not having the correct barley varieties was not pointed out to Glencore in 2012, indicated that Hughes was aware that the Varieties Practice had been in place for some significant period of time.[2481]

3259 As for the Gibberellic Acid Practice, the position was equally clear. It is unnecessary to go further than what Hughes stated on 23 October 2013, namely that the use of prohibited gibberellic acid was difficult to detect and that Joe White engaged in such conduct routinely at all of its plants when it should not have.[2482] This clear and unequivocal evidence was consistent with a large body of other evidence that indicated that Hughes was aware of the Gibberellic Acid Practice.[2483]

2477 See, for example, pars 73, 90, 167, 174, 201, 206, 226, 229, 245, 248, 270, 271, 287, 1280 (and in particular the reference to Joe White using the Reporting Practice at all its plants for all its customers) above.

2478 See par 1281 above.

2479 Ibid, and see in particular fn 782 above.

2480 Ibid.

2481 See issue 10.7 above in relation to evidence indicating non-approved barley varieties being used from 2010 to 2013; and issues 10.8 and 10.9 above as to the data available concerning the Varieties Practice.

2482 See par 1282 above.

2483 See pars 1129-1130, 1215, 1218, 1224-1225, 1251-1255, 1265, 2556 above.

3260 In addition to these matters, some observations may be made about the evidence of Hughes' knowledge which was relevant to his collective awareness of the Viterra Practices. As the Viterra Parties themselves submitted,[2484] if there was information in the Information Memorandum (and I interpolate the Management Presentation Memorandum) that was misleading, then Hughes must have known of that fact by virtue of his position. Further, it was material that on numerous occasions when the issue arose concerning Joe White engaging in the Operational Practices, Hughes never responded by suggesting that he was not aware of them or that he did not know the manner in which they were being implemented. On the first occasion the issue was raised by Mattiske,[2485] Hughes spoke to each of the matters without needing to defer to any of the other Joe White executives in order to explain what was occurring. Similarly, when specifically addressing each of the Operational Practices on the following day,[2486] Hughes did not profess to have a lack of knowledge of any of the matters raised. Yet again, in mid-October 2013 when the Joe White executives involved in operations decided it was time to disclose the Operational Practices to Cargill, Hughes made no suggestion at the 15 October Meeting that anything that was disclosed was news to him. In short, there was no hint in the evidence that Hughes, as the hands-on executive, was unaware of any material matter concerning the Viterra Practices. Quite the contrary, on 29 October 2013 Hughes considered himself able to unreservedly convey that Joe White would be able to supply malt to its customers only if it was not required to supply exactly as specified.[2487]

3261 That is not to say that Hughes would have known of every occasion upon which the Operational Practices were implemented or every nuance of the manner in which they were applied.[2488] Undoubtedly, given the numerous occasions over an extended number of years in which they were implemented as part of Joe White's operations without his direct involvement on each occasion, he would not have been across every instance upon which a Sign-Out Report was pencilled, a Certificate of Analysis

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2484 See par 2645 above.
2485 See pars 1250-1258 above.
2486 See pars 1279-1288 above.
2487 See par 1462 above.
2488 See par 1314 above.

reported results inaccurately, a barley variety was used contrary to customer specifications and (on the occasions when it occurred) was falsely reported, or gibberellic acid was used when it was prohibited. However, this lack of knowledge of every time that the Operational Practices were implemented did not equate to a lack of knowledge of the Viterra Practices. The evidence demonstrated that Hughes was fully aware of the general approach of implementing the Viterra Practices in order to allow Joe White to give the impression on an ongoing basis of a much higher level of compliance with customer requirements and specifications than that which was actually occurring.

3262 In relation to the tenth of the Financial and Operational Performance Representations, to the effect that the Undisclosed Matters did not exist, for substantially the same reasons that it has been found that that representation was made,[2489] Hughes must have been aware that it was made and that it was false. Plainly, Hughes was aware of the Viterra Policies.[2490] As discussed immediately above, he was also aware of the Viterra Practices and that they had been implemented as part of the Joe White Business in 2013 and the years preceding then. Further, it was axiomatic that the routine implementation of the Operational Practices without informing customers would have resulted in Joe White's financial and operational performance being substantially underpinned by such conduct. Hughes must have fully appreciated that, if Joe White had disclosed to its customers throughout the period from 2010 to October 2013 that Joe White was routinely incapable of producing malt that complied with customers' requirements and specifications,[2491] this would have caused considerable disruption to the Joe White Business and adversely affected its financial and operational performance. Exactly what level of disruption might have been caused is not necessary to determine. It is sufficient to conclude that it would have been substantial, and that Hughes must have appreciated this at the time. There were numerous pieces of evidence that indicated that this was so.[2492] His attempt to justify his position after

2489 See par 2916 above.
2490 See pars 90, 229, 287 above.
2491 See, for example, par 1226 above.
2492 See pars 73 (about the necessity to engage in pencilling and that Hughes stated in around 2000 that it

the Cargill 22 October Letter (to the extent that Mattiske's evidence suggested that he did),[2493] did not detract from the reality of the situation in 2013, and Hughes' appreciation of that reality.[2494]

3263 Further, the submissions made by Hughes to the effect that he could not have known whether the Viterra Policies had been disclosed by the Viterra Parties as part of the Due Diligence, such that he would not have appreciated that Cargill would have understood the Financial and Operational Performance Representations without some understanding of the Viterra Policies, must be rejected. While it was correct that Hughes was not given responsibility for what was to be included in the Data Room and was not told by the Viterra Parties as to precisely what had been included, it did not follow from this that he would not have appreciated that the Viterra Policies had not been disclosed. In short, no reference was made at all to the Viterra Policies in the Information Memorandum or the Management Presentation Memorandum, or during the Management Presentation, the Operations Call or the Commercial Call. Further, the nature of the dialogue during the Management Presentation, the Operations Call and the Commercial Call must have indicated to Hughes that Cargill was not aware of the Viterra Policies. Without being exhaustive, questions about how Joe White reprocessed product not within specification and internal tolerances around specifications,[2495] without any reference to standard deviations or the Viterra Policies, must have demonstrated to Hughes that Cargill was uninformed about them. In addition, he was fully aware that the Viterra Policies had been filed in a manner to conceal their true status.[2496]

3264 Furthermore, Hughes' subsequent conduct of considering it necessary to draw the Operational Practices to Cargill's attention in mid-October 2013 spoke volumes about

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was common practice to despatch out-of-specification malt), 1131, 1281 (in particular the reference to the possibility of big dollars being involved if Joe White was required to supply the correct barley varieties and the estimate of a significant increase in the cost base), 1282 (in particular the references to increased germination time if gibberellic acid was not added and that Joe White engaged in the Gibberellic Acid Practice to drive capacity), 1284 (in particular the reference to Hughes believing the use of the Operational Practices was a process to manage risk) above.

2493 See pars 1250-1258 above.

2494 See, for example, par 1218 above.

2495 See par 884 above.

2496 See pars 90, 287 above.

him being conscious of the fact that Cargill had not been informed about such matters prior to this time. There was nothing in the evidence to suggest that after 4 August 2013 Hughes' belief as to what Cargill had been told during the Due Diligence concerning disclosure of the Viterra Policies had been mistaken, or that he learnt after 4 August 2013 for the first time that Cargill had been kept in ignorance of the Operational Practices, including the existence of the Viterra Policies.[2497]

3265 In relation to attribution, it has already been found that Hughes was Viterra's agent for the purposes of the sale process.[2498] The authority given to Hughes was to assist as directed by Glencore and Viterra. This included assisting in the collating of information, in the drafting and finalising of the Information Memorandum (including verifying much of its contents) and the Management Presentation Memorandum, in making oral presentations, and in responding to questions about the Joe White Business as a result of the contents of the documents provided to Cargill as part of the sale process. Further, Hughes was the person on behalf of Viterra that was directed to assist because of his knowledge of Joe White, and was given the overarching responsibility to ensure that the relevant information was disclosed and that the material representations in relation to the Joe White Business were true and correct.[2499] Furthermore, at all times Hughes was under an express contractual obligation to act ethically and honestly,[2500] as well as to comply with the Viterra Code which mandated (amongst other things) that Hughes maintain superior standards of honesty, fairness and integrity in business relationships.[2501] The Viterra Code also required Hughes to disclose to Viterra any violations or possible violations of the Viterra Code in his dealings with or on behalf of Viterra.[2502] Hughes' duty of disclosure to Viterra was unaffected by any agreement that Glencore and Viterra may

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2497 In arriving at this conclusion, little weight is placed upon the contents of Hughes' self-serving (and untested) note of the 15 October Meeting and his subsequent (untested) statement on 23 October 2013: see pars 1148, 1280 above.

2498 See, for example, par 2660 above.

2499 See, for example, pars 366-367, 393, 433, 443, 445-451, 1876 above. Obviously, Argent was also retained for much the same purpose, but his knowledge was that of a financial controller concerned largely with financial matters, whereas Hughes was the only person who was a Viterra executive with the responsibility for both operational and financial matters.

2500 See issue 136 below.

2501 See par 59 above.

2502 See par 63 above.

have had in place with Cargill concerning their obligations to make disclosure to Cargill.

3266 As explained above, given the level of his involvement, Hughes was aware of all of the Pre-Execution Statements that were made during the sale process. Plainly, the Viterra Code required Hughes to disclose to his superiors at Viterra that many of the Pre-Execution Statements were patently wrong.[2503] In these circumstances, where he assisted in the manner that he did with the actual authority of Viterra, as a Viterra Ltd employee and a Viterra executive with responsibility for the operations of Joe White, Hughes' knowledge was attributable to Viterra.[2504]

X.22.5 Conclusion

3267 Hughes was fully aware as to the making of the Pre-Execution Statements that gave rise to the Financial and Operational Performance Representations.[2505] Accordingly, in addition to Viterra making the Financial and Operational Performance Representations, by reason of Hughes' knowledge being attributable to Viterra and his role in the sale process as explained above, Viterra knew they were false. Alternatively, in the circumstances referred to above, Hughes could not have genuinely believed any of the Pre-Execution Statements (and thus the Financial and Operational Performance Representations) were true. Even if that is incorrect, alternatively and at the very least, Hughes was reckless as to whether or not the Pre-Execution Statements (and thus the Financial and Operational Performance Representations) were true or false.

X.23 Did Viterra make the Financial and Operational Performance Representations with the intent that Cargill Australia would rely on them

2503 See further par 3277 below.

2504 See pars 2618, 2621 above.

2505 In stating this, it is acknowledged that Hughes was not fully aware of precisely what financial and operational information had been disclosed by the Viterra Parties during the Due Diligence. However, that did not diminish his knowledge of the financial and operational performance of Joe White between the 2010 and 2013 financial years (to the extent that the 2013 financial year had been completed) being substantially underpinned by Joe White's practice of supplying malt to customers pursuant to the Viterra Practices and the Viterra Policies that did not comply with customer contracts.

by entering into the Acquisition Agreement?

X.23.1 The Cargill Parties' submissions

3268 After noting that disclaimers were ineffective to exclude or defeat liability for deceit[2506] and that to establish liability it was not necessary for a person who makes a fraudulent misrepresentation to make it directly to the misled person where the communication to that person was intended by the fraudster,[2507] the Cargill Parties submitted Viterra, at the request of Glencore, provided vital information for inclusion in the Information Memorandum and the Management Presentation Memorandum about the financial and operational performance of the Joe White Business. They contended Viterra knew that both these documents would be provided to potential purchasers, including Cargill, and would be acted upon by prospective purchasers in making an assessment of whether to make an offer for the Joe White Business, and if so for how much. It was submitted that knowledge of the purpose of these documents could be inferred from the fact they were prepared for a proposed sale, coupled with the close involvement of Hughes and Argent in the sale process.

X.23.2 The Viterra Parties' submissions

3269 In the alternative to their submissions that the Financial and Operational Performance Representations were not made, the Viterra Parties submitted it should be found that because of the Sale Process Disclaimers, the Refusal of Certain Terms and the risks Cargill agreed to accept, Viterra did not make the Financial and Operational Performance Representations with the intent that Cargill Australia should rely upon them. They submitted the existence of these factors was wholly inconsistent with any such intention. Referring to authority,[2508] they submitted that, although the disclaimers could not avert the operation of provisions such as section 18 of the Australian Consumer Law, the Sale Process Disclaimers were a circumstance to be

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2506 *Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337, 344.8 (Menzies J, with whom Barwick CJ, McTiernan and Gibbs JJ agreed), 350.2 (Gibbs J, with whom McTiernan J agreed).

2507 Ibid, 344.9-345.2 (Menzies J, with whom Barwick CJ, McTiernan and Gibbs JJ agreed), 346.8 (Gibbs J, with whom McTiernan J agreed).

2508 *Citigroup Pty Ltd v CrediProtect Pty Ltd* [2010] NSWSC 1054, [107]-[108] (McDougall J).

taken into account in assessing whether or not there was reliance upon representations made. They contended it followed that a disclaimer also evidenced the plain intention of the person disclaiming liability that any representation to which the disclaimer applied should not be relied upon by the person to whom the representation was made and to whom any liability was disclaimed.

X.23.3 Analysis

3270 As was stated by Gibbs J in *Commercial Banking Co of Sydney v RH Brown & Co*,[2509] what was intended by the representor is a question of fact which is not simply determined by consideration of disclaimers alone.

3271 It was beyond controversy that the Information Memorandum and the Management Presentation Memorandum comprised marketing material created by "Glencore and its subsidiaries", namely Viterra, in order to try to obtain a very good outcome for the Sellers and Glencore.[2510] Further, those with responsibility for its contents, including the Financial and Operational Information, fully appreciated that what was stated in these documents would affect not only whether or not a prospective purchaser would be interested, but also how the Joe White Business would be valued and the price a prospective purchaser would be likely to be willing to pay.[2511] They were drafted by Merrill Lynch, an organisation very experienced in such matters, and then fastidiously reviewed in order to carefully produce documents that would be likely to achieve the desired outcome.[2512] To the same end, both Glencore and Viterra made sure that the management who they incentivised to assist with the sale process were properly rehearsed on the key messages to be delivered.[2513]

3272 Further, the contemporaneous documentary evidence demonstrated that Hughes was completely on board with the notion of presenting the Joe White Business in a positive way.[2514] This was additionally demonstrated not only by the contents of the

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2509 (1972) 126 CLR 337, 350.4.
2510 See, for example, pars 110, 766, and fn 364 above.
2511 See, for example, pars 398-399, 402-406, 429, 436, 438, 525-528, 530, 536, 623, 678, 766, 797-810 above.
2512 See, for example, pars 110, 696-697 above and fn 4078 below.
2513 See, for example, pars 366-368, 396, 402, 698-700, 872 above.
2514 See, for example, pars 797-810, 872 above.

Information Memorandum and the Management Presentation Memorandum themselves and the substantial extent to which he approved the contents of those documents, but also by what Hughes refrained from stating about the Joe White Business up until around mid-October 2013, including the failure even to make any mention of the Operational Practices.

3273 If Hughes had intended to represent the Joe White Business fairly and accurately then, at the very least, he would have included a reference to the Viterra Practices, the Viterra Policies, the inability of Joe White to obtain all the barley varieties as required by its customers, the inability to meet customer specifications on a regular basis (including with respect to customers who prohibited the use of exogenous gibberellic acid) and the fact that Joe White had insufficient storage at most of its plants. Naturally, if he had done so (if not in the Information Memorandum or the Management Presentation Memorandum, the finalisation of which was not ultimately his responsibility, then in the Operations Call and the Commercial Call), it would have been less likely that a prospective purchaser would have been induced by what had been stated about the Joe White Business. Indeed, such disclosure would have exposed a significant number of material statements in the Information Memorandum and the Management Presentation Memorandum to have been patently and materially incorrect, which would have had the inevitable consequence of a prospective purchaser re-evaluating its assessment of the Joe White Business.[2515] The fact that he did not state such matters was further indication that Hughes intended to induce a prospective purchaser to be interested in acquiring Joe White on the basis represented.

3274 It follows from what is stated above that the evidence demonstrated that throughout the relevant corporate structure (that is, from the upper echelons of Glencore's executives down to Mattiske, in his role as a Glencore executive and a director of Viterra, and those employed by Viterra Ltd, including Hughes and Argent after being "well instructed"), there was a united intention to present Joe White in a positive

2515 See, for example, pars 905-906 above and par 3396 below.

manner. It was hoped that this positive presentation would result in a prospective purchaser, including Cargill,[2516] being induced to pay a very significant sum for the shares in Joe White and the Joe White Business more generally. This united intention was reflected in all aspects of how Joe White was presented, including in the making of the Financial and Operational Performance Representations to Cargill.

3275 The intention to induce prospective purchasers, including Cargill, was not displaced by the Sale Process Disclaimers. The context in which the Sale Process Disclaimers were imposed, and the regime created with respect to the extent to which the information disclosed could be verified and assessed, was entirely consistent with the intention to induce Cargill to rely upon the Financial and Operational Performance Representations. As discussed elsewhere,[2517] Cargill and other prospective purchasers had limited and very controlled means by which they could conduct their own investigations and analyses in assessing the Joe White Business.

3276 In conclusion, the answer to the question posed is yes.

X.23.4 Further observations

3277 Before leaving the issues concerned with this claim for deceit, I note that the findings concerning Hughes knowingly making false statements have not been made lightly.[2518] Nor have they been made without due consideration of the fact that it was Glencore and Viterra, not Hughes, that had the ultimate say on what was included in the Information Memorandum and the Management Presentation Memorandum, together with nearly all of what was disclosed during the Due Diligence, including in the Data Room.

3278 Hughes was not called as a witness despite being a party to the proceeding. In circumstances where the court has not had the opportunity to hear from Hughes himself about why he did what he did, it is not without some hesitation that these findings have been made. However, Hughes was represented by very experienced

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2516 See par 398 above.
2517 See pars 468-469, 643, 651, 656-658 above.
2518 See *Evidence Act*, s 140(2). See also par 2285 above.

and capable counsel and it can only be presumed that the decision not to call Hughes was made advisedly. Further, despite his detailed knowledge of how the Joe White Business was conducted, during the sale process in 2013 Hughes approved and did not correct statements such as: "[Joe White] delivers high quality products adhering to specific customer requirements"; "Joe White's business model is focused on ensuring customers receive the highest quality malt to meet their exact specifications and requirements"; "Technical analysis and strict quality control procedures ensure customer specifications are consistently met"; "Once a customer's specific product needs have been identified, the procurement function ensures the appropriate quantity of malting barley is acquired to meet these specifications"; and "Joe White's high-quality manufacturing assets had an outstanding reputation for product uniformity, consistency and an ability to produce to a customer's exact specifications". Furthermore, not only did he approve and fail to correct these statements, but to compound matters he gave answers to Cargill's questions which were entirely consistent and congruent with, and reaffirming of, them despite the questions put to him towards the end of the Due Diligence during the Operations Call[2519] and the Commercial Call.[2520] In these circumstances, the inescapable conclusion was that Hughes must have known that what was being stated about some critical aspects of the Joe White Business was both patently and materially inaccurate, and incontrovertibly misleading.[2521] Further, unlike any of the other Third Party Individuals, he knew of all of the relevant statements that had been made (that gave rise to the Financial and Operational Performance Representations) and of the

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2519 These included questions concerning the regularity of Joe White's experience of quality problems, how Joe White dealt with product that was not within specifications, issues concerning challenges with storage, and managing malt quality and grades of barley: see par 884 above.

2520 These included questions concerning the attainability of forecasts, the attainability of volumes, the ability to achieve higher margins, the key factors that allowed Joe White to command a premium, margin opportunities and risks within the domestic market, the ability to push margins on domestic and export customers, and the prospects of Joe White in the Japanese market: some of these matters are referred to in pars 910-915 above.

2521 See, for example, pars 1098, 1210-1232, 1462 above in relation to the position in October 2013. See also Hughes' submission to the effect that, if the Viterra Parties had taken reasonable care, then they would have acted differently because they either knew or should have known that, amongst other things, the Financial and Operational Performance Representations were false: see par 5188 below (although Hughes' case was that he was not doing anything other than what he believed to be in good faith, honest and in the best interest of Viterra: see pars 5236-5237 below).

implementation of the Viterra Practices.

3279 Moreover, although the court did not have the benefit of Hughes' evidence, in reaching this conclusion the question of why he engaged in such unsatisfactory behavior should be considered in light of the surrounding circumstances. It seems implausible that his conduct would have been motivated purely by a desire to secure his incentive bonus or from being driven to obtain the highest price for Glencore and Viterra no matter what the means (especially as he would no longer be a Viterra Ltd employee when the deal was completed, but instead would be employed by the new owner). It would be surprising if either of these factors, or both in combination, would have caused Hughes to commit such serious wrongs in such a substantial transaction.

3280 However, it was entirely plausible that in early 2013 Hughes found himself in a position where it was easier for him to continue the deception in relation to how the Joe White Business operated rather than being candid about the unsatisfactory practices being engaged in. After all, Hughes had been employed as the senior executive at Joe White for many years and during that time Joe White had been the subject of a number of takeovers. These included the most recent takeover of Viterra by Glencore, and the Viterra Practices were successfully concealed from Glencore on that occasion.[2522] Further, the 2 most recent owners of Joe White, being ABB Grain and Viterra, both had codes of conduct requiring ethical business practices and yet the Viterra Practices had been able to continue without any real interruption.[2523] Hughes had purported to comply and oversee compliance with these codes. Further, under the Viterra Code he had been required to report each year that both he and the Joe White Business had been conducted in a proper manner.[2524] In short, not only had Hughes been successful over many years in carrying out the subterfuge which necessarily went with overseeing the implementation of the Viterra Practices, but he had effectively locked himself in to the position of representing on an ongoing basis that everything concerning the operations and financial reporting of Joe White was

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2522 See pars 352-360, 1281 above.
2523 See pars 58-64 and fn 144 above.
2524 See pars 62-63 above.

above board. In these circumstances, it seems highly likely Hughes would have formed the view that the best path for him to follow was to continue to play to the same tune, to do what he had done for many years and then to try to make sure yet again that he could finesse the situation with the new owner after a sale had taken place. He must have realised sometime in September or early October 2013, after learning about the manner in which Cargill strictly conducted business in accordance with the Cargill Code, that the music was about to jolt to a sudden stop. Hence, he oversaw the 15 October Meeting at which the Operational Practices (though not the full extent of the Viterra Practices) were finally disclosed to Cargill.

3281 But to focus on Hughes alone would be to consider the situation too narrowly. Hughes had never been a sole director of Joe White and was not a director at any time in 2013. At no point did he have unfettered control over how the Joe White Business was conducted. Both at the time Glencore was in control, and for the 3 or so years before that when Viterra was in control, he had fellow directors from these large organisations. The case of the Viterra Parties was that none of them knew of the Viterra Practices. Leaving aside the knowledge of Viterra Ltd employees engaged in conducting the Joe White Business on a day-to-day basis, the evidence has not established that any of them did. Be that as it may, the directors of Joe White, and Joe White's wholly-owning shareholders, for many years allowed Hughes to perform his role while the Viterra Practices were being engaged in. Further, Hughes and others involved in the Joe White Business operations were informed from around 2000 that profit, not quality, was *the* key performance indicator, which was only emphasised further when Viterra took control.[2525] While this approach in no way sanctioned unlawful behavior, it was a direction that would have made it more difficult for Hughes to unwind what had been occurring and to adopt business practices that would have complied with customer contracts (to the extent Joe White could), and necessarily would have resulted in smaller margins and diminished profits for the Joe White Business. In summary, by 2013 the Viterra Practices (including the deception

[2525] See pars 131-146 and fn 520 above (referring to cost reduction becoming more important from 2000 onwards).

they necessarily involved) had become an entrenched part of Joe White in conducting its operations in the pursuit of greater profits. At all times up to when the Cargill 22 October Letter was sent, Hughes had been willing to continue to operate in that manner until someone told him otherwise.

X.24 Did Glencore and/or Viterra provide the October 2013 Responses as alleged in paragraph 25 of the Statement of Claim?

X.24.1 The allegations

3282 Cargill Australia pleaded that Glencore or Viterra, or both, advised Cargill Australia of the following between 25 and 30 October 2013:

(1) There had been some "instances" where barley other than that specified pursuant to a particular contract had been used due to seasonal issues.

(2) Joe White's plants (which had been audited and approved by customers as required) were adequate and sufficient to meet the specifications applicable under customer contracts.

(3) Joe White had "occasionally" supplied malt to customers that included gibberellic acid in breach of customer contracts, but was able to produce malt to the specifications required to meet customer demands without adding gibberellic acid.

(4) The Joe White Business was capable of producing the quality and quantity of malt contractually sold to customers and no customer had ever rejected malt due to the issues raised by Cargill Australia.

(5) Notwithstanding the matters disclosed in subparagraphs (1) to (4) above, there was no fundamental issue with Joe White or the Joe White Business.

3283 Cargill Australia further pleaded that between 25 and 30 October 2013, there was a failure to disclose to Cargill Australia:

(1) The nature and extent of the Viterra Practices.

(2) The Viterra Certificate of Analysis Procedure or the Malt Blend Parameters Procedure (being the Viterra Policies).

(The allegations in this and the preceding paragraph, collectively, "the October 2013 Responses".)

3284 Communications to Cargill Australia during the period from 25 to 30 October 2013 consisted of the 25 October Reply Letter,[2526] 2 phone calls between Purser and Mattiske on or around 29 October 2013,[2527] a third call on 30 October 2013,[2528] and the 30 October Reply Letter.[2529] In addition, in the particulars to paragraph 25 of the Statement of Claim reference was made to discussions held immediately before this period, on 23 and 24 October 2013.[2530]

X.24.2 The Viterra Parties' general submissions

3285 The Viterra Parties made a number of submissions in relation to the October 2013 Responses generally. They contended that whatever responses they made were limited by the time available for the investigations and were also limited to information received from Joe White management. As to the first of these matters, the amount of time elapsed, being approximately 3 days, is an objective fact, but this did not alter the position as to whether or not the October 2013 Responses were made. In relation to the second matter, the 25 October Reply Letter expressly referred to the fact that Glencore had "made enquiries" of Joe White management. However, it was then stated that Glencore was in a position to advise in certain matters. Again, the objective fact is that enquiries were made of Joe White management, but this fact also was not directly responsive to the allegation that the October 2013 Responses were made. Further, they acknowledged that, to the extent that any of the October 2013 Responses

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2526 See par 1405 above for an extract of the 25 October Reply Letter.
2527 See pars 1442-1444, 1447-1450, 1503-1509 above.
2528 See par 1514-1523 above.
2529 See par 1512 for an extract of the 30 October Reply Letter; the final version of the letter was identical to this draft.
2530 See pars 1319-1322, 1344, 1368-1371 above.

were made as alleged, they were attributable to each of the Viterra Parties directly.

X.24.3 Analysis

3286 In relation to the gravamen of the first statement, a materially identical statement was included in the 25 October Reply Letter: "there have been instances where barley other than that specified in a particular contract has been used". But the explanation that this was "due to seasonal issues" was not communicated in writing or orally in those precise words. Although Mattiske did tell Purser on 24 October 2013 that Joe White had on occasions been unable to source the barley variety required by a customer because it was unavailable in the market,[2531] that was a broader explanation (which might or might not have encompassed seasonal issues).[2532] Accordingly, this part of the allegation has not been made out. That said, the Viterra Parties accepted that the effect of the communications made was that Cargill Australia was told that incorrect varieties had been used.[2533]

3287 Words to the effect of the second statement were also included in the 25 October Reply Letter, which stated that: "…you are concerned that the plant is not sufficient to meet the specifications set out in customer contracts. This concern is unfounded. We have confirmed that the plants are adequate to deliver malt that meets customer specifications and have been audited and approved by customers as required." This account of the plants' adequacy in the conduct of a stated concern about sufficiency suggested the plants were both adequate and sufficient. This position was buttressed by oral communications between Purser and Mattiske.[2534]

3288 In relation to the third statement, Cargill Australia was advised in the 25 October Reply Letter that there had "been non-compliance with customer requirements around [gibberellic acid]". In downplaying the significance of this, it was also stated

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2531 See par 1378(7) above.

2532 A similar response was made in the 30 October Reply Letter, which suggested it was common knowledge within the industry that there was a short-term shortage of certain barley varieties: see par 1512 above.

2533 They further submitted that Cargill was informed that it would be an ongoing issue until the new crop was available, but this submission went beyond the matters raised in issue 24.

2534 See pars 1368, 1378(1) above.

that there were no complaints or claims known to be in existence and that such non-compliance was not necessary to meet customer specifications. In short, there was no hint of any real or ongoing problem. Thus the latter part of the statement, that Joe White was "able to produce the specifications of malt required to meet customer demands without adding [gibberellic acid]", was included in the 25 October Reply Letter, with the additional note that "modified production conditions may be required". Further, Cargill was informed orally shortly before this that, in addition to everything concerning quality issues being fully and properly documented, Joe White had only occasionally used gibberellic acid when it had been requested that it not be used. Importantly, Mattiske also said words which indicated the relevant customers were aware of the conduct.[2535] Furthermore, Cargill was told in late October 2013 that the unauthorised use of gibberellic acid related to a single contract.[2536] While the reference to "non-compliance" in the 25 October Reply Letter gave no indication of the frequency of non-compliance, in the context of the words that immediately followed which indicated there was no real problem, and of the other statements concerning this issue, it appeared to suggest that Joe White had, at most, "occasionally" used gibberellic acid when not permitted. Furthermore, the "non-compliance with customer requirements" in relation to gibberellic acid amounted to a statement that there had been a "breach of customer contracts" (albeit with the relevant customers' knowledge).[2537]

3289 The Viterra Parties submitted that the cumulative effect of the communications on this issue was that Cargill was told that Joe White had used gibberellic acid when it was prohibited, but did not seek to address the allegation concerning how often it was said this was done. The Viterra Parties also accepted that Cargill was told it appeared that the prohibited use of gibberellic acid affected a particular 70,000 tonne contract and that the cessation of the Gibberellic Acid Practice would increase germination time from 4 days to 5 days. This aspect of the submission did not directly address the allegation so far as it concerned the ability to produce malt to the specifications

2535 See par 1378(6) above.
2536 See pars 1505, 1507-1509 above.
2537 See par 1378(6) above.

required without adding gibberellic acid, however it was implicit that the extended germination period would solve the issue. In short, these submissions do not affect the basis of the finding made.

3290 In relation to the fourth statement, the 25 October Reply Letter stated: "the plants are adequate to deliver malt that meets customer specifications" and that Joe White was "able to produce the specifications of malt required to meet customer demands without adding [gibberellic acid] although modified production conditions may be required". These statements conveyed that the Joe White Business was capable of producing the quality and quantity of malt as contractually sold to customers. Although the letter refers to the "plants", rather than "the Joe White Business", the effect was the same because all malt produced by the Joe White Business was produced by Joe White's plants. Further, the reference in the letter to "customer specifications", rather than "malt contractually sold to customers", was a distinction without a material difference. Generally, customer contracts contained the customer specifications unless they were changed by a direction from the customer (which would ordinarily amount to a variation of the contract in question). The latter part of the statement, that "no customer had ever rejected malt due to the issues raised" by Cargill Australia, was also included in the 25 October Reply Letter.[2538]

3291 In relation to the fifth statement pleaded, Purser made a contemporaneous note which recorded that she had been told by Mattiske of his belief, in substance, that there was no fundamental issue with the Joe White Business.[2539] Effectively, this statement coupled with the terms of the 25 October Reply Letter amounted to an assurance that there were no fundamental issues notwithstanding the statements that, relevantly, had been made.

3292 In relation to the first failure to disclose, there was plainly a failure to disclose the nature and extent of the Viterra Practices to Cargill Australia between 25 October and 30 October 2013. Nothing said to Cargill at this time either individually or in

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2538 See also pars 1368, 1378(5) above.

2539 See par 1378 above.

combination consisted of a communication that Joe White "routinely and without informing customers" engaged in the Operational Practices, or even suggested that the Operational Practices had been or were being engaged in at a level that had or would have any significant impact on the financial and operational performance of the Joe White Business.

X.24.4 The Viterra Parties' further submissions

3293 The Viterra Parties made submissions which tried to have a bit each way. They submitted that it was unreasonable to suggest that they could have disclosed the Viterra Practices within 9 days after first hearing of the potential existence of such issues. However, they also submitted that, by reason of the matters raised in response to issue 12 above, the information relevant to the existence and extent of the Viterra Practices was disclosed to Cargill in the course of the Due Diligence. As to the latter, these submissions have already been rejected.[2540] In relation to the former submission, this effectively amounts to an admission that the Viterra Practices were not disclosed, as was the fact. Any submission about the reasonableness of the October 2013 Responses was not responsive to the allegations. There were also other submissions made about Cargill's knowledge or conduct which were not responsive to this issue, so it is unnecessary to address them here.

3294 In relation to the Viterra Policies, they were not disclosed to Cargill Australia between 25 and 30 October 2013. The Viterra Parties conceded as much. In fact, despite knowing of the existence of written policies in the form of the Viterra Certificate of Analysis Procedure and the Malt Blend Parameters Procedure in October 2013,[2541] the fact of their existence was not even admitted by the Viterra Parties on the pleadings until 13 December 2018.[2542]

3295 Notwithstanding this, the Viterra Parties also submitted that the content of the Viterra Policies had been explained to Cargill by the Joe White executives at some length

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2540 See issue 12 above.

2541 See pars 1324, 1332 above. The Malt Blend Parameters Procedure was expressly referred to in the Viterra Certificate of Analysis Procedure: see par 203 above.

2542 See par 1854 above.

during the 15 October Meeting. They contended, as a result, no inference as to "second tier representations" could be drawn from the fact that Cargill was not provided with the relevant documents. This submission was without merit.

3296 The presentation made during the 15 October Meeting made express reference to the Malt Proficiency Scheme,[2543] but made no reference to the Viterra Policies being in writing. The Malt Proficiency Scheme had been included in the Data Room.[2544] The 25 October Reply Letter referred to a documented procedure, being the "ISO accredited quality system" (and no other relevant documents). Further, the day before the 25 October Reply Letter was sent, Mattiske told Purser that the relevant policy had been disclosed in the Data Room; and to compound this misleading statement, Mattiske said the policy was disclosed in the Malt Proficiency Scheme.[2545] The 30 October Reply Letter referred to Joe White's accreditation with the International Organisation for Standardisation and its documented procedures. In other words, neither what was told to Cargill at the 15 October Meeting nor what was contained in the Reply Letters identified the existence of the Viterra Policies, but inadequately referred to other documentation. This circumstance was made even more stark by the fact that, leaving aside Hughes' knowledge being attributable to Viterra or Glencore, all the Viterra Parties knew full well of the existence of the Viterra Certificate of Analysis Procedure, which in its terms referred to the Malt Blend Parameters Procedure, and the significance of both documents to the issues at hand by 23 October 2013 at the very latest.[2546] And yet, on 24 October 2013, Mattiske directed Purser to the wrong document by referring to the existence of the Malt Proficiency Scheme in the Data Room. Further, none of the communications to Cargill on any of these occasions gave any indication of the true extent of the Viterra Practices.

3297 Again, the Viterra Parties made submissions with respect to other matters not responsive to the allegations the subject of this issue. Accordingly, they will not be

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2543 See par 1116 above.
2544 See par 1015 above.
2545 See par 1378(2) above.
2546 See par 1324 above. Linder and Fitzgerald were both acting for Glencore and Viterra at this time.

addressed here.

X.24.5 Conclusion

3298 In summary, the allegation that each of the Viterra Parties engaged in the provision of the October 2013 Responses has been made out in substance. The minor exception to this was not material,[2547] as the explanation given in relation to the first statement gave no indication that the Varieties Practice was being engaged in routinely and without Joe White informing its customers.

X.25 Did (a) Glencore and/or (b) Viterra convey any and if so which of the Pre-Completion Representations as pleaded in paragraph 33 of the Statement of Claim, including in light of the Sale Process Disclaimers, the Acquisition Agreement Liability Terms and the Alleged Industry Practices?

X.25.1 The allegations

3299 The Cargill Parties alleged that by providing the October 2013 Responses,[2548] Glencore or Viterra, or both, conveyed the following representations:

(1) The Operational Practices had occurred only to an insignificant extent.[2549]

(2) The Operational Practices had no impact on the production, sales and earnings figures and operational performance stated in the Financial and Operational Information.

(3) The production and sales figures stated in the Financial and Operational Information were based upon compliance with customer contracts including customer specifications, and as a result, had been properly and lawfully achieved.

2547 See par 3286 above.

2548 See issue 24 above.

2549 The Statement of Claim referred to the "Viterra Practices" only occurring to a limited extent, but it is convenient to use the term "Operational Practices" as this term has been defined in these reasons, which definition does not include the extent to which the relevant practices were engaged in: see par 43 above.

(4) The assets of the Joe White Business were sufficient for Joe White to sell malt in the volumes and for the returns stated in the Financial and Operational Information.

(5) By reason of the matters alleged in subparagraphs (1) to (4) above, Joe White had low future capital expenditure needs in the short to medium term.

(Together, "the Pre-Completion Representations".)

3300 Paragraph 33 of the Statement of Claim contained no particulars. The Pre-Completion Representations were alleged to have arisen simply by reason that the October 2013 Responses were given. Necessarily, the October 2013 Responses were to be understood in the context in which they were communicated. That context was identified by the particulars to paragraph 25.[2550] The particulars in support of the allegation included that on 23 October 2013 Mattiske had stated that if the issues raised in the Cargill 22 October Letter were true they were serious and unacceptable and that Purser had told Mattiske that Cargill needed to know if ceasing the alleged practices immediately would impact the Joe White Business in any way, including its profitability and the ability to meet customers' contract specifications. On the evidence, those matters have been established.[2551] The particulars also referred to the Reply Letters.[2552]

X.25.2 The Cargill Parties' submissions

3301 The Cargill Parties noted that the relevant events arose in the final days before Completion. They submitted that the information about the Viterra Practices received on 15 October 2013 was fragmented and uncertain, in part due to positive statements received during the Due Diligence that Joe White could make malt to meet customers' "exact specifications" and because Cargill was completely reliant on Glencore and

2550 See par 3284 above.
2551 See pars 1319-1321 above.
2552 See pars 1405, 1512, 1524 above.

Viterra to shed light on the issues disclosed in the 15 October Meeting.

3302 In relation to the first representation, the Cargill Parties submitted that the language of the October 2013 Responses played down the occasions on which certain Viterra Practices took place. They referred to the statements that the wrong barley variety was only used in some "instances",[2553] and that gibberellic acid was used occasionally when it was not permitted.[2554] Further, it was submitted that these admissions could be taken as nothing more than isolated incidents given Mattiske's statements to the effect that the plants were sufficient to make the quality and quantity of malt as contractually sold to customers[2555] and that there was "no fundamental issue" with the Joe White Business,[2556] and because of the failure to disclose the Viterra Policies and the extent of the Viterra Practices.[2557]

3303 In relation to the second, third and fourth representations, the Cargill Parties submitted that these were conveyed by the express statements that the plants were adequate and sufficient to meet contractual specifications,[2558] and that they had been audited and approved by customers as required.[2559] Further, they again referred to Mattiske's statements and the non-disclosure of the Viterra Policies, and submitted these statements in context conveyed these representations.

3304 The Cargill Parties also referred to the Viterra Parties' silence. It was submitted that if the Viterra Policies had been provided to Cargill in October 2013, Cargill would have been informed that the Viterra Practices were institutionalised within Joe White. It was submitted such information was relevant to the issue of the extent of the Viterra Practices and went to the heart of each of these representations. The Cargill Parties submitted that no satisfactory explanation was provided for the failure to disclose the Viterra Policies; Mattiske and Fitzgerald could have disclosed them and there would have been no rational impediment to disclosure if the Viterra Parties genuinely

2553 See par 3286 above.
2554 See par 3288 above.
2555 See par 3287 above.
2556 See par 3291 above.
2557 See pars 3292-3296 above.
2558 See pars 3287, 3290 above.
2559 See par 3287 above.

viewed them as benign.

3305 In relation to the fifth representation, the Cargill Parties contended that that representation was implied from the other representations to the effect that the Joe White Business was functional and operative and not underpinned by the Viterra Practices. Further, it was contended that the representation was a continuation of the express representations made during the sale process that Joe White had low future capital needs in the short to medium term.[2560]

3306 In response to the Viterra Parties' submissions (referred to immediately below), the Cargill Parties submitted that the Viterra Parties denied the Pre-Completion Representations were made but did not contend that the October 2013 Responses had some alternative meaning. They then referred to various matters raised in the Defence and gave their responses. They submitted the Sale Process Disclaimers relied upon by the Viterra Parties[2561] did not apply to post-sale events, the sale process having concluded on 4 August 2013. Further, they submitted that the Acquisition Agreement Liability Terms were irrelevant,[2562] and that the Alleged Industry Practices did not exist. Furthermore, in response to the Viterra Parties' defence to allegations in paragraph 19 of the Statement of Claim, to allegations of Cargill's knowledge (including the existence of Alleged Industry Practices) and to the defence to the allegation that the October 2013 Responses were not conveyed because of the Alleged Industry Practices and related matters, the Cargill Parties relied on their submissions above as well as their other submissions concerning the Viterra Practices and Cargill's reliance on the Financial and Operational Performance Representations and the Pre-Completion Representations "as applicable" (without specificity).[2563]

X.25.3 The Viterra Parties' submissions

2560 See pars 2146(11), 2889-2894 above.

2561 These included various disclaimers made in the Phase 1 Process Letter, the Information Memorandum, the Confidentiality Deed, the Phase 2 Process Letter, the Data Room Protocol and the Management Presentation: see par 2828 above.

2562 It was submitted that the terms did not have the contended effect, as they were either definitional, relevant to the construction of the Warranties or went to reliance by Cargill on representations to enter into the Acquisition Agreement and then to proceed to Completion.

2563 The reference to the Pre-Completion Representations in this context appeared entirely circular.

3307 The Viterra Parties submitted that the Pre-Completion Representations were not conveyed for 3 reasons.

3308 *First,* it was submitted that Cargill Australia agreed pursuant to the Acquisition Agreement that Viterra and its Representatives (which included Glencore) made no representation or warranty as to the accuracy or completeness of disclosures relating to Joe White other than the Warranties. Accordingly, it was submitted that they would not be liable in the absence of fraud if any information disclosed was inaccurate, incomplete or misleading.[2564]

3309 Further, they submitted that Cargill Australia had agreed that Viterra was under no obligation to provide Cargill Australia with information on future financial performance or prospects, and would not be liable under any claim relating to opinions, estimates or forecasts. Therefore it was submitted that Cargill Australia expressly agreed that information disclosed by Glencore and Viterra could not amount to any binding representation unless it was contained in the Warranties.

3310 They also relied on the Refusal of Certain Terms in the lead up to the execution of the Acquisition Agreement. It was submitted that if the Pre-Completion Representations were made it was made clear to Cargill that it could not rely upon them as Glencore and Viterra refused to accept terms proposed by Cargill to the effect that it could rely on information provided in the Due Diligence. It was contended therefore that by negotiating and agreeing to the terms in the final form of the Acquisition Agreement, Cargill accepted a degree of risk.

3311 *Secondly,* it was submitted that Cargill Australia was aware that the October 2013 Responses were not statements of fact, but rather amounted to no more than information received from Joe White management that was passed on to Cargill.

2564 Issue 25 was defined by reference to the Acquisition Agreement Liability Terms. However, the Viterra Parties confined their submissions to the terms contained in clauses 13.4(a), (b), (d) to (f) and 13.5 of the Acquisition Agreement to submit that Cargill Australia agreed that Viterra (and its Representatives) had not made any representation as to the accuracy or completeness of disclosures relating to Joe White other than the Warranties and were not liable to Cargill Australia if the information was inaccurate, incomplete or misleading.

Further, it was submitted Cargill knew that the Viterra Parties were unable to provide substantive responses, including because there was not enough time to conduct a proper investigation and because of Glencore's lack of expertise in malting.[2565]

3312 *Thirdly,* even if the October 2013 Responses were statements of fact, it was submitted they were not capable of conveying the Pre-Completion Representations. In support of this, it was submitted that the following factors must be taken into account:

(1) The substantial size of the transaction.

(2) The nature of the parties, being large multinationals.

(3) The fact that Cargill was advised by its internal financial advice group (referred to in the Cargill Parties' opening as its own internal merchant bank) and at least 4 internal lawyers, as well as the external advisers Goldman Sachs, Allens and Deloitte.

(4) Cargill's knowledge of the Alleged Industry Practices.

(5) Cargill's knowledge of the Operational Practices.

(6) The information provided to Cargill in October 2013 by Joe White management as to the way in which Joe White was operating.[2566]

3313 The Viterra Parties submitted that in these circumstances, even if the October 2013 Reponses were made because of the statements made or by reason of the non-disclosure alleged (as the case may be), such conduct should not be held to amount to the making of any of the Pre-Competition Representations. Further, the Viterra Parties referred to what Cargill was actually told and submitted the October 2013 Responses did not: (1) state the regularity of the Viterra Practices (with a minor

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2565 See par 3285 above.

2566 The communications to Cargill were said to include that investigations were limited and only passing on what Joe White management had said, that Joe White had and would continue to use incorrect varieties, and that ceasing the Gibberellic Acid Practice, which had affected a 70,000 tonne contract, would increase germination time.

exception);[2567] (2) include any reference to the reliability of the information in the Due Diligence; or (3) provide any definitive guarantee as to the adequacy of Joe White's facilities.

3314 Furthermore, it was submitted that a sophisticated commercial entity the size of Cargill, with its level of expert advice, and knowledge of the Alleged Industry Practices and the way Joe White was operating, would not have inferred the Pre-Completion Representations from the October 2013 Responses.

3315 More specifically, in relation to the first representation, the Viterra Parties submitted that it was not conveyed because:

(1) Cargill was aware of the existence of the Alleged Industry Practices and that Joe White engaged in them.

(2) Based on the 15 October Meeting, Cargill knew of a number of matters. *First,* for many customers there was a need to "send out of specification according to our own laboratory" so that it would be within specification when tested by customers. *Secondly,* Joe White's policy allowed for results to be amended by up to 2 standard deviations. *Thirdly,* Joe White wanted a transition period after Completion to cease its practice of supplying customers with similar varieties where the desired variety was not available. *Fourthly,* the Gibberellic Acid Practice existed and its cessation might require some malt production timelines to increase from 4 to 5 days.

(3) In the second half of October 2013, the Viterra Parties told Cargill that Joe White issued Certificates of Analysis in compliance with a documented procedure which had been discussed at the 15 October Meeting, that Joe White had used incorrect barley varieties which would be an ongoing issue until new crop barley was available and that the

[2567] This was a reference to the 70,000 tonne contract (see par 1447 above), on the basis that it was Mattiske's understanding of the situation rather than a substantiated position.

Gibberellic Acid Practice existed in Joe White which appeared to affect a 70,000 tonne contract.

(4) In the second half of October 2013, the Viterra Parties did not seek to quantify the extent of the Alleged Industry Practices in which Joe White engaged, and there was no reasonable basis upon which Cargill could have assumed that the extent of the Operational Practices was only insignificant.

(5) The Viterra Parties repeatedly told Cargill that the information provided was no more than what Joe White had told them and did not provide any definitive guarantees.

3316 In relation to the second representation, the Viterra Parties submitted it was not conveyed for reasons not materially dissimilar to submissions at paragraph 3315(1), 3315(4) and 3315(5) above, and because Cargill knew that ceasing "such practices" could significantly weaken a malting business "to the point of closure" and as such Cargill knew that such practices could significantly affect such matters.[2568]

3317 In relation to the third representation, the Viterra Parties submitted that it was not conveyed because:

(1) None of the October 2013 Responses mentioned the basis upon which the production and sales figures stated in the Financial and Operational Information were prepared.

(2) Cargill had been informed during the Due Diligence that the Financial and Operational Information had been sourced primarily from data based on Joe White's actual operations.[2569]

(3) Based on the contentions immediately above and the submissions in

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2568 This submission obviously touched upon the matters raised in issue 10 concerning the Viterra Practices underpinning the Joe White Business, and did not seem to sit comfortably with the submissions made by the Viterra Parties in relation to that issue.

2569 See par 2738 above.

relation to issues 12, 13 and 21 above, Cargill was aware of the practices engaged in by Joe White, and knew that the production and sales figures stated in the Financial and Operational Information had been prepared on the basis of Joe White's actual operations to date and therefore it knew that the production and sales figures were based upon Joe White's use of the Alleged Industry Practices. Therefore, to the extent that Cargill considered that the Alleged Industry Practices involved non-compliance with customer contracts, Cargill knew that the information provided was based upon practices which involved such non-compliance.

3318 In relation to the fourth representation, the Viterra Parties submitted that this was not conveyed for the same reasons as the third representation was not made and in addition the reason at paragraph 3315(5) above.

3319 In relation to the fifth representation, the Viterra Parties submitted that this was not conveyed for the same reasons as the fourth representation was not made. Further, they submitted it was not made because of matters relating to Cargill's theoretical blend approach, including that De Samblanx was concerned that additional storage would be needed if Joe White did not follow the Certificate of Analysis rules as Cargill did, which would increase Joe White's future capital expenditure.[2570]

X.25.4 Analysis

X.25.4.1 General observations

3320 Determining whether or not the representations were conveyed requires a consideration of both the context in which they were made and of the language used in the express statements themselves. As to the context, the October 2013 Responses were made very close to the date of Completion, against a backdrop of numerous positive statements made by the Viterra Parties, including about Joe White's ability to meet customer specifications.[2571] The reliability of such statements had withstood the

2570 See pars 772, 858 above.

2571 See, for example, par 2913 above regarding the representation made by the Viterra Parties that Joe White was able to meet customers' exact specifications.

Due Diligence in the sense that Cargill was satisfied with its own investigations based on the information available to it, but then this had been subjected to doubt by reason of what was stated to Cargill in the lead up to and at the 15 October Meeting. However, what Cargill had been told at the 15 October Meeting did not disclose the extent to which the Operational Practices were engaged in or the extent to which their implementation was disclosed to customers. Importantly, what was stated did not inform Cargill whether, and if so the extent to which, Joe White had been acting outside the terms of its customers' contracts.[2572]

3321 In addition, Cargill did not have "unfettered access to all"[2573] the relevant information and was therefore reliant on Glencore or Viterra to illuminate and clarify the issues disclosed at the 15 October Meeting. The Viterra Parties were aware of this as, after the Cargill 22 October Letter was sent, it had been mutually agreed that the issues raised were serious.[2574] Not only did Purser demand that Cargill needed to know if an immediate cessation of the Operational Practices would impact the Joe White Business in any way, but in response Mattiske specifically told Purser that he would keep Cargill informed. Consistent with this approach, both the Cargill 22 October Letter and the Cargill 29 October Letter enquired about and sought specific answers as to the frequency and the impact of the Operational Practices.

3322 Further, to the extent the Viterra Parties' submissions relied upon Cargill's asserted knowledge of the Alleged Industry Practices they must be rejected, as the Viterra Parties failed to establish the existence of the Alleged Industry Practices or Cargill's knowledge of any such practices.[2575] As already observed,[2576] notice that some small number of individuals or organisations in the industry acted, or had acted, dishonestly or unethically was a far cry from knowledge of something alleged to be endemic in the malting industry, much less an awareness that that was how the Joe White Business operated, particularly in light of the positive way in which it had been

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2572 See pars 1102-1141 above.

2573 To adopt the language in the 30 October Reply Letter: see par 1512 above.

2574 See par 1319 above. The contents of the Cargill 22 October Letter also made it clear this was Cargill's position at the time the letter was sent: see par 1236 above.

2575 See issue 13 above.

2576 See pars 2805-2806, 3051 above.

presented to Cargill by the Viterra Parties.

3323 Furthermore, in relation to the time available to investigate the matters raised, the Viterra Parties had more than enough time to speak with the relevant operational executives to ascertain the true position. Although there may have been insufficient time to do a detailed analysis of the exact extent to which the Operational Practices had been implemented historically or the precise extent to which they were being implemented in late October 2013, there was ample opportunity for the Viterra Parties to obtain a substantive account from the relevant employees as to the existence and implementation of each of the Viterra Practices generally in October 2013, and the extent to which any cessation would have been likely to have impacted upon the Joe White Business. So much was clear from what actually occurred; albeit that the investigations were not nearly as comprehensive as they reasonably could have been and that much of what Fitzgerald was told by Hughes, Youil, Wicks and Stewart was not conveyed to Cargill.[2577] In addition, although there may have been insufficient time to check all the matters that Hughes conveyed on 29 October 2013,[2578] there was no apparent reason why that information could not have been obtained from Hughes on or shortly after 23 October 2013 if the Viterra Parties had been serious about conducting a proper investigation into the Operational Practices. If it had been so obtained, in the days that followed after receipt of the Cargill 22 October Letter there would have been more than enough time to check the substance of the relevant details before the agreed date for Completion.

3324 Moreover, the substantial size of the transaction, the size and experience of Cargill and the resources available to Cargill did not alter the fact that the Viterra Parties had access to, or the ability to access, material information concerning the Viterra Practices (and their likely effect on the Joe White Business) which Cargill did not. In that regard, the Cargill 22 October Letter made it clear that Cargill was seeking a response from the Sellers, being the entities who had actually agreed to sell the shares in Joe White and the related assets. Any suggestion that Viterra, who by October 2013 had been in

2577 See par 1373 above and annexure C to these reasons.
2578 See par 1462 above.

control of the Joe White Business for 4 years, was incapable of giving a meaningful response to queries raised concerning the frequency and likely impact of the Viterra Practices was without substance. In the circumstances, including that "[Joe White] management" were all long term employees of Viterra Ltd engaged for the past 4 years in conducting the malt business of Viterra Malt, the attempt to characterise Viterra as a mere conduit of information provided by Joe White was not tenable. Although Mattiske informed Purser that Glencore could not respond to the questions in the detail that had been asked,[2579] any inability of Glencore to provide specific details was no bar to Viterra providing meaningful responses to the issues raised in a timely manner.

X.25.4.2 The 5 representations comprising the Pre-Completion Representations

3325 The first representation, that *the Viterra Practices had occurred only to an insignificant extent*, was conveyed. The October 2013 Responses comprised statements that there had been some *instances* where non-specified barley was used (but the technical needs of the customer were always met),[2580] and that the Gibberellic Acid Practice occurred *occasionally*.[2581] These statements conveyed that the occurrences were infrequent and not a regular or substantive practice of Joe White; that is, in substance that they were insignificant. Both of these responses were provided in the context of the 25 October Reply Letter stating Cargill's concerns about Joe White's plants being insufficient to meet contractual specifications being unfounded and both Reply Letters also stating that Certificates of Analysis were issued by Joe White in compliance with a documented procedure, being its "[International Organisation for Standardisation] accredited quality system".

3326 Further, the representation to the effect that the Viterra Practices only occurred to an insignificant extent was reinforced by the October 2013 Response that there was *no*

2579 See par 1504 above.

2580 See par 3286 above. The statement as to customers' technical needs always being met was qualified with the words "as far as we are aware", it having been acknowledged that enquiries had been made of "[Joe White] management": see par 1405 above.

2581 See par 3288 above.

fundamental issue with Joe White or the Joe White Business.[2582]

3327 Furthermore, the October 2013 Responses were given in the context of a number of relevant statements made by Cargill in the Cargill 22 October Letter.[2583] Cargill told the Viterra Parties that it did not know if the practices were "sporadic or widespread, which customers [were] affected and whether the practices [were] ongoing". Cargill also stated that it was concerned that the potential ramifications might have been "significant" should the Operational Practices have occurred. Similarly, Cargill asked Viterra directly about the frequency of the Operational Practices and the extent of their impact. The fact that these more probing questions were not addressed beyond what was reassuringly said fortified and affirmed the representation that the Viterra Practices only occurred to an insignificant and inconsequential extent.

3328 The second representation, that *the Viterra Practices had no impact on the production, sales and earnings figures and operational performance stated in the Financial and Operational Information*, was conveyed for much the same reasons as the first representation. Although the October 2013 Responses informed Cargill that there had been some "instances" where barley other than that specified pursuant to a particular contract had been used and that Joe White had "occasionally" supplied malt to customers that included gibberellic acid in breach of customer contracts,[2584] there was no suggestion that these practices had resulted or would result in an impact on the production and earnings figures and operational performance stated in the Financial and Operational Information.

3329 In relation to barley varieties, not only was there no indication that there had been any impact on the production, sales and earnings figures or Joe White's operational performance, but the statement that as far as management was aware the customers' technical needs had always been met suggested there had been no impact.

3330 Equally, the fact that the second representation was made was unaffected by the

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2582 See par 3291 above.
2583 See par 1236 above.
2584 See pars 3286, 3288 above.

disclosures concerning the use of gibberellic acid. Included with the reference to occasional conduct of using gibberellic acid when it had been requested that it not be used was the suggestion that such conduct occurred with the knowledge of the relevant customers.[2585] The reference to non-compliance with customer requirements must be seen in this context, together with the statements about the capability of Joe White to produce malt in accordance with customer contracts and the absence of any suggestion that the performance of Joe White had been impacted in the past or would be impacted by the cessation of the Operational Practices. Again, the terms of the 25 October Reply Letter were emphatic in informing Cargill that any concern it had about Joe White's ability to meet specifications in customer contracts was unfounded.

3331 The third representation, that *the production and sales figures stated in the Financial and Operational Information were based upon compliance with customer contracts including customer specifications, and as a result, had been properly and lawfully achieved*, was conveyed for similar reasons as those stated above. There was an obvious minor exception to this with regard to the Gibberellic Acid Practice, being the third of the October 2013 Responses to the effect that malt was supplied to customers that included gibberellic acid *in breach* of customer contracts.[2586] However, the communications concerning this issue included Mattiske telling Purser in substance that the customers were aware of the use.[2587] More significantly, by pointing to what was being suggested to be a trivial and transparent exception, the position could only be understood as Cargill being told that Joe White was otherwise complying with its customers' contracts. In short, when this piece of information was viewed in the context of all the other assurances given by the Viterra Parties at the time, in substance it did not suggest anything other than the Financial and Operational Information was based on compliance with customer contracts and specifications.

3332 The fourth representation, that *the assets of Joe White were sufficient for Joe White to sell malt in the volumes and for the returns stated in the Financial and Operational Information*,

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2585 See par 1378(6) above.
2586 See par 3282 above.
2587 See par 1378(6) above.

was conveyed. This representation was largely reflected in the October 2013 Response to the effect that Joe White's plants (which were said to have been audited and approved by customers as required) were adequate and sufficient to meet the specifications applicable under customer contracts. This response, together with the other assurances given and the statements as to the very limited circumstances in which issues concerning the use of incorrect barley varieties (but meeting technical needs) and the unauthorised use of gibberellic acid (but disclosed to customers) were said to have occurred, indicated that Joe White's assets were more than sufficient for selling malt in the manner that had been represented.

3333 The fifth representation, that *by reason of the matters alleged in the first 4 Pre-Completion Representations, Joe White had low future capital expenditure needs in the short to medium term*, was also conveyed. In circumstances where the first 4 representations were made and assurances had been previously given about minimal need for future capital expenditure in the short to medium term,[2588] this position was effectively confirmed by the October 2013 Responses in the context in which they were given.

3334 Before completing the discussion on whether the Pre-Completion Representations were made, reference should be made to the Viterra Parties' submissions that the October 2013 Responses did not: (1) state the regularity of the Viterra Practices (with a minor exception); (2) include any reference to the reliability of the information in the Due Diligence; and (3) provide any definitive guarantee as to the adequacy of Joe White's facilities.[2589] These general observations about what was not specifically stated did not alter the effect of what was represented. Indeed, it must be observed that the failure of the Viterra Parties to properly address any of these 3 matters in October 2013 was entirely consistent with the Pre-Completion Representations having been made.

X.25.5 The disclaimers and related terms

2588 See pars 2146(11), 2889-2894 above.

2589 See par 3313 above.

3335 Consistent with what is stated above in relation to issue 15 above,[2590] none of the Sale Process Disclaimers, the Refusal of Certain Terms or the Acquisition Agreement Liability Terms resulted in the Pre-Completion Representations not being made. The simple fact was that the Viterra Parties chose to respond to Cargill's queries by giving the October 2013 Responses. In so doing, the Viterra Parties did not state or imply that they relied upon any of the Sale Process Disclaimers or the Acquisition Agreement Liability Terms in giving their responses.

3336 Further, not only did the Viterra Parties not refuse to respond or assert any legal right not to respond, or state that their responses were qualified beyond what was specifically outlined in the Reply Letters (by reason of the Sale Process Disclaimers, the Refusal of Certain Terms or the Acquisition Agreement Liability Terms), Mattiske gave positive assurances concerning the basis upon which the Viterra Parties would address the issues that had been raised, including that they would be dealt with in "good faith",[2591] and provided "reassurance" about Joe White's ability to meet customer specifications.[2592] No doubt, he did so as he perceived it was in the interests of the Viterra Parties to address Cargill's concerns so as to seek to ensure that Cargill Australia did not decide not to proceed to Completion in accordance with the terms of the Acquisition Agreement.

3337 Furthermore, this was done in circumstances where Cargill made it clear that it intended to rely upon the responses given. The position of Cargill was reiterated by the Cargill 29 October Letter which made plain that Cargill would not be fobbed off by the plainly inadequate responses that had been given in the 25 October Reply Letter.

X.25.6 Conclusion

3338 For these reasons, Glencore and Viterra conveyed each of the Pre-Completion Representations.

2590 See pars 2931-3028 above.
2591 See pars 1234, 1319-1321, 1368-1372, 1376-1378, 1380, 1442-1450, 1503-1509, 1514-1522 above.
2592 See, for example, par 1368 above.

X.26 Were the Pre-Completion Representations false for the reasons pleaded in paragraphs 19 and 30 of the Statement of Claim, including in light of the Sale Process Disclaimers, the Acquisition Agreement Liability Terms and the Alleged Industry Practices, and did Glencore and/or Viterra thereby engage in misleading or deceptive conduct within the meaning of the Australian Consumer Law?

3339 Both paragraphs 19 and 30 of the Statement of Claim referred to the non-disclosure of the Undisclosed Matters,[2593] which have been found to have existed at all material times before Completion.[2594]

3340 In making the Pre-Completion Representations, the Viterra Parties did not disclose any of the Undisclosed Matters. Indeed, each of the Pre-Completion Representations was fundamentally inconsistent with the state of affairs that existed at Joe White concerning the existence and implementation of the Viterra Practices.

3341 More specifically, the Viterra Practices had occurred to a significant extent for a significant period of time, and throughout the period from 2010 to 2013. Further, the Viterra Practices underpinned Joe White's financial and operational performance for each of the financial years 2010 to 2013,[2595] and thus had a material impact on the production, sales and earnings figures and operational performance stated in the Financial and Operational Information. Furthermore, by reason of the implementation of the Viterra Practices, the production sales figures stated in the Financial and Operational Information were not based upon compliance with customer contracts, including customer specifications, and therefore had not been properly and lawfully achieved. Moreover, the assets of the Joe White Business were not sufficient for Joe White to sell malt in the volumes and for the returns stated in the Financial and Operational Information (regardless of whether or not the theoretical blend approach was adopted).[2596] Accordingly, contrary to the Pre-Completion

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2593 See par 1851 above.
2594 See issue 10 above.
2595 See issue 10.12 above.
2596 See, for example, par 1216 above.

Representations, Joe White did not have low future capital expenditure needs in the short to medium term and needed to engage in immediate material capital expenditure if it was to have the capacity in the future to sell malt in the volumes and for the returns that had been represented.

3342 In the circumstances, the Pre-Completion Representations were false. In making the Pre-Completion Representations, the Viterra Parties and each of them engaged in conduct that was misleading or deceptive within the meaning of the Australian Consumer Law.[2597]

3343 In addition, for the reasons discussed in issue 25 above,[2598] nothing contained in the Sale Process Disclaimers or the Acquisition Agreement Liability Terms[2599] had the effect of altering the substance of what was represented. Equally, allegations concerning the Alleged Industry Practices took the matter no further.[2600]

3344 Finally, to the extent that the Viterra Parties maintained that what was stated in the October 2013 Responses accurately reflected what they had been told by the Joe White executives, that submission cannot be accepted.[2601]

3345 In rejecting this submission, the position of Hughes has not been overlooked. Despite Hughes being a party to the proceeding, no party chose to call him. Accordingly, the court is none the wiser as to how it might have been said by Hughes that he could have conscientiously approved the contents of each of the Reply Letters.[2602] In the absence of evidence on the point from Hughes, the most favourable manner in which the relevant circumstances could be considered from Hughes' perspective was that Hughes had been open and candid with Fitzgerald and Lindner in their meeting on 23 October 2013, and the draft letters had been prepared by the Viterra Parties' lawyers

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2597 In making this finding, it is unnecessary to refer separately to s 4 of the Australian Consumer Law, which was also relied upon by Cargill Australia.

2598 See pars 3335-3337 above.

2599 Including the Refusal of Certain Terms.

2600 See par 3322 above.

2601 See, for example, pars 1373, 1380, 1462-1465 above and annexure C to these reasons.

2602 See pars 1395-1404 above in relation to the 25 October Reply Letter and par 1513 above in relation to the 30 October Reply Letter.

with the knowledge of what Hughes and the other Joe White executives had said to Fitzgerald and Lindner in response to Cargill's queries. In those circumstances, it appeared that Hughes was willing to go along with what others might have considered could be said about the current position without "stretching" the responses.[2603] This included not providing a proper account of what had been occurring historically, and Hughes acceding to the "elision" of referring to customers' needs to avoid the Viterra Parties having to disclose openly and unambiguously that routinely customers' specifications had not been and were not being met for numerous reasons.[2604]

3346 Interestingly (but understandably), when addressing the issue of his suggested changes to the draft in his closing submissions, Hughes did not submit that the contents of the Reply Letters were accurate or a fair account of the Operational Practices.[2605] Rather, those submissions highlighted the fact that he had given far more detail at the meeting held on 23 October 2013, as was the fact.[2606]

3347 In any event, the fact that Hughes gave his imprimatur to the extent that he did in no way altered the glaring inaccuracies and inadequacies of the responses contained in the Reply Letters.[2607] Nor did it alter what Hughes, Youil, Wicks and Stewart stated to the Viterra Parties on or about 23 October 2013 as to the ongoing existence and implementation of the Viterra Practices and the material impact on the Joe White Business that would be likely to result if the Viterra Practices were ceased immediately upon Completion.

X.27 Were the Pre-Completion Representations made in trade or commerce in Australia?

2603 See par 1395 above.

2604 The reference to the "elision" related to Stewart's evidence about the change he recommended to the talking points from "customer specifications" to "customer needs": see par 1353 above. However, that elision was carried through by Hughes to the contents of the 25 October Reply Letter: see par 1399 above. As to concealing the fact that customers' specifications were not being met, see also par 1398 above.

2605 See fn 844 above.

2606 See pars 1279-1288 above.

2607 By way of further example, see pars 1210-1233 above.

3348 There was no issue that if the Pre-Completion Representations were made, they were made in trade or commerce in Australia.

X.28 If the Pre-Completion Representations, or any of them, were made by Mattiske and/or Viterra, is that conduct deemed to be Glencore's conduct under section 139B(2) of the *Competition and Consumer Act*?

3349 In closing submissions, the Viterra Parties accepted that if the Pre-Completion Representations were made by Mattiske or Viterra, or both, that conduct was deemed to be Glencore's conduct.

X.29 If the Pre-Completion Representations, or any of them, were made by Mattiske and/or Glencore, was the conduct deemed to be Viterra's conduct under section 139B(2) of the *Competition and Consumer Act*?

3350 Similar to issue 28, the Viterra Parties accepted that if Mattiske or Glencore engaged in the conduct of making the Pre-Completion Representations, that conduct was deemed to be Viterra's conduct.

X.30 Did Cargill Australia rely upon the Pre-Completion Representations in completing the Acquisition Agreement, including in light of the Sale Process Disclaimers, Acquisition Agreement Liability Terms and the Alleged Industry Practices?

3351 This issue may be dealt with very briefly as the Cargill Parties made no substantive submission to the effect that the Pre-Completion Representations were relied upon by any representative of Cargill. Although the Statement of Claim specifically pleaded that Cargill Australia completed the Acquisition Agreement in reliance upon the Pre-Completion Representations, no particulars of that allegation were given and no witness called by the Cargill Parties gave evidence to that effect. On the contrary, it was made clear to the Viterra Parties, as was the fact, that Cargill was sceptical of and unsatisfied with the responses that had been provided.[2608] This was not surprising

[2608] See par 1521 above.

given the lack of directness in responding to, or the complete avoidance of, the questions raised. More significantly, contrary to the position that might have existed if the Operational Practices had been disclosed before the Acquisition Agreement was entered into, in the absence of a proper understanding of the position, Cargill reasonably considered it had little choice other than to proceed with the Acquisition and assess the situation once it was in control.

3352 Therefore the answer to the question posed is no. However, so there can be no misunderstanding, some of the Viterra Parties' submissions on this issue will be addressed.[2609]

3353 After referring to a large body of evidence, the Viterra Parties submitted that the evidence demonstrated Cargill Australia consciously believed that it could not rely on information provided by the Viterra Parties in October 2013 and therefore did not rely on that information. Contrary to this submission, Cargill made enquiries in October 2013 as a result of disclosures in around mid October 2013 that had not previously been made, on the basis that they would be answered accurately and in good faith. The contents of both the Cargill 25 October Letter and the Cargill 29 October Letter demonstrated that Cargill was requesting important information in a serious manner and expected meaningful and reliable responses. There could be no doubt that this was fully appreciated at the time by the Viterra Parties.[2610]

3354 Again, to the extent the Viterra Parties relied upon submissions concerning Cargill's knowledge of Joe White's operations and the Alleged Industry Practices, such submissions did not assist.

3355 Finally, reference was made by the Viterra Parties to evidence that Cargill was told the information provided was not verified. To the extent that Cargill was told this, it did not follow that Cargill knew information being provided was no more than what the Viterra Parties had been told by Joe White management or that the Viterra Parties were unable to independently verify the relevant information. Whatever might have

2609 See also par 3370 below.
2610 See pars 1234, 1319 above.

been the position with respect to Glencore's lack of knowledge (including that of Mattiske, despite the fact he had been a director of Joe White and Viterra for many months), that did not equate to lack of knowledge on the part of Viterra. Further, Glencore itself had the ability to take the necessary steps to access all relevant employees (who were all employees of Viterra Ltd) to obtain the relevant information; steps which it in fact took (albeit with material deficiencies).

X.31 Was Cargill Australia deprived of the opportunity to obtain properly informed legal advice about whether it was entitled to terminate the Acquisition Agreement prior to Completion, as a result of Glencore or Viterra, or both, making the Pre-Completion Representations?

3356 For the reasons that follow, Cargill Australia was deprived of the opportunity to obtain properly informed legal advice as to whether it was entitled to terminate the Acquisition Agreement in the period leading up to Completion. Further, it was so deprived because of the making of the Pre-Completion Representations in the context in which they were made, as explained below.

3357 *First*, before the Acquisition Agreement was executed, the contents of the Data Room (including information contained in the black box) did not disclose or give notice of the occurrence, let alone the extent, of the Operational Practices. Although none of the Cargill representatives specifically requested any Joe White policy relevant to the analysis and reporting of test results for malt produced and delivered during the Due Diligence, this did not negate the fact that Cargill Australia was not provided access to critical information.

3358 It was entirely reasonable for Cargill to expect that any such policies material to Joe White's operations would have been disclosed in the Data Room.[2611] Further, if the

[2611] See pars 616-619, 1018-1019 above and pars 3382-3383 below. This expectation was not affected by the terms of the Data Room Protocol (see par 650-658 above); the fact that the parties agreed that the Viterra Parties were under no *obligation* to disclose any particular information did not alter the circumstances giving rise to the *expectation*; namely, that it had been agreed that a due diligence would be conducted by Cargill, including in relation to the information provided as part of the sale process, in order for Cargill to conduct its own investigations and analyses to seek to assess the nature and value of the Joe White Business.

questions asked during the Due Diligence had been properly answered,[2612] then the non-disclosure of the Undisclosed Matters would not have occurred. In light of this material non-disclosure, in the context in which it occurred, at the time Cargill Australia agreed to enter into the Acquisition Agreement it was not on notice that Joe White engaged in the Operational Practices; and thus was not on notice of the Viterra Practices.

3359 *Secondly*, prior to receiving regulatory approval from the Foreign Investment Review Board and in the earlier stages of the integration period, Cargill Australia's access to Joe White's information and management team was considerably restricted. To avoid breaching Australian competition laws, Cargill and Joe White were required to operate independently.[2613] A somewhat cautious approach was therefore adopted by Cargill concerning seeking any disclosure of Joe White's sensitive information. Although in early October some Cargill representatives were put on notice of the Operational Practices, the extent to which these pervaded the Joe White Business was not revealed.[2614] Further, Viers' evidence that Cargill was constrained as to what could be discussed with Joe White pre-Completion and before foreign investment approval emphasised the barrier Cargill faced until shortly before Completion in seeking comprehensive information.[2615]

3360 That said, around 15 October 2013, informal notification of the Foreign Investment Review Board's approval was given for the Acquisition to go ahead. Accordingly, such information could have been made more readily available to Cargill; and there was an opportunity for greater disclosure at or shortly after the 15 October Meeting.[2616] As already observed,[2617] on the basis of what was presented, the true extent of the Operational Practices was not revealed, and the opportunity to press

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2612 See, for example, pars 884, 911, 912, 914-916, 926, 929-930 above.
2613 See pars 1050-1051, 1068 above.
2614 See par 1084 above.
2615 See par 1090 above.
2616 See pars 1102-1119 above.
2617 See par 3359 above. See also pars 1140-1142 above.

further questions was, at least in Viers' mind, curbed due to anti-trust concerns.[2618]

3361 *Thirdly*, following the 15 October Meeting, the internal correspondence within Cargill revealed 2 things: (1) based on an acceptance of what Cargill had been told,[2619] there was an understanding that the Operational Practices had been engaged in at some level; and (2) equally, Cargill was not equipped with enough information to make an informed assessment as to the extent or potential impact of the Operational Practices.[2620] These internal communications prompted Cargill to seek legal advice from Allens. The advice produced promptly on 17 October 2013 was caveated by a declaration that it was "high-level" and "given at a time when [Allens] have only limited information that does not form a sufficient basis for [Allens] to form conclusive views" on the potential issues arising out of the Operational Practices.[2621] Evidently, Allens did not have enough information to take a position on Cargill Australia's right to terminate the Acquisition Agreement. Further, Cargill was in no position to provide the information required given the limited disclosure that had been made to it.[2622] Contrary to the Viterra Parties' submission, the inadequacy of the information available to Allens was not because Cargill chose to withhold from Allens some of the material information of which it was aware.[2623]

3362 *Fourthly*, on 21 October 2013 the Customer Review Spreadsheet was circulated and reviewed by a number of Joe White executives, which recorded that Joe White was not meeting its customers' requirements.[2624] This spreadsheet and the Key Recommendations Memorandum were never disclosed to Cargill before Completion.[2625] If they had been, these documents would have revealed a substantial amount of further material information regarding the Operational Practices and

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2618 See par 1142 above.
2619 See pars 1238-1239 above.
2620 See pars 1144, 1156 above.
2621 See par 1172 above.
2622 See also fn 715 above.
2623 As to any inferences that might have been drawn because Savona was not called as a witness, see pars 2101-2108 above.
2624 See pars 1211-1232 above.
2625 See par 1232 above.

shown that the Pre-Completion Representations were materially misleading.

3363 *Fifthly*, at the point when Cargill did relay its concerns in respect of the Operational Practices, the responses set out in the 25 October Reply Letter[2626] and the 30 October Reply Letter,[2627] which gave rise to the Pre-Completion Representations, were not satisfactory. The Reply Letters not only provided no further material information to Cargill than what had previously been disclosed, but they omitted very significant details of the full nature and extent of the Operational Practices. Thus, after receipt of the Reply Letters, Allens was in no better position to confirm either way as to whether Cargill Australia had a right to terminate the Acquisition Agreement. Ultimately, consistent with this position, Allens was of the view throughout the period leading up to Completion that more information was required as to the extent of the Operational Practices before any advice could be given in respect of termination.[2628]

3364 Further, at the time Cargill received the 25 October Reply Letter, Cargill representatives were generally uneasy as to the adequacy and completeness of the disclosures.[2629] Furthermore, it was noted that Joe White management was still not available to Cargill for the purposes of obtaining more information, and Viers, in particular, pressed for a second letter to be sent in a bid to gain access to some meaningful details on the Operational Practices.[2630]

3365 As to the 30 October Reply Letter, in addition to the lack of detail, Mattiske concluded by stating that Cargill had been provided with "an appropriate level of access" to Joe White records and current employees and that "from [Completion] Cargill [would] have full and unfettered access to all records and employees of [Joe White]".[2631] This reflected the fact that Cargill did not have full access to the relevant information to that time and that there was an acceptance that disclosure before Completion on the matters Cargill was raising would not be as comprehensive as it would be after

2626 See pars 1405-1406 above.
2627 See pars 1512, 1524-1525 above.
2628 See pars 1275, 1413-1415, 1418-1425, 1529-1530 above.
2629 See pars 1406-1407 above.
2630 See par 1408 above.
2631 See par 1512 above.

Completion. Further, Cargill's representatives, including Eden, Viers and Van Lierde, expressed concern as to the pervasiveness of the Operational Practices and whether what was known provided enough material to terminate.[2632] Clark's evidence in respect of the 30 October Reply Letter confirmed, from his legal perspective, that more information was required in respect of the impact of the Operational Practices on the Joe White Business before Cargill Australia's rights could be determined.[2633] Clark's advice was undoubtedly correct.

3366 Finally, consistent with the conclusions in issue 12 above, Cargill was not sufficiently informed of the Operational Practices so as to have the ability to understand the extent to which these were implemented or adopted, or the extent to which they: (1) resulted in Joe White misstating results in Certificates of Analysis; (2) resulted in Joe White supplying malt contrary to customer requirements and specifications (including secretly using incorrect barley varieties and prohibited gibberellic acid); and (3) impacted upon Joe White's financial and operational performance.

3367 In conclusion, there were insufficient facts disclosed pertaining to the Operational Practices and the extent to which these impacted the Joe White Business with which to instruct Allens comprehensively or at least at a level that would allow Allens to give properly informed legal advice. The limited information led to the result that Allens could not provide any meaningful advice regarding Cargill Australia's right to terminate the Acquisition Agreement.

3368 Notwithstanding Cargill's patent apprehensiveness and uncertainty, Cargill maintained its desire to complete the Acquisition and resolve any issues commercially. However, this desire to complete did not reflect any implacable or overriding intention; rather it was maintained in circumstances where Cargill was not fully informed as to the full nature, extent or materiality of the Operational Practices.[2634] Further, to have decided not to complete, in light of the advice that had

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2632 See pars 1526-1528 above.

2633 See pars 1529-1530 above.

2634 This observation also relates to views expressed before the Reply Letters were received, as those views were expressed in ignorance of the magnitude of the problems involved.

been given about the lack of relevant information and the exposure to a possible large damages claim, would have been a step highly unlikely to have been taken by a company acting in a commercially sensible way.[2635]

3369 Thus, contrary to the Viterra Parties' submission, it ought not be inferred that Cargill did not properly instruct Allens because Cargill was determined to reach Completion regardless of what they had been told. Both the contemporaneous documentation and the evidence given at trial made it clear that advice was being sought so that the option of termination might be properly considered.[2636] Further, termination would not only have been seriously considered if Cargill was reliably informed about the full nature and extent of the Operational Practices, but would have been directed.[2637]

3370 Before leaving this issue, it should be recorded that whether or not the Pre-Completion Representations were actually made in the terms alleged seems to be of little moment. The real issue on the events leading up to Completion was the substantial failure by the Viterra Parties to properly address the issues that had been raised by Cargill. If the Viterra Parties had responded properly to the issues concerning the Operational Practices (which they would have been able to do if they had chosen to properly investigate and report on the issues then at hand), then Cargill would have been in a position to properly assess, and obtain properly informed legal advice about, whether or not it should have proceeded with the Acquisition in circumstances where the financial and operational performance of the Joe White Business was materially different than had previously been represented.

X.32 If Cargill Australia had obtained properly informed legal advice, would that advice have been to the effect that it was lawfully entitled to terminate the Acquisition Agreement prior to Completion?

X.32.1 Introduction

3371 For the reasons that follow, on the basis of what would have been known in the period

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2635 See further fn 2638 below.
2636 See pars 1179-1183, 1275, 1417 above.
2637 See par 1183 above. This issue is discussed further at issue 33 below.

before Completion if the Viterra Parties had responded more responsively and comprehensively, it is more likely than not that Allens would have concluded that Cargill Australia was entitled to terminate the Acquisition Agreement because of contraventions of the Australian Consumer Law.[2638]

3372 In answering this issue, the court is considering a counterfactual, where certain information would have been disclosed after the parties had entered into the Acquisition Agreement but before Completion. Based on the facts as found, if proper disclosure had been given, the instructions to Allens would have included that the Operational Practices existed, and further, that they were engaged in routinely without disclosure to Joe White's customers, so as to comprise the Viterra Practices.[2639] The court is required to determine whether Allens, sufficiently informed of the material information relating to the Viterra Practices before Completion, would have concluded there was a right to terminate.

X.32.2 The allegations

3373 Before dealing with the substantive matters that arise, to identify precisely how the issue arose it is necessary to spend a moment on the pleadings. In the Statement of Claim the following was alleged:

> (a) As a result of Glencore and/or Viterra making the Pre-Completion Representations, Cargill Australia was deprived of the opportunity to obtain properly informed legal advice regarding whether it was entitled to terminate the Acquisition Agreement prior to Completion;
>
> (b) If Cargill Australia had received properly informed legal advice to the effect it was lawfully entitled to terminate the Acquisition Agreement, it would have exercised its right to do so.

2638 To be clear, it is also likely that any such advice would have included a warning that, if Cargill Australia was to terminate, such action would be coupled with the attendant risk that Viterra would not accept the termination and would sue for damages for an alleged wrongful termination. However, it would also be likely that such a warning would have been coupled with advice that Cargill Australia would have been able to defend any such claim successfully in light of the seriously misleading conduct that had been engaged in. As to the consequences of wrongfully seeking to terminate a contract, see *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 575-577 [9]-[12] (Kiefel CJ, Bell and Keane JJ, dissenting); *Foran v Wight* (1989) 168 CLR 385, 396.2 (Mason CJ), 430.2-432.4 (Brennan J), 438.8 (Deane J), 441.7-442.3 (Dawson J); *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444, 453.8 (Barwick CJ); *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327, 343.7 (Fullagar J, with whom Dixon CJ, Williams, Webb and Kitto JJ agreed).

2639 See issue 10 above.

As may be seen, there was no express allegation that Cargill Australia would have received advice that it was entitled to terminate. Undoubtedly, so much was implicit and hence this issue was identified in the terms that it was.

3374 The particulars to these allegations bear this out. They included that Cargill Australia was deprived of the opportunity to instruct its lawyers as to the existence and extent of the Undisclosed Matters and the reasons why the Financial and Operational Performance Representations were false. It was stated that as a result it was not able "to obtain legal advice regarding whether it could terminate the Acquisition Agreement without exposing itself to an unknown risk of significant liability in circumstances in which those matters existed". Further, the implicit allegation was addressed in the particulars to subparagraph (b). After referring to the Undisclosed Matters and the alleged falsehood of the Financial and Operational Performance Representations, it was stated that it was therefore likely that Clark would have advised that Cargill Australia could terminate the Acquisition Agreement without exposing itself to any unknown risk of significant liability.

3375 Notably, neither the allegations nor the particulars supporting them sought to identify the legal basis upon which it was alleged Allens would have advised Cargill Australia of its right to terminate. In the Defence, the Viterra Parties simply denied the entirety of the allegations without further elaboration.

3376 The state of the pleadings might explain why, in the respective closing submissions, the matters raised were somewhat mismatched. The Cargill Parties made submissions concerning rights of rescission at general law and in equity based on misrepresentations having been made, and then separately addressed the rights Cargill Australia had arising from the Australian Consumer Law. In contrast, the Viterra Parties referred to common law principles regarding termination rights and also referred to specific clauses in the Acquisition Agreement (which were not the subject of submissions by the Cargill Parties).

3377 Plainly, both on the pleadings and on the issue as articulated, it was left open as to the

precise basis upon which it was alleged Allens might have given advice to Cargill Australia in October 2013 if it had been properly instructed as to the relevant facts. Naturally, it was only necessary for Cargill Australia to establish a single basis upon which Allens might have based its advice as to the right to terminate. In light of the view that I have formed, the most efficient manner to deal with this issue is to address the issues that arise under the Australian Consumer Law first.

X.32.3 Analysis

3378 In a situation where the material relevant to the Operational Practices was substantially disclosed after the Acquisition Agreement was entered into but before Completion, it would have been clear that the manner in which the Joe White Business was being conducted was fundamentally inconsistent with what had been represented, including with respect to the material inaccuracy of the the Financial and Operational Performance Representations,[2640] the Warranty Representations[2641] and the Pre-Completion Representations.[2642] In short, the true situation was far removed from critical representations made (both expressly and impliedly) in relation to the Joe White Business, including in the Information Memorandum,[2643] the Management Presentation Memorandum,[2644] the Acquisition Agreement,[2645] and the Reply Letters.[2646] This position alone would have resulted in Allens observing that there was something completely amiss between what had been represented before Completion and the actual financial and operational features of the Joe White Business. Therefore, it was highly likely that in these circumstances Allens would have advised of the probability that section 18 of the Australian Consumer Law had been contravened; consequentially enlivening a host of available remedies, including termination.[2647]

2640 See issue 15 above.
2641 See issues 48-53 below.
2642 See issue 25 above.
2643 See par 470 above.
2644 See par 711 above.
2645 See issues 48-53 below.
2646 See pars 1405, 1512, 1524 above.
2647 Section 237 provides a court may impose any order the court thinks appropriate on the application of an injured person (being a person who has suffered, or is likely to suffer, loss or damage) because of

3379 In my view, nothing in the advice Allens in fact gave in October 2013, on the limited information available,[2648] suggested that such advice would not have been given. This was particularly so in light of the material misrepresentations that had been made and the very significant consequences Cargill would have anticipated for the Joe White Business if Cargill Australia was to acquire the Joe White Business and customer contracts were to be adhered to.[2649]

3380 Further, if the existence of the Viterra Practices had been disclosed to Allens in a manner which accounted for their true nature and extent, there would have been sufficient information available for Allens to give properly informed advice on termination. In submitting to the contrary,[2650] the Viterra Parties referred to the evidence of Clark about what he required before he could form a view on whether or not Cargill Australia had a right to terminate. These included the purpose for which Certificates of Analysis were used, which customers were affected, how long the Viterra Practices had been engaged in, the quantities involved, the exact level of tolerance accepted in respect of Certificates of Analysis and the physical capacity of Joe White's malting facilities to produce malt to meet customer specifications.[2651] Clark also gave evidence that no particular issue was determinative and that it was difficult to provide a single set of fact patterns that he would have needed in order to advise. Clark gave further evidence that if there were such a substantial impact on production that the Joe White Business could not fulfil customer contracts, that would have been highly determinant.

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conduct in contravention of Chapter 2, 3 or 4 of the Australian Consumer Law. The order must be for the purpose of compensating for loss, or preventing or reducing the loss or likely loss. Chapter 2 includes the prohibition on misleading or deceptive conduct: see further par 3385 below.

2648 See, for example, pars 1171-1176, 1178-1181, 1184 above.

2649 See, for example, par 3316 above.

2650 The Viterra Parties also made submissions based upon clauses referred to in the Allens Letter of Advice, and contended that none of them could have been considered an essential term the breach of which would have given rise to a right to terminate. It is unnecessary to address these matters.

2651 See also pars 1189-1191 above. Further, based on Clark's evidence as referred to in these paragraphs, the Viterra Parties submitted Clark had a broad understanding of the reality of the practices at Joe White and did not consider any contractual term would justify termination. It suffices to say that the extent of Clark's understanding of the Viterra Practices in October 2013 was materially limited and did not allow him to form any meaningful opinion on Cargill Australia's right to terminate (as he expressly stated at the time).

3381 Based on this and other like evidence, the Viterra Parties submitted that Clark would have needed to know a great deal more than it would have been possible to learn before Completion. They further submitted that in the limited time of the "7 days" available after receipt of the Cargill 22 October Letter, it would not have been possible for the Viterra Parties to identify and disclose everything that Clark required. Even putting aside the evidence of Mattiske that he might have paid a lot more attention to the issues that confronted him at the time,[2652] the evidence overwhelmingly indicated that within 48 hours of receipt of the Cargill 22 October Letter, the Viterra Parties had at their disposal information from the Joe White executives which would have enabled substantial disclosure to Cargill of the existence and extent of the Viterra Practices, including the existence of the Viterra Policies. If the Viterra Parties had been minded to provide a full and frank response to the issues that had been raised, such matters could have been disclosed readily and comprehensively.[2653] To the extent that the 30 October Reply Letter suggested there was limited time to explore the matters raised,[2654] the limitations were not such that the Viterra Parties were precluded or materially impeded from providing, in substance, the details of the Viterra Practices, at least sufficiently to have enabled Cargill to have properly instructed Allens so as to have enabled Allens to give legal advice on Cargill Australia's right to terminate the Acquisition Agreement. For completeness, it must be observed that there were between 8 to 10 days between 22 October 2013 and the date for Completion on 31 October 2013 (depending on whether 22 October 2013 or 31 October 2013 or both were or were not included in the total days), not 7 days as submitted by the Viterra Parties.

3382 Further, it is likely Allens would have advised that the Viterra Parties' ongoing non-

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2652 See par 1485 above.

2653 See, for example, pars 1211, 1276-1311, 1324, 1373 above.

2654 See pars 1512, 1524 above. See also par 1504 above. Ultimately, it appeared that very little turned on the amount of time available. Based on certain assumptions that did not reflect the facts (see fn 4551 below), Mattiske's evidence in re-examination was to the effect that if he had been alerted of matters immediately after the Acquisition Agreement had been signed rather than on 22 October 2013 he would have provided the same responses as those set out in the Reply Letters in any event. In other words, according to Mattiske, any absence of time pressure that the Viterra Parties might have been experiencing in late October 2013 would not have made any substantive difference because Mattiske's position was that if he had had the extra time he would not have responded any differently.

disclosure of the Viterra Practices was contrary to a reasonable expectation of Cargill that, in the circumstances, certain disclosures would have been made.[2655] Such disclosures ought to have included information material to the operations of the Joe White Business.[2656]

3383 This expectation arose for 2 key reasons.[2657] *First*, because the Operational Practices were so inextricably intertwined with the Joe White Business that they vitally affected and underpinned its financial and operational performance.[2658] *Secondly*, in the context of a complex commercial transaction of significant value, the Viterra Parties held a considerably advantageous position when compared to Cargill with respect to the knowledge of the Operational Practices.[2659] In such circumstances, with an obvious disparity between the position of the parties, in light of the representations that had been made it was entirely reasonable to expect that matters which greatly affected the Joe White Business, such as the Operational Practices, would be disclosed prior to its sale.[2660]

3384 Furthermore, for reasons discussed elsewhere,[2661] the existence of exclusion or limitation clauses would not have thwarted Cargill Australia's right to terminate. Allens expressly advised that these clauses would not preclude Cargill Australia from exercising its rights if the Australian Consumer Law had been contravened.[2662]

3385 In all the circumstances, it is likely Cargill Australia would also have been advised it could terminate by its own action and further or alternatively seek to obtain a remedy

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2655 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32.4 (Black CJ); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 557.6 (Lockhart J, with whom Burchett J agreed and Foster J relevantly agreed).

2656 See par 3358 above.

2657 These are in addition to expectations which existed expressly by reason of the Sellers' obligations under the Acquisition Agreement pursuant to cll 13.7 and 13.8(a) in relation to Warranties to the Sellers' knowledge that were likely to be incorrect or misleading, such as those found in schedule 4, cll 4.2(c), 6.1(e), 7.3, 12(a), (b) and (c), 13.4, 17(a).

2658 See *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 557.7.

2659 See *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32.4 (Black CJ), 41.2 (Gummow J). See also pars 617-619, 1019 above.

2660 *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 557.7.

2661 See issue 144 below.

2662 See par 1176 above.

under section 237 of the Australian Consumer Law.[2663] In order to be able to obtain a remedy under this section, including with respect to termination, loss or likely loss, a person is required to establish the loss or damage suffered, or the likely loss or damage, was because of the misleading conduct the subject of the claim.[2664] Had Allens been provided with all of the relevant information pertaining to the Operational Practices, there would have been no need for a laborious analysis. On a preliminary view, patently,[2665] without the continued implementation of the Viterra Practices, it would have been plain that Joe White faced substantial erosion to its business productivity and, consequently, its value. In this proceeding, it has been established that Joe White was confronted with many disadvantages and adverse consequences in relation to its plant operations, production capacity and relations with its customers following the cessation of the Viterra Practices.[2666] In short, it was highly probable that Allens would have advised (if such advice were even necessary in light of the view Cargill itself would have formed) that loss was likely to be suffered if the Acquisition Agreement were to proceed to Completion.

X.32.4 Conclusion

3386 In summary, if Allens had been properly informed of the material facts, it would have advised Cargill Australia that it could lawfully terminate the Acquisition Agreement because of contraventions of the Australian Consumer Law. Given this conclusion, it is unnecessary to consider separately what advice Allens would have given concerning the right to terminate at common law more generally.[2667]

X.33 If, prior to Completion, Cargill Australia had received advice to the effect that it was lawfully entitled to terminate the Acquisition Agreement, would

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2663 Remedies available include an order declaring a contract void, void from a point in time or void *ab initio*: s 243(a).

2664 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 515 [54] (McHugh, Hayne and Callinan JJ).

2665 See, for example, pars 1144, 1146 above.

2666 In relation to the plant and operation changes see, for example, pars 1460, 1465, 1784-1787, 1824-1829 above. See also issues 10.3, 10.4 above.

2667 The Acquisition Agreement did not contain any relevant express right to terminate, however a right to terminate may still exist in these circumstances: see, for example, *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, 136-139 [47]-[49] (Gleeson CJ, Gummow, Heydon and Crennan JJ).

it have exercised its right to do so?

X.33.1 The allegation

3387 On the premise that Cargill Australia had received advice that it was able to lawfully terminate the Acquisition Agreement (which premise carries with it that Allens had been properly instructed and therefore Cargill Australia was also aware of the relevant circumstances), the evidence demonstrated that Cargill Australia would have terminated before Completion.

X.33.2 The Viterra Parties' overarching submissions and general responses to them

3388 In opposing such a finding being made, the Viterra Parties made a number of related submissions in contending the counterfactual evidence of the Cargill witnesses ought not be accepted, particularly in light of its hypothetical nature.[2668]

3389 *First*, it was submitted that Cargill Australia was not interested in termination because of Cargill's intense keenness to acquire Joe White. This submission was also made on the basis that Cargill proceeded to Completion despite, so it was contended, having knowledge of the Alleged Industry Practices and the degree to which Joe White engaged in these or similar practices. It suffices to say that this submission concerning Cargill's knowledge was contrary to the facts as found.[2669] Further, the suggestion that Cargill Australia intended to complete the Acquisition Agreement come what may has also been rejected.[2670] The various examples given by the Viterra Parties of evidence indicating Cargill intended to complete in no way demonstrated that, if Cargill had known the extent of the issues relating to the Viterra Practices, it would have effectively ignored them and proceeded with Completion.

3390 *Secondly*, as an extension of the first submission, the Viterra Parties submitted Cargill

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2668 See also *Sigma Pharmaceuticals (Australia) Pty Ltd v Wyeth* (2018) 136 IPR 8, 72 [281] (Jagot J); *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 331 [1733] (Jacobson, Gilmour and Gordon JJ); *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200, [1976]-[1977] (Jagot J); *Fabcot Pty Ltd v Port Macquarie-Hastings Council* [2011] NSWCA 167, [186]-[187] (Sackville AJA, with whom Beazley and Campbell JJA agreed).

2669 See issue 13 above.

2670 See pars 3368-3369 above.

was not concerned with operational matters. They contended the Acquisition was strategic and "had nothing to do with operational aspects" of the Joe White Business. For similar reasons in response to the first submission, this cannot be accepted. Although the investment was undoubtedly strategic, the evidence demonstrated that the strategy was not being pursued to the exclusion of operational matters.[2671] Further, Cargill required that those involved in Project Hawk complete an independent evaluation so that the Joe White Business could be valued before any funds were committed. This could not have been performed without a proper consideration of operational matters.

3391 *Thirdly*, as an extension to the first and second submissions, the Viterra Parties submitted that Cargill believed a failure to secure an acquisition of the Joe White Business would have materially harmed its global malt business. This submission accurately encapsulated Cargill's position if the Joe White Business was in fact, or at least something akin to, what it had been represented to be. The purchase of the Joe White Business had been anticipated as the last step in Cargill, Inc establishing a successful global malt business.[2672] There was no question that this was a priority in 2013 leading up to the Acquisition Agreement, albeit not as high a priority as it had previously been considered to be.[2673] However, for the same reasons stated in response to the first of the preceding submissions on this issue, such a position did not amount to Cargill having an intention to purchase the Joe White Business regardless of its manner of operation, its value or the ability of Cargill to conduct a business consistently with the guiding principles outlined in the Cargill Code.

3392 *Fourthly*, the Viterra Parties submitted that if Cargill intended to acquire a business that did not engage in the Operational Practices it would have expressly provided for that outcome in the Acquisition Agreement. This was put on the basis that Cargill was aware of the prevalence of the Alleged Industry Practices. It was contended that because Cargill made no attempt to negotiate any such protection this reflected the

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2671 See, for example, pars 622, 705-707, 823-824, 839-857, 976, 3200, 3204 above and pars 3750, 3942 below.
2672 See pars 1, 301 above.
2673 See par 707 above.

fact that Cargill's interest in the Joe White Business "had nothing to do with the [Joe White Business'] use or non-use of any particular operating practices". This submission was premised on the Viterra Parties establishing the existence of the Alleged Industry Practices, which they have failed to do.[2674] Further, as stated in response to the previous submission, to contend that Cargill's interest in Joe White, and its position in deciding whether to make a bid and at what amount, had nothing to do with operational matters ignored a substantial body of evidence to the contrary. Furthermore, the submission appeared to assume that the Warranties were not breached despite the existence of the Viterra Practices, which is contrary to what has been found.[2675] Moreover, as discussed below,[2676] if Cargill had believed or had reasonable grounds to suspect that the Operational Practices existed to any significant degree before the Acquisition Agreement was entered into, it would not have been interested in negotiating any form of warranty to cover the situation as it would not have agreed to enter into an acquisition agreement.

3393 *Fifthly*, the Viterra Parties submitted that what occurred between 9 and 22 October 2013 demonstrated the position Cargill would have adopted. It was contended that Cargill engaged in open and forthright discussions with the Joe White executives as to how Joe White was operating and "even with all this knowledge" Cargill did not seek to terminate the Acquisition Agreement. As discussed elsewhere,[2677] at no time before Completion did Cargill have a proper understanding of the Viterra Practices such that it could have known (or obtained advice to the effect) that it was legally entitled to terminate the Acquisition Agreement.

X.33.3 Cargill's corporate structure and the counterfactual evidence

3394 As explained above,[2678] the structure of Cargill, Inc was such that if any of the Cargill leadership team, a platform leader or a business unit leader decided that a transaction should not proceed notwithstanding it had been approved by the board of Cargill, Inc,

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2674 See issue 13 above.
2675 See issues 39-47 below.
2676 See pars 3396-3412, 3748-3759 below.
2677 See issues 12, 21, 24, 25, 30-32 above. See also pars 1195-1198, 1206, 1414-1415 above.
2678 See par 299 above.

then that decision to desist would be implemented. Each of Conway and Koenig (both members of the Cargill leadership team), Van Lierde (a platform leader) and Eden (the business unit leader) gave evidence in substance that they would have terminated or recommended termination of the Acquisition Agreement if relevant facts about the Viterra Practices were known and advice had been received from Allens that Cargill Australia could lawfully terminate. Further, Hawthorne, Engle and Viers gave evidence that they would have recommended to the decision-makers to terminate. De Samblanx also gave relevant evidence of what he would have done during the Due Diligence if certain matters had been discovered.[2679]

3395 The counterfactual evidence was adduced by the Cargill Parties during the evidence in chief of a number of witnesses. As the propositions put to each of the key witnesses on this issue were slightly different (and the Viterra Parties' submission in response also differed), it is necessary to refer to the key witnesses' evidence on this topic individually.

3396 Conway's evidence was that if he knew before Completion, in substance, that the Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice were being engaged in then Cargill would not have proceeded. (The 4 propositions put to Conway were that he was to assume he had been informed:[2680] (1) the Reporting Practice was engaged in so as to alter actual results to report to customers that malt complied with specifications when in fact it did not; (2) the Varieties Practice was customary and widespread; (3) the Gibberellic Acid Practice was engaged in "notwithstanding the customer's express specification" that gibberellic acid not be used; and (4) the customers had not been informed of the practices.) Conway explained if Cargill had known the true position before 4 August 2013, Cargill Australia would never have signed the Acquisition Agreement, because of these practices and their potential to have significant impact on the value of the Joe White Business from the perspective of known unknowns and unknown unknowns,

2679 See pars 905-906 above.

2680 The terms "Reporting Practice", "Varieties Practice" and Gibberellic Acid Practice" were not used when putting these propositions to the relevant witnesses, but it is convenient to use these terms in summarising the evidence for present purposes.

including the reaction of Joe White's customers. Further, Conway gave evidence that Cargill had sent a full team down to do a due diligence and these things had not come out beforehand, which would have raised queries about the culture of Joe White and that it would have been a major red flag. Conway stated his position would have been the same both before the Acquisition Agreement was signed, and after the Acquisition Agreement had been signed but before Completion.

3397 The Viterra Parties noted the differences between how the 3 Operational Practices were presented to Conway. They contended that he was asked to assume: (1) in relation to the Varieties Practice, that it was customary and widespread; (2) for the Gibberellic Acid Practice, that it was customary;[2681] and (3) with respect to the Reporting Practice, that it existed without any assumption as to its extent. In these circumstances, it was submitted that the evidence left open the possibility that Conway gave his evidence on the basis that the Reporting Practice was neither customary nor widespread and that the Gibberellic Acid Practice was customary but not widespread. Thus, it was contended that the evidence of Conway was more ambiguous than the evidence given by other witnesses (referred to below) and accordingly was of even less assistance to the court.[2682]

3398 Contrary to these submissions, the fact that Conway gave evidence in these terms meant it was clear that if his evidence were accepted then there was no way Cargill would have proceeded to Completion if it had been properly informed of the Viterra Practices. In short, his evidence was that if he had been told of circumstances that were less obnoxious than the Viterra Practices themselves, then he would have

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2681 This submission in relation to gibberellic acid was put without a reference to the transcript being provided. The relevant passage in the transcript is summarised in the preceding paragraph above and there was no reference to the "practice of adding gibberellic acid during the malting process, notwithstanding the customer's express specification that gibberellic acid should not be used" being "customary".

2682 To elaborate, the Viterra Parties submitted that the absence of any reference to "customary" or "widespread" (in contrast to the Varieties Practice) gave rise to the "potential inference" that the assumption put to Conway was that the Reporting Practice was neither customary nor widespread. No such inference could reasonably have been drawn, and there was nothing in Conway's evidence to suggest he understood the proposition in such a manner. The proposition clearly put was that the Reporting Practice applied to all Certificates of Analysis (as was the fact).

decided not to proceed. It obviously must follow that if the true position had been disclosed his position would have been the same, though presumably more emphatic.

3399 Further, as a purported example of the fifth submission referred to above,[2683] the Viterra Parties referred to Conway's conduct in October 2013 and submitted that the evidence of his actual reaction at this time should be preferred by the court to the evidence he gave at trial. The difficulty with this submission was that in October 2013 Conway (and all others at Cargill) did not have a proper understanding of what was occurring. Then, having made enquiries in the context of a binding agreement being in place, Cargill was told that its concerns were without foundation. Conway's reaction in such circumstances was of little probative value in determining what Conway would have done if he had been told the Operational Practices definitely existed in the manner put to him in the witness box, much less what his reaction would have been if he was actually told about the full extent of the Viterra Practices.

3400 Furthermore, insofar as the propositions put to Conway (and other witnesses) included a reference to a practice being "customary", they submitted that that term was vague and ambiguous in relation to the extent to which it suggested the relevant practice occurred. They also submitted that "widespread" failed to address the questions of materiality or the extent to which the witness was to assume that each affected customer was in fact affected. While neither of these terms were capable of conveying specificity in relation to the precise prevalence of the Operational Practices or the exact impact on customers, such matters were of little moment. Both terms are of common parlance and readily understood. There was no suggestion of any ambiguity in this regard when the questions were put to the witnesses.[2684] As the Cargill Parties submitted, customary in this context meant it was the custom of the Joe White Business to engage in the conduct and was an appropriate synonym. In addition, Cargill Australia's case did not require the implementation of the

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2683 See par 3393 above.

2684 Also authorities indicate that customary is a well-understood term in the commercial sphere: see, for example, *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 423.4-424.2 (Brennan CJ, Dawson and Toohey JJ); *Con-Stan Industries of Australia Pty Ltd v Norwich Winterhur Insurance (Australia) Ltd* (1986) 160 CLR 226, 236.2-237.4 (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ).

Operational Practices to be established at any precise level. And although the case prosecuted was based on establishing the Operational Practices were routine (presumably because that was the language used by some of the Joe White executives in 2013), they could also be aptly described as customary or widespread; indeed in relation to the implementation of the Reporting Practice, the procedure in place was universal.

3401 Koenig's evidence was that if he knew before Completion that, in substance, the Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice were being engaged in customarily then Cargill would have brought the contract to a screeching halt. (The 4 propositions put to Koenig were that he was to assume he had been informed: (1) the Reporting Practice was a customary practice; (2) the Varieties Practice was a customary practice; (3) the Gibberellic Acid Practice was engaged in even where the customer prohibited its use; and (4) the customers were not told of the practices.) Koenig explained that Cargill would not have been interested in the Joe White Business if it could not be operated successfully in line with the guiding principles of the Cargill Code, and further that there would have been no way to provide an accurate and reasonable valuation of the Joe White Business, including it would have been very difficult to put a valuation on what forward projections could look like.

3402 The Viterra Parties acknowledged that Koenig was a member of the Cargill leadership team, but submitted he otherwise did not have any particular responsibility for Cargill Malt. In a similar vein, they submitted the involvement he had in this transaction was at the request of others and that he was not a relevant decision-maker. They submitted Koenig's evidence concerning the inability to operate in accordance with the Cargill Code should be rejected on the basis that there was nothing to suggest Joe White could not be operated in accordance with Cargill's guiding principles. They also referred to his evidence that he could not recall Conway raising issues with him in October 2013 and that there was no evidence that he took any steps to stop the transaction despite what occurred in October 2013. In these circumstances, it was submitted his evidence

should not be accepted.

3403 Dealing with the last point first, similar to the position with Conway, the position Koenig adopted in October 2013 was of little probative value when the true facts had been concealed from Cargill. In relation to the submission concerning the Cargill Code, Koenig's evidence was unchallenged. No doubt, in theory the Joe White Business could have been conducted in accordance with the Cargill Code, but implicit in Koenig's evidence was that it could not be run successfully or at least at an acceptable level. As the matter was not explored during his cross-examination, this evidence will not be rejected on a supposition as to what was theoretically possible. As to the other matters raised, none of them detracted from the fact that Koenig was a very senior officer of Cargill who was taking an interest in the possible purchase of Joe White and who had the authority to direct that Cargill withdraw from the transaction. Further, none of Koenig's evidence on this issue was the subject of any cross-examination.

3404 Van Lierde's evidence was that if he knew before Completion, in substance, the Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice were engaged in customarily and on a widespread basis then Cargill "for sure" would have terminated the process and would not have continued with the Acquisition. (The 4 propositions put to Van Lierde were that he was to assume he had been informed: (1) the Reporting Practice was a customary and widespread practice; (2) the Varieties Practice was a customary and widespread practice; (3) the Gibberellic Acid Practice was engaged in where the customer prohibited its use and the practice was widespread; and (4) the customers were not told of the practices.) Further, his evidence was that if any of these practices were known before the Acquisition Agreement was entered into, then Cargill would have terminated the process of acquiring Joe White. Van Lierde's evidence was that if the Reporting Practice was disclosed before 4 August 2013, the Joe White Business would not have been acquired for multiple reasons, but first and foremost because it would have been very evident that the conduct was completely in breach of Cargill's guiding principles under the

Cargill Code, which Cargill strongly adhered to. He also said it would have been impossible for Cargill to have an idea of the ramifications in terms of the impact on Cargill's existing malt business. When asked a broader question about the Operational Practices more generally, Van Lierde's evidence was that the moment Cargill was faced with issues that were in breach of Cargill's guiding principles the conclusion would have been reached that Joe White would not be a good fit to be operated by Cargill no matter how important the target might have been. In addition, Van Lierde's evidence was that if Eden had expressed a view to him that the transaction should be stopped, he would have supported Eden's position and informed Conway of the situation.

3405 The Viterra Parties submitted this evidence of Van Lierde should be given no weight because it amounted to a categorical rejection of proceeding to Completion, which was contended to be uncommercial. They submitted that, like Conway, Van Lierde's evidence was inherently unlikely as he suggested he would never have contemplated any "normal commercial action", such as seeking further information or a reduction in the purchase price. It was submitted his evidence was strongly coloured by the benefit of hindsight. Further, in light of Van Lierde's involvement in October 2013 it was contended he must have known there was at least a material risk of the existence of practices akin to those described to him during his evidence. As there was a complete lack of evidence of Van Lierde's reaction in October 2013 resembling his hypothetical evidence, it was contended his evidence should be rejected.

3406 With respect to Van Lierde's evidence about the impact on Cargill's existing malt business and the Cargill Code, the Viterra Parties invited the court to consider how Cargill actually conducted the Due Diligence. They submitted if these 2 factors were really so important, such that they could have led to the transaction being immediately terminated, then that would have been reflected in the manner in which the Due Diligence was carried out. Instead, so it was contended, the Due Diligence was not thorough, careful or diligent and was inconsistent with Van Lierde's "contrived counterfactual answers".

3407 Little need be said concerning Van Lierde's evidence beyond what has already been said in relation to Conway and Koenig. Further, with respect to the submission about the manner in which Cargill conducted the Due Diligence, it has been found that it was carried out diligently and with reasonable care.[2685]

3408 Eden's evidence was that if he knew before Completion any of, in substance, the Reporting Practice, the Varieties Practice or the Gibberellic Acid Practice was being engaged in customarily and on a widespread basis, he would have recommended to his direct superior, Van Lierde, that the Acquisition Agreement be terminated. Eden gave evidence that if he had been informed of the Operational Practices before he had made a recommendation to the food ingredients and systems platform, he would have recommended Cargill stop the process. (The 4 propositions put to Eden were that he was asked to assume he had been informed: (1) the Reporting Practice was a customary and widespread practice; (2) the Varieties Practice was a customary and widespread practice; (3) the Gibberellic Acid Practice was engaged in where the customer prohibited its use and the practice was widespread amongst those that prohibited its use; and (4) the customers were not told of the practices.) Eden also gave extensive evidence as to why each of these matters would have been of significance to him. These included the serious breach of trust with customers, that such conduct would have been dealt with very seriously under the guiding principles in the Cargill Code,[2686] together with the costs of remedying the situation and the implications to the value of the Joe White Business.

3409 The Viterra Parties submitted the hypothetical scenario put to Eden was very complex and contrived, and that Eden was dogmatic in responding. They emphasised Eden's keenness in 2013 to have Cargill buy the Joe White Business and contended that Eden had probably made a mistake about his assessment of the Joe White Business. They submitted his evidence on what he would have done was motivated by him not wanting to accept the blame for what occurred.

2685 See issue 80 below. See also fn 2371 above.

2686 See also par 1094 above.

3410 They also sought to attack Eden's evidence concerning customers taking the requirement to use specific barley varieties very seriously, suggesting it was concerned with the position of maltsters and that the underlying premise of this evidence had not been established. Reference was made to some of Eden's notes in 2013, including referring to the investment being very strategic and the absence of a focus on reputation. They suggested these matters undermined the credibility of Eden's evidence on this topic.

3411 In addition to the matters already stated above concerning the other key witnesses on this issue, the particular matters raised by the Viterra Parties concerning Eden did not take the matter any further. Eden's evidence concerning the importance of barley varieties to brewers who specified particular varieties were required to be used was supported by a large body of other evidence.[2687] His evidence during his cross-examination about his reaction to Joe White secretly substituting varieties was compelling and not challenged.[2688] Further, Eden's obvious enthusiasm in 2013 did not mean that he would have acted without any business acumen and would have simply ignored the seriousness of the occasion if the Operational Practices had been disclosed to him in a manner that indicated that Joe White's customers were being deceived on an ongoing basis to a significant degree. Furthermore, as Eden explained in his evidence, part of the reason why Cargill's investment in Joe White was strategic was because of the supreme reputation of Australian malt.[2689] He said that if it became known that that reputation was not soundly based then the strategic element of the recommendation would not have existed anymore.[2690] Moreover, Eden's conduct in

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2687 See pars 18, 1676, 1679, 1711, 1744, 1814, 1816, 1834-1835, 2455, 2499 above and 3724 below.

2688 See par 1146 above. In the Viterra Parties' closing submissions, it was suggested that Eden "laced his evidence" with language like "shocking" and "cheating". On the occasions where such language was used it did not strike me as being inappropriate given the subject matter he was addressing. Significantly, "cheating" was the way Eden referred to penciling in discussing the issue in 2013: see par 1091 above.

2689 See par 301 above.

2690 The Viterra Parties submitted this evidence should be rejected because no mention of Australia's reputation was referred to in his contemporaneous notes, which were focused on demand, margin and geographical location. Any absence of a contemporaneous note (compare Eden's notes of 9 July 2013 referring to "Aussie dream" and Australia being the "2nd sweet spot": par 845 above) was no basis to find that Eden's evidence on this point was completely fabricated, even more so as the evidence of such a view appeared entirely rational.

2013 was not consistent with the Viterra Parties' submission that the Due Diligence was unimportant because of the strategic benefits. Eden was keen to ensure Cargill had sufficient time to conduct a proper Due Diligence.[2691]

3412 By reason of Cargill, Inc's corporate structure, if the evidence of any of Conway, Koenig, Van Lierde or Eden were accepted, then the Cargill Parties would have established that the Acquisition Agreement would have been terminated if the relevant advice had been received. In fact, I accept the evidence of each of these witnesses. Not only was each of them a credible witness more generally, but their evidence to the effect that they would not have proceeded in the circumstances, and the reasons they gave, made perfect commercial sense. Without being exhaustive, if the disclosure of the Operational Practices in the manner put to these witnesses in the various propositions summarised above had occurred in 2013 (either before the Acquisition Agreement was entered into or shortly before Completion was due to occur),[2692] this would have indicated to each of them: (1) the Joe White Business had been materially misrepresented; (2) there could be no way of knowing how Joe White's customers would react if the true position were disclosed; (3) any attempt to value the Joe White Business would be based on information which could not be relied upon, including in relation to matters relevant to synergies;[2693] (4) Cargill would have been associating itself with a business engaging in improper practices if it allowed the transaction to proceed; (5) Cargill intended to continue to employ those managing the

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2691 See fn 602 above. Further, the records concerning the Data Room showed that Eden accessed it on 10 separate occasions (though Eden could not recall doing so).

2692 To be clear, to the extent not touched upon already, the evidence of Conway, Koenig, Van Lierde and Eden (concerning whether or not Cargill Australia would have entered into the Acquisition Agreement if they had learned about, speaking broadly in summarising their evidence, the Operational Practices or practices of that nature being conducted at a significant level before 4 August 2013) was the same in substance. Universally, their evidence was that the transaction would not have gone ahead. The Viterra Parties submitted this evidence was not relevant to causation because it was Page who made a decision on 2 August 2013 to proceed with the Acquisition Agreement. The contention that it was Page alone who made this decision has been rejected: see pars 3799, 3867 below. In any event, even if this finding is incorrect, any such decision by Page would not have resulted in the Acquisition Agreement being entered into for $420 million if Cargill had known of the Viterra Practices on or before 4 August 2013 as each of Conway, Koenig, Van Lierde and Eden would have advised that the transaction should not proceed, and, because of the corporate structure and decision-making process of Cargill, that advice from any 1 of them would have been acted upon.

2693 Synergies were a large component of the value of Joe White as assessed by Cargill.

Joe White Business who had engaged in these practices; (6) there could have been real problems implementing the Cargill Code; (7) the approval given by the board on 9 July 2013 would have been based on materially misleading information; and (8) there could be no real means of ascertaining how Joe White would perform if it were to operate in a proper manner without the use of the Operational Practices.[2694]

3413 As a result of the findings made above, it is unnecessary to specifically address the Viterra Parties' submissions made in relation to Hawthorne, Engle, Viers and De Samblanx on this issue. Suffice to say that, for similar reasons to those expressed above, the submissions of the Viterra Parties were also unpersuasive in relation to these 4 witnesses.

X.33.4 The background to Conway being called and his unchallenged evidence

3414 Before leaving this topic, the significance of Conway's evidence should be alluded to. No witness statement was filed on behalf of Conway by the Cargill Parties before the trial commenced. In their opening, the Viterra Parties emphasised this fact. They submitted that Conway had made pivotal decisions concerning the Acquisition and suggested that Cargill was so sensitive about this that Conway's name (together with Page's) was not mentioned in the Cargill Parties' opening. Further, during Eden's cross-examination it was put to him by the Viterra Parties' senior counsel that Conway was the primary decision-maker as to what course Cargill should have adopted in late October 2013.[2695] Conway was also referred to repeatedly by the Viterra Parties during the cross-examination of Hawthorne and Koenig. On the 22nd day of trial, the Cargill Parties announced that they might call Conway as a witness as the Viterra Parties "had been pressing for him", however his availability was then unknown. On the 27th day of trial, when it was made clear that Conway would definitely be called as a witness, the Viterra Parties opposed him being called on the basis they would be prejudiced,

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2694 It must be noted that, in submitting the October 2013 Responses did not give rise to Pre-Completion Representations (see par 3316 above), the Viterra Parties submitted that Cargill's experience before October 2013 meant it "knew" ceasing the Operational Practices "could significantly weaken the [Joe White Business] (to the point of closure), and as such Cargill knew (better than the [Viterra Parties]) that such practices could significantly affect [production, sales and earnings figures and operational performance]".

2695 Eden did not accept this proposition.

while also maintaining an adverse inference ought to be drawn if he failed to give evidence or the court ruled he should not be permitted to do so. In addressing this position, it was pointed out to the Viterra Parties that repeated and incessant observations by them about the absence of Conway from the Cargill Parties' witness list had caused the Cargill Parties to change their approach. The Viterra Parties' opposition to Conway being called by the Cargill Parties was unsuccessful.

3415 When Conway was finally called on the 37th day of trial, he gave clear and unequivocal evidence about what he would have done if he had known, in substance, about the Operational Practices in 2013.[2696] Significantly, during his cross-examination by the Viterra Parties (no other party cross-examined him), Conway was not challenged about any of this evidence.[2697]

X.34 Prior to Completion, did Cargill Australia and Cargill, Inc have the knowledge or state of mind pleaded in paragraph 40A of the Defence?

X.34.1 The allegations and the evidence relied upon

3416 By paragraph 40A of the Defence, the Viterra Parties alleged, further or alternatively, that if any of the matters pleaded in paragraph 19 of the Statement of Claim were the fact[2698] (which was not admitted) then, before 31 October 2013 Cargill knew or suspected the existence of those matters or some of them. The Viterra Parties set out 16 paragraphs of particulars, from which it was said that Cargill's knowledge was to be inferred. The 16 paragraphs may be loosely grouped into 2 categories, being matters before and matters after the Acquisition Agreement was entered into.

3417 As to the first of these, the particulars referred to the matters pleaded in paragraph

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2696 See pars 3396-3400 above.

2697 Naturally, the mere fact that Conway's evidence was not the subject of cross-examination did not mean the court was required to accept it: *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, 586C-588B (Samuels JA, with whom Meagher JA agreed and Kirby P relevantly agreed). Further, in fairness, I am not suggesting that cross-examination on this issue did not occur because it had been overlooked. It appeared abundantly clear from Conway's evidence that what he was stating on the issue (and his evidence more generally) was entirely credible.

2698 See issue 10 above.

31A of the Defence. These matters have already been addressed in reaching the conclusion that no matters raised in this paragraph of the Defence put Cargill on notice of the Undisclosed Matters.[2699]

3418 In relation to the latter category, certain documents[2700] preceding and arising out of the 15 October Meeting and leading up to the Cargill 22 October Letter, the Cargill 29 October Letter and the Reply Letters (including these letters themselves) were relied upon.[2701]

3419 In addition to these documents, the Viterra Parties referred to the evidence of De Samblanx concerning what he was told on 10 October 2013 regarding corrections that could be made to Certificates of Analysis for results within 2 standard deviations,[2702] together with his view that the presentation given during the 15 October Meeting was detailed, frank, uninhibited and forthcoming, and he could have asked whatever questions he wanted during it.[2703] Further, they relied upon what was stated in the 15 October Meeting, including:

(1) Joe White's overarching philosophy involved sending malt that was within specification according to the customer for those customers that analysed malt.[2704]

(2) There were many examples where customers expected that they would read within specification, which meant that Joe White needed to send

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2699 See issue 21 above. See also issue 12 above.

2700 Including at pars 1089, 1100, 1103, 1106, 1120, 1143-1144, 1159, 1162, 1170, 1187, 1195, 1199, 1204-1205, 1207, 1236, 1305, 1405, 1409-1412, 1419, 1451, 1524 above. With respect to Eden's email referred to at par 1159, the Cargill Parties submitted the contents of the email should not be taken as representing Eden's state of mind because that was not put to him during cross-examination. Although there might be an issue as to what Eden meant by the email (as to which see par 1159 above), its contents indicated that it plainly was intended to reflect his views. When this matter was raised during oral submissions, the Cargill Parties' senior counsel appear to resile from the submission. In any event, it is rejected.

2701 Some further documents were referred to by the Viterra Parties that were not tendered at trial, and accordingly are not referred to here. In closing submissions, the Viterra Parties also sought to rely upon the Alleged Industry Practices, and Cargill's alleged knowledge of them, which need not be addressed further: see issue 13 above.

2702 See par 1088 above.

2703 See par 1140 above.

2704 See par 1108 above.

out-of-specification malt according to its laboratories.[2705]

(3) In order to address inherent unreliability, Joe White's policy permitted results to be amended by up to 2 standard deviations to allow for normal variation.[2706]

(4) Stewart's evidence that he stated during the course of the presentation that a procedure had been developed through utilising the standard deviations of the Malt Proficiency Scheme, which stated that 2 standard deviations were recognised as normal variation for a particular analysis parameter.[2707]

(5) Joe White's procedures permitted malt to be shipped if results were more than 2 standard deviations out of specification, so long as 2 general managers signed off on the shipment.[2708]

(6) If a barley variety a customer desired was not available, Joe White would supply a variety with a similar character instead.[2709]

(7) It was unlikely that Joe White had sufficient stocks of barley remaining to meet customers' requirements of certain varieties.[2710]

(8) Gibberellic acid was used for the majority of Joe White's customers, but there were some who prohibited its use; of those who prohibited it, Joe White continued to use gibberellic acid for some but not all.[2711]

3420 Interestingly, when making submissions on this issue as to what it was alleged Cargill knew or suspected, the Viterra Parties made no reference to any information contained in the Reply Letters, nor how what was stated in the Reply Letters impacted upon

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2705 See par 1115 above.
2706 See par 1116 above.
2707 Ibid.
2708 See par 1112 and fn 701 above.
2709 See par 1117 above.
2710 This was based on what was contained in Hughes' notes (see par 1128 above), which suggested something more specific was stated on this topic than was recorded in the presentation: see par 1117 above.
2711 See par 1129 above.

Cargill's knowledge or any suspicions it may have had.

3421 In any event, having referred to the matters set out above, the Viterra Parties submitted that the combined effect of Cargill's knowledge of the Alleged Industry Practices, the information provided during the Due Diligence and the further communications with Joe White in October 2013 was that "Cargill was well aware that Joe White was engaging in the [Alleged] Industry Practices". Further, the Viterra Parties submitted that Cargill not only knew that Joe White engaged in the "[Alleged] Industry Practices, but also knew or suspected that the extent of those practices was significant".[2712]

X.34.2 Conclusion

3422 There was no controversy that, prior to Completion, Cargill had been told of the existence of each of the Operational Practices. However, at the time of Completion Cargill did not know the extent to which any of the Operational Practices were implemented, much less the extent to which they might have impacted upon the operational and financial performance of the Joe White Business. Indeed, Cargill had not even been provided with the Viterra Policies.

3423 Further, whatever knowledge or suspicion Cargill may have had must be seen in light of the October 2013 Responses.[2713] In particular, the final word from the Viterra Parties was that Certificates of Analysis had been issued in accordance with the accredited quality system of the International Organisation for Standardisation, that the issue with barley varieties was only short term, and that steps had been taken so it would be unnecessary to use gibberellic acid where customers prohibited it.[2714] More generally, Cargill was also told any concern about Joe White's plants' ability to meet customers' specifications was unfounded. Each of these assertions bore no resemblance to operations that incorporated the Viterra Practices.

2712 The Viterra Parties also made a submission concerning the inferences that could be drawn from the fact that none of Hermus, Hughes or Savona was called by the Cargill Parties to give evidence. This has been dealt with elsewhere: see pars 2043-2073, 2126, 2105-2108 above respectively.

2713 See issue 24 above.

2714 See par 1512 above.

3424 In short, there was no real basis to suggest that Cargill knew (or had effective notice to form a basis to suspect in any substantive or material way) that Joe White was or had been engaged in the Viterra Practices in the manner in which it was when it proceeded to Completion.

X.34.3 A further remark

3425 It cannot pass without comment that the Viterra Parties' submissions on this issue appeared to conflict with their underlying case. Notwithstanding that the Viterra Parties maintained that the Cargill Parties had not proven that the Operational Practices were implemented routinely and without informing customers (so as to comprise the Viterra Practices), their submissions on this issue invited the court to find positively that Cargill knew, or at least suspected, that the extent of the use of the Operational Practices was significant such that they knew or suspected some or all of the Undisclosed Matters.[2715] Naturally, no such finding of actual knowledge could be made about Cargill's state of mind unless the underlying facts were in existence or had occurred. Even though the allegations in paragraph 40A of the Defence were made "further or alternatively", the tension between these submissions and the overall position adopted by the Viterra Parties was manifest.

X.35 Did Viterra know that the Pre-Completion Representations or any of them were or was false and/or did Viterra not genuinely believe the representations were true and/or was Viterra reckless as to whether they were true or false?

X.35.1 Introduction

3426 The principles relevant to the tort of deceit are set out above.[2716]

3427 It has already been established that the Pre-Completion Representations were made.[2717] However, a moment needs to be spent discussing the manner in which issue

2715 See also par 908 above.
2716 See issue 22.1 above.
2717 See issue 25 above.

35 was formulated. As may be seen, the question as framed invited the court to consider the Pre-Completion Representations both collectively and individually. This reflected the manner in which the allegations were pleaded in the Statement of Claim; which referred collectively to "the Representations", which in turn was defined to be a reference to the Financial and Operational Performance Representations, the Warranty Representations and the Pre-Completion Representations "individually, collectively or any combination". However, the last of the Pre-Completion Representations was alleged to have been made by reason of the making of the first 4 Pre-Completion Representations.[2718] It followed from this that, if any of the first 4 Pre-Completion Representations were not made in the manner alleged, then it could not be established that the fifth Pre-Completion Representation was made as alleged. Further, and more importantly, each of the Pre-Completion Representations was alleged to have been made by reason of the provision of the October 2013 Responses. Accordingly, making an assessment as to whether Viterra had the state of mind alleged by reason of the knowledge of any particular person or persons necessarily involved considering the knowledge of the person in question in the making of all of the October 2013 Responses.

X.35.2 The Cargill Parties' submissions

3428 In their submissions, the Cargill Parties relied on the knowledge of Fitzgerald, Mattiske, Hughes, and Mallesons.[2719]

3429 The Cargill Parties submitted that the Pre-Completion Representations were conveyed by the October 2013 Responses, all of which were false by reason of the Viterra Practices and by matters revealed to Mattiske, Fitzgerald and Mallesons during the investigation carried out in response to the Cargill 22 October Letter. It

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2718 See par 3299 above.

2719 In the Statement of Claim, the Cargill Parties alleged the knowledge of various persons was attributable to Viterra including Mattiske, Fitzgerald, Hughes, Stewart, Mallesons, Rees, Gordon and McMeekin. The final version of the agreed list of issues (see par 1861 above) identified that for the purposes of issue 35 the Cargill Parties relied upon the knowledge of Mattiske, Fitzgerald, Hughes, Stewart, Mallesons and Rees. The Cargill Parties did not make submissions in relation to the knowledge of Rees at all, and only referred to Stewart to make submissions concerning the knowledge of Fitzgerald, Hughes and Mallesons.

was submitted that Mattiske's actions conveyed the Pre-Completion Representations. It was noted the content of the Reply Letters and the talking points (on which the oral statements in the October 2013 Responses were based) were written by Mattiske, Fitzgerald and Lindner. The fact that Hughes contributed to the 25 October Reply Letter was also referred to.

3430 The Cargill Parties submitted that the Pre-Completion Representations were made by Mattiske, on behalf of Glencore and Viterra,[2720] and that the evidence clearly established that Mattiske either knew that the Pre-Completion Representations were false or that he was reckless as to their truth. The Cargill Parties pointed to the fact that Mattiske was a director of all 3 Viterra companies, the managing director of Glencore Grain and an employee of Glencore.[2721] In conjunction with these matters, they relied upon the fact that Mattiske was responsible for the investigation of matters raised by Cargill, and that he signed both the Reply Letters.

3431 Further, the Cargill Parties submitted that the knowledge of Hughes was the knowledge of Viterra for the reasons they provided in their submissions for issues 11, 22 and 23 above**.**

3432 Furthermore, it was submitted that the knowledge of Mattiske, Fitzgerald and Mallesons was the knowledge of Glencore and Viterra in making the Pre-Completion Representations for the following reasons:

(1) Fitzgerald was the company secretary and general counsel for the 3 Viterra companies and obtained his knowledge of the Viterra Practices within the course of his authority as general counsel and secretary. Further, his role in the investigation, at the behest of Mattiske, gave rise to a duty to inform Mattiske of the matters he learned during the investigation and the opportunity to do so.[2722]

2720 In their submissions, the Cargill Parties dealt with issues 35 and 37 together, relying on the same set of submissions to establish both Glencore's and Viterra's knowledge.

2721 See par 97 above.

2722 The Cargill Parties relied on *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 438 [66]

(2) Mattiske's evidence was that Fitzgerald reported the contents of each interview carried out with the Joe White executives during the investigation.[2723] As the Viterra Parties decided not to call Fitzgerald, it was submitted that the court should find that Mattiske was told, and therefore knew, everything that Fitzgerald was told during the investigation.

(3) Mallesons was retained by Glencore and Viterra, it was submitted for the purpose of investigating and advising them about the matters raised,[2724] and therefore any knowledge obtained was in Mallesons' capacity as an agent, which was therefore attributable to Glencore and Viterra.

3433 The Cargill Parties submitted that each of Mattiske, Fitzgerald, Mallesons and Hughes knew that the specific matters referred to below were false when the October 2013 Responses were made, and therefore Glencore and Viterra could not honestly have believed that the statements were true.

3434 *First,* it was submitted that the statements concerning the extent of the Viterra Practices were not honestly made. It was submitted that the October 2013 Responses concerned the extent of the Viterra Practices as follows:

(1) There had been some "instances" where barley other than that specified pursuant to a particular contract had been used due to seasonal issues.[2725]

(Allsop CJ) concerning aggregation of information between officers or agents of a company if there is a duty and opportunity to communicate it: see par 2647 above.

2723 See par 1276 above, although his evidence was that he was not aware of Lindner's involvement: see par 1277 above.

2724 It was admitted by the Viterra Parties that Glencore and Viterra retained Mallesons on or about 22 October 2013 to advise them in relation to the substance of the matters raised and how to respond. It was also admitted that Fitzgerald led the investigation in response to Cargill's queries. Otherwise, they denied the allegation that Glencore or Viterra or both retained Mallesons to investigate and advise on the substance of matters raised in the Cargill 22 and 29 October Letters.

2725 See par 3282(1) above.

(2) Joe White had "occasionally" supplied malt to customers that included gibberellic acid in breach of customer contracts.[2726]

(3) The Joe White Business was capable of producing the quality and quantity of malt contractually sold to customers.[2727]

(4) That, notwithstanding these matters, there was no fundamental issue with Joe White or the Joe White Business.[2728]

(5) The silence as to the extent of the Viterra Practices.

3435 It was submitted that it was obvious from the matters disclosed to Fitzgerald, Lindner and Mattiske that the Viterra Practices were systemic and permeated each aspect of the Joe White Business. It was also submitted there could be no controversy that Hughes knew about the existence and the extent of the Viterra Practices. Further, it was submitted that as a result of what had been raised in August 2010[2729] and in October 2013[2730] each of them knew the following:

(1) The Reporting Practice was routine and Joe White routinely did not supply malt that met customers' contractual specifications.

(2) Joe White altered Certificates of Analysis to a significant extent.

(3) Joe White had persistent difficulties in obtaining good quality barley that was capable of meeting customer requirements.

(4) The Gibberellic Acid Practice existed.

(5) The written procedure recorded as the Viterra Certificate of Analysis Procedure had not been disclosed during the Due Diligence.

(6) Customers were not told about the Operational Practices, and were

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2726 See par 3282(3) above.
2727 See par 3282(4) above.
2728 See par 3282(5) above.
2729 See pars 162-163 above.
2730 See pars 1276-1373 above.

unaware that contracts were routinely breached.

(7) The impact of ceasing the Operational Practices would be profound.

(8) There was not enough barley in Australia to fill the shortfall of barley faced by the Joe White Business, and it was unable to supply malt exactly as specified, and thus was at risk of breaching malt contracts.

3436 Further, it was submitted that Stewart informed Fitzgerald of the existence of the Customer Review Spreadsheet,[2731] which revealed that the Joe White Business utilised the Operational Practices for every customer and was incapable of meeting its contractual obligations for every single customer.[2732] The Cargill Parties submitted that the court should conclude that Fitzgerald, having been made aware of the contents of the Customer Review Spreadsheet and informed of the extent of the Operational Practices during the interviews, either read the spreadsheet or deliberately shut his eyes to making enquiries that would have revealed the existence of the spreadsheet.

3437 *Secondly,* the Cargill Parties submitted that it could not have been honestly said that Joe White's plants were adequate and sufficient to meet contractual specifications. It was submitted that the Key Recommendations Memorandum prepared by Stewart, which contained key recommendations in response to the Customer Review Spreadsheet,[2733] identified that Joe White plants did not have adequate barley or malt storage to meet customer specifications. The Cargill Parties submitted that Hughes and Mattiske were aware of this document,[2734] that Stewart provided this information to Fitzgerald and Lindner,[2735] and that Mattiske was informed by Fitzgerald of all relevant and important information learned during the investigation. Further, they referred to the Customer Review Spreadsheet, which they contended identified that

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2731 See par 1270 above.

2732 The Cargill Parties referred to their submissions under issue 10 in their support of this submission.

2733 See par 1212 above.

2734 See pars 1265-1270 above. The Cargill Parties' submission was based upon the further submission that Fitzgerald passed on all relevant information to Mattiske.

2735 See par 1270 above.

increased silo capacity was the *only* long-term solution to the inability of Joe White to produce malt within specification without applying a standard deviation buffer.[2736]

3438 *Thirdly,* the Cargill Parties submitted that it could not have been honestly said that Joe White was able to produce malt to the specifications required to meet customer demands without adding gibberellic acid. It was submitted that Mattiske, Fitzgerald, Lindner and Hughes had knowledge of the Key Recommendations Memorandum, which recorded that it would take the business 3 to 4 months to be able to produce additive free malt,[2737] and that it would require an extra day of germination to meet requirements for Asia Pacific Breweries and Sapporo, resulting in a loss of 14,000 metric tonnes of production per year.[2738] It was submitted that this information about the size of the production loss was also contained in a memorandum sent by Stewart to Fitzgerald on 24 October 2013.[2739]

3439 *Fourthly,* the Cargill Parties submitted that the statement that no customer had ever rejected malt due to the issues raised by Cargill was materially incomplete and thereby false because customers did not know they were receiving malt that did not comply with their contracts and therefore were in no position to reject malt for that reason. It was submitted that Hughes knew that the contracts were routinely breached. Further, they submitted Mattiske, Fitzgerald and Lindner were informed of the breaches and must have been aware that the statement was false as they removed a drafted talking point for Mattiske that encapsulated this paradox.[2740]

3440 *Fifthly,* the Cargill Parties submitted that the failure to disclose the Viterra Policies was inexplicable and dishonest. It was submitted that Fitzgerald and Lindner obtained a

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2736 See pars 1228-1229 above.

2737 The reference to 3 to 4 months was taken from the first draft of the Key Recommendations Memorandum. In the later draft, which was the subject of Stewart's email to the other executives with which Hughes and Wicks agreed and Youil implicitly agreed, referred to a period of 6 months before additive-free malt could be produced: see pars 1210, 1212, 1218 above.

2738 See par 1215 above.

2739 See pars 1388-1389 above.

2740 The talking point that was omitted had said "it appears that from time to time [gibberellic acid] has been included when it should not have been. But we understand that it is very hard to detect and as far as we are aware no customer complaints have been received": see pars 1345-1346, 1356, 1358, 1366-1367 above.

copy of the Viterra Certificate of Analysis Procedure and, upon a review of the Data Room index, would have ascertained that it had not been provided to Cargill in the Data Room.[2741] It was submitted there was no explanation for their failure to provide such a clearly relevant document.

3441 Further, despite this knowledge, it was submitted that Fitzgerald, Lindner and Mattiske drafted talking points and the Reply Letters which expressly referred to the alteration of Certificates of Analysis in accordance with Joe White's documented procedures, which were said to be accredited in accordance with the International Organisation for Standardisation.[2742] The Cargill Parties submitted that either these were knowingly false statements or Mattiske, Fitzgerald or Lindner, knowing that the Viterra Certificate of Analysis Procedure had not been disclosed, made a deliberate decision not to interrogate further any references to International Organisation for Standardisation accreditation in reference to the Viterra Certificate of Analysis Procedure. It was submitted that their conduct in failing to disclose the procedures while simultaneously making positive statements was designed to give the impression that their pencilling practice had a proper basis, which was reckless conduct.

X.35.3 The Viterra Parties' submissions

3442 The Viterra Parties maintained that the Pre-Completion Representations were not conveyed (see issue 25 above), and alternatively, if they were made, they were not false: see issue 26 above. In the alternative, the Viterra Parties submitted that Viterra did not know that such representations were false and Viterra was not reckless as to whether they were false and genuinely believed the Pre-Completion Representations were true, for the following reasons:

(1) The knowledge that could be attributable to Viterra, even if aggregated,

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2741 See pars 661, 1324 above.

2742 It was not contested that the Viterra Certificate of Analysis Procedure was not an International Organisation for Standardisation accredited procedure. Further it was submitted by the Cargill Parties that no satisfactory explanation was provided about the meaning of the International Organisation for Standardisation accredited system in the Reply Letters.

did not amount to knowledge that the Pre-Completion Representations were false.

(2) In effect, in the alternative to subparagraph (1) above, the knowledge of persons who had knowledge that could be said to amount to knowledge that the Pre-Completion Representations were false should not be attributable to Viterra.

(3) There was positive evidence that persons whose knowledge could be attributed to Viterra believed that the Pre-Completion Representations were true.

3443 With regard to the knowledge of particular individuals, the Viterra Parties submitted that:

(1) Each of Mattiske's, Fitzgerald's and Mallesons' knowledge could be attributed to Viterra for this purpose, but there was no evidence to support a finding that each of them knew of the Undisclosed Matters.[2743]

(2) Hughes and Stewart's knowledge should not be attributed to Viterra.

3444 In relation to the Customer Review Spreadsheet and the Key Recommendations Memorandum,[2744] the Viterra Parties submitted that these were drafted by Joe White and were withheld from the Viterra Parties, who therefore did not have knowledge. Further, they contended it should not be inferred that Hughes provided these matters to or discussed them with Fitzgerald. Furthermore, even if the Viterra Parties had knowledge of the Customer Review Spreadsheet, it was submitted that such knowledge did not amount to knowledge of the Viterra Practices or the Undisclosed Matters as the spreadsheet did not reveal the extent of the Operational Practices and the reliability of the information contained in the spreadsheet was questionable.

2743 The Viterra Parties also considered Rees' knowledge, submitting that it should not be attributable to Viterra, and that alternatively there was no evidence to support a finding that he knew of the Undisclosed Matters. As the Cargill Parties made no positive submissions in relation to Rees, it is unnecessary to address him separately.

2744 See pars 1210-1211 above.

3445 The Viterra Parties addressed each individual said to have attributable knowledge and made the submissions outlined below.

3446 *First,* the Viterra Parties relied on their submissions under issue 22 above to submit that it was not established that Fitzgerald had knowledge of the Undisclosed Matters prior to 4 August 2013. Further, the Viterra Parties disputed the factual bases raised by the Cargill Parties regarding Fitzgerald's alleged knowledge between 4 August 2013 and 31 October 2013 for the following reasons:[2745]

(1) Fitzgerald received the Cargill 22 October Letter; however, the information provided by Cargill Australia to Fitzgerald did not form a proper basis to determine that Fitzgerald had knowledge of the matters which made the Pre-Completion Representations false. It was submitted it could not reasonably be said that the Viterra Parties had an obligation to inform Cargill Australia of the matters of which Cargill Australia had informed the Viterra Parties in the Cargill 22 October Letter.

(2) On 22 October 2013, Hughes sent an email, copied to Fitzgerald, with the subject line "Cargill [Customer] Review & Cargill Customer Review Key Recommendations Document";[2746] however, the Customer Review Spreadsheet and the Key Recommendations Memorandum were not attached and there was no evidence to suggest that Fitzgerald received those documents.

(3) Fitzgerald had discussions with Hughes in relation to matters raised in the Cargill 22 October Letter and held meetings with Hughes, Youil, Stewart and Wicks on 23 October 2013, of which Lindner took notes;[2747] however, the Viterra Parties disagreed with Cargill Australia's

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2745 The Viterra Parties identified 13 bases upon which the Cargill Parties asserted Fitzgerald had knowledge between 4 August 2013 and 31 August 2013. These 13 points are identified at the start of each subparagraph.

2746 See par 1265 above.

2747 See pars 1276-1311 above.

characterisation of what was said and submitted that it was necessary to view these discussions within the context in which they occurred.

(4) On 23 October 2013, Fitzgerald was provided with the Viterra Certificate of Analysis Procedure;[2748] however, Fitzgerald was not aware of its existence before 23 October 2013 and believed that it had likely been disclosed to Cargill in the Data Room.[2749]

(5) Fitzgerald was involved in drafting talking points for a call between Purser and Mattiske on 24 October 2013;[2750] however, this involvement demonstrated nothing more than a drafting process and did not demonstrate additional knowledge on Fitzgerald's part.

(6) On 24 October 2013, in response to a request from Fitzgerald, Stewart sent Fitzgerald an email containing the information requested for barley variety use and additive free malting;[2751] however, this email did not constitute evidence that Fitzgerald had knowledge that Joe White was engaging in the Undisclosed Matters. It was submitted that the fact that Fitzgerald requested this information showed that he was making reasonable enquiries. Further, the email did not mention the Customer Review Spreadsheet or the Key Recommendations Memorandum and no offer was made to provide Fitzgerald with further details or explanation of the contents of the email. Despite Fitzgerald apparently having requested information which led to him being provided with the email on 24 October, he was not given the opportunity to consider the further work that Joe White was undertaking.[2752] After receiving the email, Fitzgerald sent draft talking points to Stewart for feedback, demonstrating that Fitzgerald was seeking to ensure that the

2748 See par 1313 above.
2749 See par 1324 above.
2750 See pars 1344-1368 above.
2751 See par 1387 above.
2752 The Viterra Parties' senior counsel explained that this submission meant that Fitzgerald did not know about the "[Customer Review Spreadsheet] and so on".

communications with Cargill were consistent with Stewart's understanding of the facts.

(7) The drafting process for the 25 October Reply Letter[2753] did no more than demonstrate a drafting process and did not demonstrate additional knowledge of Fitzgerald.

(8) The phone call between Lindner and Fitzgerald on 24 October 2013[2754] did not evidence any knowledge by Fitzgerald of the Undisclosed Matters, but rather demonstrated an effort to avoid any misleading conduct.

(9) The alleged communications between Fitzgerald, Rees and Mattiske from 22 October 2013 to 31 October 2013 regarding the Viterra Practices and Viterra Policies, for the purposes of providing responses to the Cargill 22 October Letter and the Cargill 29 October Letter, did not provide any further particulars or any evidence of knowledge passed between those people.

(10) Fitzgerald received the Cargill 29 October Letter;[2755] however, it was submitted it could not be reasonably said that he had an obligation to inform Cargill Australia of the information Cargill Australia had just provided to the Viterra Parties.

(11) The Viterra Parties disagreed with Cargill Australia's characterisation of what was said in the meeting on 29 October 2013,[2756] which Fitzgerald, Norman, Rees, Lindner, Hughes and Wicks attended in person and Mattiske attended by telephone, and further submitted that it was necessary to view the discussions as a whole and in the context within which they occurred. It was submitted that the information was

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2753 See pars 1381-1405 above.
2754 See pars 1383-1384 above.
2755 See pars 1454-1457 above.
2756 See pars 1457-1466 above.

adequately conveyed to Cargill Australia and was, in any event, already known to it.

(12) The conversation on 29 October 2013 between Fitzgerald and Stewart or Wicks, or both, that Cargill asserted occurred,[2757] did not support a finding that Fitzgerald had any knowledge of the Undisclosed Matters as a result of that conversation. Further, the fact that Stewart sent a version of the Customer Review Spreadsheet to McIntyre on 28 October 2013 did not constitute evidence of Fitzgerald's knowledge of matters in the spreadsheet and it was not established that the spreadsheet recorded the nature and extent of the Viterra Practices.[2758]

(13) The process of drafting the 30 October Reply Letter demonstrated that what the Viterra Parties confirmed with Joe White was not inaccurate,[2759] and did not demonstrate additional knowledge of Fitzgerald.[2760]

3447 *Secondly,* the Viterra Parties submitted that Mattiske had no knowledge of the Undisclosed Matters prior to October 2013, nor after 22 October 2013, other than the information provided to Cargill. They submitted that the factual bases upon which the Cargill Parties asserted that Mattiske had knowledge were insufficient for the following reasons:[2761]

(1) Mattiske did receive the Cargill 22 October Letter and the Cargill 29 October Letter; however the same reasons set out in relation to Fitzgerald[2762] applied to Mattiske's receipt of the letters. It was obvious that any representations conveyed were subject to what Cargill

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2757 See pars 1510-1511 above.
2758 See par 1429 above.
2759 The submission put was not precisely in these terms and was somewhat cryptic, however what is set out above is my understanding of what was being submitted.
2760 See pars 1512-1513, 1525 above.
2761 The Viterra Parties identified 8 bases upon which the Cargill Parties asserted Mattiske had knowledge after 22 October 2013.
2762 See par 3446(1), (10) above.

Australia had been told by Joe White in October 2013.

(2) The alleged communications between Fitzgerald, Rees and Mattiske, from 22 October 2013 to 31 October 2013 regarding the Viterra Practices and Viterra Policies, for the purposes of providing responses to the Cargill 22 October Letter and the Cargill 29 October Letter, did not provide any further particulars or any evidence that knowledge passed between those people.

(3) With regard to the preparation of the talking points and the 25 October Reply Letter, the Viterra Parties relied upon the same matters they submitted in respect of Fitzgerald's knowledge.[2763]

(4) Mattiske sent the 25 October Reply Letter to Cargill Australia;[2764] however, this did not demonstrate that Mattiske knew that what Cargill was told was false.

(5) With regard to the call on 29 October and the preparation of the 30 October Reply Letter, the Viterra Parties relied upon the same matters they submitted in respect of Fitzgerald's knowledge.[2765]

(6) To the extent that communications on 29 and 30 October 2013 demonstrated knowledge by Mattiske,[2766] such knowledge was sufficiently disclosed to Cargill by way of the Reply Letters and Mattiske's discussions with Purser in October 2013.

(7) Mattiske sent the draft 30 October Reply Letter to Walt on 29 October 2013;[2767] however, this did not add anything to Cargill Australia's allegation as to Mattiske's knowledge.

2763 See par 3446(5),3446(7)above.
2764 See fn 850 above.
2765 See par 3446(11), 3446(13) above.
2766 See pars 1454, 1456, 1467, 1490-1491 above.
2767 See par 1513 above.

(8) Mattiske sent the 30 October Reply Letter;[2768] however, this showed the information that Mattiske provided to Cargill, and did not demonstrate that Mattiske knew that what Cargill was told was false.

3448 *Thirdly,* the Viterra Parties boldly submitted that Mallesons had no knowledge of the Undisclosed Matters after 22 October 2013 *other than the information already provided to Cargill*. Further, they submitted the Cargill Parties relied on no additional material unique to Mallesons and that nothing was contended beyond the matters relied upon by the Cargill Parties to establish Fitzgerald's knowledge. Accordingly, it was submitted there was no need to consider separately Mallesons' knowledge. Further, they referred to Lindner's evidence that she believed that, to the extent they were made, the Pre-Completion Representations were true.[2769]

3449 *Fourthly,* with regard to Hughes' knowledge, the Viterra Parties relied on their submissions for issue 22 above, to submit that Hughes' knowledge was not attributable to Viterra and the evidence did not support a finding that Hughes had knowledge of the extent and effects of the Viterra Practices.

3450 *Fifthly,* the Viterra Parties submitted that Stewart's knowledge was not attributable to Viterra and that the Cargill Parties had not established that Stewart had knowledge of the extent and effects of the Viterra Practices. The Viterra Parties submitted that Cargill did not seek to add Stewart as a knowledge individual for the purposes of clause 31.15 of the Acquisition Agreement, and merely relied on the fact that he was an employee of Viterra Ltd, which was an insufficient basis for attribution.

3451 *Finally*, the Viterra Parties submitted that for the reasons submitted at issue 22 above, the Viterra Parties did not have knowledge that the Pre-Completion Representations were false, nor that Viterra was reckless as to whether they were false.

X.35.4 Analysis

2768 See par 1524 above.
2769 See pars 1384-1385, 1525 above.

3452 There were 5 Pre-Completion Representations conveyed.[2770] Based upon the majority judgment in *Krakowski v Eurolynx Properties Ltd*,[2771] it is necessary to consider the knowledge of the individuals identified by the Cargill Parties to determine whether a person whose knowledge was attributable to Viterra had the state of mind required for the second element of the cause of action in deceit to be made out against Viterra.[2772] As there has not been universality in the reasoning of decisions following *Krakowski v Eurolynx Properties*,[2773] findings relevant to the state of knowledge will be made with respect to each person in question regardless of whether the person knew that the Pre-Completion Representations as pleaded had been made.

X.35.4.1 Hughes

3453 It has been found elsewhere that Hughes' knowledge of the Joe White Business was knowledge that was attributable to Viterra during the sale process.[2774]

3454 The evidence established that Hughes did have knowledge of the matters pleaded in paragraph 30(bb), (bc), (bd) and (be) of the Defence.[2775] Further, it was established that Hughes had knowledge of the existence and extent of the implementation of the Viterra Practices.[2776]

3455 To elaborate, by virtue of his knowledge of the Viterra Practices, Hughes knew that it was not true that:[2777]

(1) The Operational Practices had occurred only to an insignificant extent.

(2) The Operational Practices had no impact on the production, sales and earnings figures and operational performance stated in the Financial and Operational Information.

2770 See issue 25 above.
2771 (1995) 183 CLR 563 (Brennan, Deane, Gaudron and McHugh JJ).
2772 See par 3232 above.
2773 See, for example, the cases referred to in *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 456-457 [146]-[149] (Edelman J, with whom Allsop CJ and Besanko J relevantly agreed).
2774 See issues 11, 22 above.
2775 See issue 11 above. See also par 3619 below.
2776 See issue 22 above. See also par 4902 below.
2777 Ibid; see also pars 1279-1288, 1462-1465 above.

(3) The production and sales figures stated in the Financial and Operational Information were based upon compliance with customer contracts, including customer specifications, and as a result had been properly and lawfully achieved.

This necessarily followed from Hughes' knowledge that the Viterra Practices were routinely implemented without customers' knowledge and as a result customer specifications were not being complied with.

3456 Further Hughes, as the hands-on executive had knowledge that Joe White's plants were not adequate and sufficient to meet the specifications applicable under customer contracts. Although this could be established in numerous ways, it is unnecessary to do more than refer to his discussions with Stewart in relation to the Key Recommendations Memorandum. In the Key Recommendations Memorandum, Stewart acknowledged that there was inadequate storage for both barley and malt which had the consequence that there was no ability to reliably meet customer specifications, with the exception of customers being supplied by malt from Tamworth.[2778] Stewart spoke to Hughes about the Key Recommendations Memorandum and Hughes said he agreed with its contents.[2779] By this conduct, Hughes confirmed his knowledge at the time the Pre-Completion Representations were made that the assets of the Joe White Business were not sufficient for Joe White to sell malt in the volumes and for the returns stated in the Financial and Operational Information. Hughes also knew this was the view of all the senior operational executives of Joe White.

3457 Furthermore, based on his knowledge of these 4 matters,[2780] Hughes must have been in a position to know that it was not the case that Joe White had low future capital expenditure needs in the short to medium term.[2781] Presumably, this was reflected in part by what occurred some months earlier, namely the proposed inclusion of the

2778 See par 1216 above.
2779 See par 1218 above.
2780 See par 3299(1)-(4) above.
2781 See, for example, par 1216 above.

stated need of $30 million of net working capital in an early draft of the Information Memorandum (which was removed in its entirety).[2782]

3458 Having made these findings, it is also necessary to consider if, and if so the extent to which, Hughes knew of the making of the Pre-Completion Representations.[2783] In contrast to the allegations concerning the Financial and Operational Performance Representations, there was no allegation that Hughes himself made any of the Pre-Completion Representations for or on behalf of Viterra. Indeed, in what can only be described as a lacuna in this claim of deceit based on Hughes' knowledge, there was no pleaded allegation nor any submission directed to how it was said that Hughes knew that the Pre-Completion Representations were made at any time before Completion by Viterra.[2784] Despite this apparent deficiency, it is appropriate to refer to the relevant evidence, being evidence relating to the basis upon which the Pre-Completion Representations were alleged to have been made, coupled with Hughes' knowledge of such matters.

3459 The evidence disclosed that Hughes was aware of and approved the contents of each of the Reply Letters.[2785] The Viterra Parties did not dispute this.[2786] Accordingly, to the extent that the Pre-Completion Representations were alleged to be based upon the October 2013 Responses made in the Reply Letters, it has been established that Hughes was aware of that relevant information.[2787] However, Hughes was not privy to, and there was no evidence to suggest he was told about, what Mattiske said to Purser

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2782 See par 436 above. As for other information being removed, see par 4406 below.

2783 See par 3232 above.

2784 The Cargill Parties' submissions expressly identified what they relied upon in alleging that Hughes knew certain matters were false when the October 2013 Responses were made. The only submissions made by the Cargill Parties concerning Hughes' knowledge in this regard were that he contributed to the 25 October Reply Letter, he knew of the Viterra Practices, he knew of the Key Recommendations Memorandum and the Customer Review Spreadsheet, and he knew customers were unaware that their contracts were being breached.

2785 See pars 1395-1400, 1513 above.

2786 Indeed, they submitted that an inference ought to be drawn that Hughes believed the contents of the Reply Letters were correct. (The Viterra Parties' submissions referred to letters dated 22 and 30 October 2013, but the context made clear that it was intended to refer to the Reply Letters, that is the letters dated 25 and 30 October 2013.)

2787 As explained in pars 3286-3290 above, the first 4 of the October 2013 Responses were derived in part (but not entirely) from the contents of the 25 October Reply Letter.

during their discussions on 23 and 24 October 2013. Thus, there was no basis to find that Hughes' knowledge could be attributed to Viterra with respect to all the October 2013 Responses (and therefore each of the Pre-Completion Representations), as each of the first, third, fourth and fifth responses comprising the October 2013 Responses were alleged to have been given in part by reason of what Mattiske stated to Purser on 23 and 24 October 2013.[2788]

3460 Lest it be considered relevant despite the conclusion in the previous paragraph, some further observations should be made about Hughes' position at this time. It must follow from what is stated above that Hughes did not have the requisite knowledge of the facts in question so that it could be found that he knew the Pre-Completion Representations had been made. Accordingly, in respect of these allegations the falsehood of the Pre-Completion Representations could not be attributed to Viterra by reason of Hughes' knowledge of the Undisclosed Matters. However, Hughes must have fully appreciated that the contents of the Reply Letters were not directly responsive to Cargill's enquiries, that what was stated in relation to each of the Operational Practices was materially inaccurate and that the Viterra Parties had failed to make any proper disclosure of the Viterra Practices notwithstanding they were directly relevant to the enquiries.

3461 It must also be observed that the seriousness of the falsehoods stated by way of the contents of the Reply Letters was in some respects more acute than what had transpired concerning earlier false representations. By Hughes knowing of the contents of the Cargill 22 and 29 October Letters, as he did, he must have been fully aware that Cargill had made specific enquiries in relation to each of the Operational Practices, including as a result of what had been stated at the 15 October Meeting. In these circumstances, not only must it have been clear to Hughes that Cargill considered the issues that it had raised to be important, but also it must have been obvious that the materially inaccurate and inadequate responses in the Reply Letters

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2788 See pars 3282-3291 above. See also par 3427 above.

gave a false account of what was occurring in relation to the manner in which the operations of Joe White were being conducted.

X.35.4.2 The lawyers

3462 Naturally, the position of Fitzgerald and Mallesons must be considered separately. However, it is convenient to initially refer to them together as there was considerable overlap with some of the matters about which they were informed after the Cargill 22 October Letter.

3463 Self-evidently, both Fitzgerald and Mallesons (through Lindner) were aware of what had been said by Hughes, Youil, Stewart and Wicks on 23 October 2013.[2789] From these meetings, it was made clear to them both that the Operational Practices identified in the Cargill 22 October Letter existed, and were engaged in at least to a not insignificant extent.[2790]

3464 More specifically, in the meeting with the most senior Viterra executive involved in running the Joe White Business, Hughes, it was made known to Fitzgerald and Mallesons that, amongst other things:

(1) The Certificate of Analysis Procedure was adopted for every customer.[2791]

(2) The correct barley variety was not always available for supply to customers.[2792]

(3) The financial ramifications of Joe White's past conduct and inability to supply correct barley varieties up to March 2014 could be significant.[2793]

(4) The Gibberellic Acid Practice was carried out routinely at all plants

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2789 See pars 1276-1311 above.
2790 See, for example, pars 1285-1287 above.
2791 See pars 1280, 1285 above. See also par 1316 above in relation to further information provided to Fitzgerald.
2792 See pars 1281, 1286 above.
2793 Ibid.

when it should not have been.[2794]

(5) Ceasing the Gibberellic Acid Practice would have an adverse effect on production schedules, in the order of 20 percent with respect to the relevant customers, which would obviously have flow on effects for other production schedules.[2795]

(6) The financial impact of the conduct identified on the Joe White Business had not been ascertained with any precision.[2796]

3465 The meetings with Youil, Stewart and Wicks provided more information to Fitzgerald and Mallesons on the extent of the Operational Practices, including further details on the loss of capacity.[2797]

3466 As a general observation (which addresses a number of the Viterra Parties' submissions), even by the end of 23 October 2013 (still 2 days before any response was sent), the matters that Fitzgerald and Lindner had been informed of went well beyond what had been disclosed to Cargill at the 15 October Meeting, or at any other time before the Cargill 22 October Letter was sent.[2798] Critically, the Joe White executives had provided information on which Glencore and Viterra would have been able to form a level of understanding of the general prevalence of the Operational Practices. Even if, contrary to this conclusion, the information was insufficient to form any view with reasonable certainty, it must have been abundantly clear that there were very serious issues that needed to be addressed and that it would have been possible to obtain more detailed information if further enquiries were made.

3467 As a result of the information provided in the interviews, Fitzgerald and Lindner were informed of matters relevant to the Pre-Completion Representations. Those matters were disclosed by Viterra Ltd employees with knowledge of the facts, which facts

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2794 See pars 1282, 1287 above.
2795 Ibid.
2796 See pars 1283, 1288 above.
2797 See pars 1289-1310 above.
2798 See, for example, annexure C to these reasons.

indicated that:

(1) The Operational Practices were occurring to a significant extent.

(2) Once disclosed, the Operational Practices had the potential, if not the likelihood, to have a material adverse financial impact on the Joe White Business and its reputation.

(3) The production and sales figures stated in the Financial and Operational Information were not based upon compliance with customer contracts including customer specifications, and had not been properly and lawfully achieved.

However, the position in relation to the adequacy of Joe White's plant capacity was less clear. Certainly, nothing in Lindner's notes indicated that any of Hughes, Youil, Stewart or Wicks disclosed their joint view as recorded in the Key Recommendations Memorandum.[2799] In any event, as at the close of business on 23 October 2013, it seems likely that Fitzgerald and Mallesons were in a position to realise that there must have been a real question as to whether Joe White had low future capital expenditure needs in the short to medium term.

X.35.4.2.1 Mallesons

3468 Notwithstanding the position at the close of 23 October 2013, because of matters that occurred subsequently, I cannot be satisfied that Mallesons knew or even ought to have known of any of the matters identified in the preceding paragraph by the time the 25 October Reply Letter was sent. There are principally 2 reasons for this.

3469 The first arises out of the email that Lindner sent to herself on the evening of 24 October 2013.[2800] That email recorded a discussion with Fitzgerald that afternoon concerning whether or not the draft responses in relation to barley varieties and the use of gibberellic acid were misleading. In giving her evidence, Lindner had no

2799 See par 1216 above.
2800 See par 1383 above.

recollection of the discussion beyond being able to state that she was satisfied with the outcome. She was conscious that neither she nor anyone else from Mallesons had verified what was being said to Cargill.[2801] It was Fitzgerald who had been given the task of determining what steps ought to be taken in response to Mattiske's direction that an investigation needed to be carried out. Although Fitzgerald involved Lindner in the conversations with some of the Joe White executives on 23 October 2013 (by way of telephone), at no time was Mallesons instructed to give advice concerning what steps needed to be taken in response to the Cargill 22 October Letter. Further, there were numerous discussions and exchanges of information within Viterra and Glencore to which Mallesons was not privy.

3470 In these circumstances, particularly given that Lindner had specifically turned her mind as to whether or not what was intended to be stated would be misleading, and was given assurances that what was going to be stated was not, I cannot be satisfied that Mallesons knew that any of the October 2013 Responses was false or that Lindner (or anyone else from Mallesons) was reckless in that regard. On the contrary, on the limited evidence available as to what occurred, there could be no basis for such a finding.

3471 The second principal reason was the different position in which Mallesons stood. Self-evidently, it may be distinguished from that of Hughes who was aware of the material facts concerning the Viterra Practices. Further, Mallesons' position was markedly different from Fitzgerald in a number of material respects.

3472 *First*, as already touched upon, it was Fitzgerald who was determining what steps ought or ought not to have been taken in order to obtain sufficient information to be able to respond to the issues that had been raised. Thus, it was Fitzgerald who had the duty to report back faithfully and accurately (consistent with exercising reasonable care in the circumstances) to Mattiske. Although Mallesons assisted with drafting and gave advice on some matters, it was not asked to assume, and never assumed,

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2801 See par 1384 above.

responsibility for the conduct or outcome of the investigation.[2802]

3473 *Secondly,* as reflected in the exchange on 24 October 2013 between Fitzgerald and Lindner, it was Fitzgerald who was responsible for forming the view as to whether or not the responses were misleading. In accepting Fitzgerald's view that the proposed responses (subject to some changes) were not misleading, Lindner would have undoubtedly believed, reasonably, that Fitzgerald was in a better position to make this assessment. In contrast to Lindner's position, Fitzgerald was the long-standing general counsel at Viterra. Further, Fitzgerald had had significant opportunity to make further enquiries after the conclusion of the interviews with the Joe White executives, in circumstances where it was expressly contemplated during those interviews that further information would be provided to Fitzgerald.

3474 *Thirdly,* Fitzgerald had access or the ability to gain access to all, or substantially all, of the relevant information on the basis that it was Viterra's information, including the Customer Review Spreadsheet[2803] and the Key Recommendations Memorandum. He also had the ability to directly raise any issues with any executive he chose to speak to and to ascertain the state of affairs (for example, as illustrated by the email sent to Fitzgerald by Stewart on 24 October 2013).[2804] In contrast, although Mallesons was emailed various drafts of the Reply Letters, assisted in the drafting of these letters, and was informed along the way as to Hughes' reservations with respect to some matters,[2805] as well as assisting with drafting the talking points,[2806] Mallesons was not in a position to verify the underlying facts for itself or, on an informed basis, to form a view contrary to the instructions it had received about the information being conveyed not being misleading.

3475 *Fourthly*, Fitzgerald was in a position to ascertain categorically whether or not the Viterra Certificate of Analysis Procedure had been included in the Data Room

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2802 In substance, this was the position reflected in the Defence: see fn 2724 above. See also par 1312 above.
2803 See, for example, par 1270 above.
2804 See par 1387 above.
2805 See, for example, pars 1395-1401 above.
2806 See par 1344 above.

Documentation. In contrast, there was no evidence to indicate that Mallesons was ever instructed as to the result of enquiries in this regard.[2807] In such circumstances, there was nothing to indicate that Mallesons would have appreciated that the Viterra Certificate of Analysis Procedure was not included in the numerous documents that had been listed or that the belief Fitzgerald expressed on the evening of 23 October 2013 was incorrect.[2808] For reasons explained elsewhere,[2809] it has been found that Fitzgerald must have appreciated the omission of the Viterra Certificate of Analysis Procedure from the Data Room Documentation. It must have been apparent to him that such an omission was material.

3476 *Fifthly*, unlike Mallesons, Fitzgerald had the ability to check the veracity of assertions concerning the Reporting Practice and whether there was any accreditation that meant it complied with the International Organisation for Standardisation requirements. There was nothing in the Viterra Certificate of Analysis Procedure to suggest that any such requirements were being met or that any accreditation had been obtained.[2810]

3477 Further, it is instructive that, after listening to what had been said by the Joe White executives on 23 October 2013, Lindner was alive to the risk that the responses in relation to the use of incorrect barley varieties and the use of gibberellic acid when prohibited could be considered misleading "because they understated the frequency of the practices referred to".[2811] There was nothing in the evidence to suggest that Fitzgerald was told by any executive that the frequency of the Varieties Practice or the Gibberellic Acid Practice was otherwise than as disclosed on 23 October 2013. On the contrary, the further information he either received or was made aware of only fortified the position that the Operational Practices were implemented on a more than insignificant basis.[2812]

3478 The materially different position of Mallesons remained after the Cargill 29 October

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2807 See pars 1324, 1326 above.
2808 Ibid.
2809 See pars 1332, 1365, 1470 above.
2810 See also pars 1280, 1316 above and the references to "ISO audits" and pars 1355, 1398, 1533 above.
2811 See par 1383 above.
2812 See, for example, pars 1387-1388 above.

Letter was sent. Although Lindner was provided with further information[2813] and forwarded her initial draft of the 30 October Reply Letter,[2814] neither she nor anyone else from Mallesons was fully briefed on all that had been provided to Fitzgerald including as a result of the further letter from Cargill. Further, the 30 October Reply Letter was conspicuous for its non-responsiveness and its generality. Very little of substance was said beyond what had previously been said. Furthermore, the letter was drafted subject to Fitzgerald's comments and, to Lindner's knowledge, was also reviewed by Hughes.[2815]

3479 Moreover and in any event, unlike the involvement Mallesons had in settling the talking points for the earlier discussion with Purser, there was nothing to suggest that Mallesons fully understood what Mattiske actually told (or did not tell) Purser in his discussions with her.[2816]

X.35.4.2.2 Fitzgerald

3480 Including for the reasons set out immediately above, Fitzgerald's position was materially different from that of Mallesons. That said, it is difficult to state precisely what level of knowledge Fitzgerald had in circumstances where neither he nor Hughes gave evidence. Obviously, he was informed about numerous matters that were not conveyed to Cargill before Completion, and he was put on notice that the operations of the Joe White Business had been improper in a number of material respects.[2817] But also it must be acknowledged that it would be expected that Fitzgerald must have derived some level of comfort from the position adopted by Hughes (and to the lesser extent that he was involved, Stewart)[2818] in agreeing to the contents of the Reply Letters and the talking points.[2819] The manner in which Stewart

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2813 See par 1462 above.
2814 See par 1512 above.
2815 See par 1513 above.
2816 See further par 3482 below.
2817 See, for example, pars 1290, 1298, 1300, 1302, 1304, 1313-1318, 1323-1324, 1326-1332, 1352, 1365, 1373, 1387-1389, 1401, 1462 above.
2818 See, for example, pars 1323, 1334, 1352-1353, 1395 above.
2819 Noting that in relation to the 30 October Reply Letter, Hughes was directed not to make any changes and confined his response to the 3 numbered paragraphs of the letter by stating that none of what was contained in those paragraphs was inaccurate: see par 1513 above.

gave evidence at trial[2820] suggested that both he and Hughes were very defensive in relation to some aspects of what had been occurring. Beyond Mattiske's and Stewart's evidence on this issue (such as it was), the exact level and basis upon which Hughes sought to justify the position to Fitzgerald was not clear in the absence of evidence from either him or Fitzgerald. However, any alleviation of Fitzgerald's position could only go so far in light of the fact that it could not seriously be contested that improper conduct was disclosed to Fitzgerald. That said, to the extent it might have been said Fitzgerald was aware of the Pre-Completion Representations, this knowledge did not establish that he knew they were false, or did not genuinely believe them to be true, or was reckless in that regard.

3481 It is important to be clear about the allegations made. They are not that Viterra, by reason of Fitzgerald's knowledge, knew that some aspects of the talking points or the Reply Letters were false or did not genuinely believe them to be true, or there was recklessness in that regard. Rather this state of mind was alleged to exist, by reason of Fitzgerald's knowledge, in relation to the precise matters said to comprise the Pre-Completion Representations. Although the facts demonstrate that: (1) both Fitzgerald and Mattiske could and should have caused far more thorough and detailed investigations to have been undertaken in response to Cargill's queries,[2821] and that more detailed and meaningful responses could have been given; (2) Fitzgerald must have been aware that the Viterra Certificate of Analysis Procedure had not been disclosed in the Data Room or referred to in the talking points or the Reply Letters;[2822] (3) Fitzgerald must have appreciated that the Viterra Certificate of Analysis Procedure was a material document in relation to the queries made by Cargill concerning Certificates of Analysis;[2823] and (4) Fitzgerald was told by the Joe White executives that Joe White was supplying malt in breach of its customers' contracts,[2824] such matters did not establish the requisite state of mind to substantiate an allegation of

2820 See, for example, pars 168-177 above.
2821 By way of example, see fn 4545 below.
2822 See pars 1327, 1329-1331 above.
2823 Ibid.
2824 See par 1328 above.

fraud in relation to the Pre-Completion Representations based on Fitzgerald's position and knowledge.

3482 Further, and in any event, Cargill Australia's claim for deceit based upon the Pre-Completion Representations suffered from the same defect in relation to Fitzgerald's knowledge as it did in relation to Hughes's and Mallesons' knowledge. Although Fitzgerald (unlike Hughes) knew of the final form of the talking points and probably knew or believed that Mattiske spoke to those talking points in his discussion with Purser on 24 October 2013,[2825] such knowledge or belief did not establish that Fitzgerald knew the substance of the 4 responses forming part of the October 2013 Responses that were said to be stated orally by Mattiske.[2826] A comparison between the contents of the talking points and the Pre-Completion Representations shows that the talking points did not contain words to the effect that: (1) there had been some instances where barley other than that specified pursuant to a particular contract had been used;[2827] (2) Joe White had occasionally supplied malt to customers that included gibberellic acid in breach of customer contracts; (3) the Joe White Business was capable of producing the quality and quantity of malt contractually sold to customers;[2828] or (4) there was no fundamental issue with Joe White or the Joe White Business.[2829] Accordingly, there was no basis to infer that Fitzgerald knew any such responses had been given in those terms and therefore knew that the Pre-Completion Representations had been made.

X.35.4.3 Mattiske

3483 The position of Mattiske was markedly different from Hughes, Mallesons and Fitzgerald as he was directly responsible for the making of each of the October 2013 Responses. Thus, he had knowledge of each of the circumstances alleged to have

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2825 See par 1368 above.

2826 See par 3282(1), (3), (4), (5) above.

2827 Though it must be acknowledged the wording in the talking points on this issue was very similar: see par 1368 above.

2828 This topic was touched upon in the talking points, but not in the precise manner alleged as part of the Pre-Completion Representations.

2829 Although this might have been implicit from what was contained in the talking points and the Reply Letters, that was not the manner in which the case of fraud was pleaded by Cargill Australia.

given rise to the Pre-Completion Representations. However, his knowledge of the underlying matters was also markedly different and needs to be considered separately.

3484 At the outset, it must be observed that Mattiske was not told everything that he might have been told as a director of Joe White and Viterra.[2830] *First,* Hughes noted in his meeting with Fitzgerald and Mallesons on 23 October 2013 that before 22 October 2013 Mattiske was not aware of the Varieties Practice and related issues.[2831] *Secondly,* Youil noted in his meeting with Fitzgerald and Mallesons that before 22 October 2013 Mattiske was not aware of the 3 practices discussed.[2832] *Thirdly,* the Viterra Certificate of Analysis Procedure was not shared with Mattiske and he was not made aware that that procedure allowed for the alteration of results even when they were outside the band of 2 standard deviations.[2833] *Fourthly,* Mattiske had not seen the Customer Review Spreadsheet before being shown it in the witness box,[2834] and there was no evidence to suggest the Key Recommendations Memorandum was brought to his attention in 2013. *Fifthly*, contrary to the Cargill Parties' submissions, it would be incorrect to infer Mattiske was told everything Fitzgerald had been told by the Joe White executives. The evidence showed he was not, and also left real doubt about the extent to which Fitzgerald disclosed all relevant matters to Mattiske.[2835]

3485 In addition to Mattiske's general lack of knowledge of the operations of the Joe White Business and of the matters referred to in the preceding paragraph, Mattiske was largely relying upon others to inform him of the relevant information. In considering whether his state of mind in late October 2013 was capable of amounting to deceitful conduct on the part of Viterra, due weight must be given to the fact that Hughes, and Fitzgerald and Mallesons (who had spoken directly to Hughes, Youil, Wicks and Stewart about Cargill's queries), all approved of the contents of the Reply Letters. Further, unlike someone in Hughes' position who would have appreciated the

2830 But see also par 1375 above.
2831 See par 1281 above.
2832 See par 1295 above.
2833 See par 1313 above.
2834 See par 1429 above.
2835 It is not being suggested that Fitzgerald deliberately withheld information from Mattiske.

subtleties of Stewart's amending language in the talking points and his own changes to a draft of the 25 October Reply Letter, it was highly unlikely that Mattiske would have realised the significance of these amendments given his lack of knowledge,[2836] together with a level of distraction due to other matters he was handling at the time.[2837]

3486 There could be no real issue that some things that were conveyed by Mattiske were materially incorrect.[2838] Further, Mattiske must have fully appreciated that both the contents of the Reply Letters and what he stated to Purser did not properly respond to the direct questions being asked by Cargill,[2839] and that there was a real risk that Cargill could make claims arising out of the Acquisition after Completion.[2840] However, the evidence did not establish that Mattiske knew or was reckless as to whether what was in fact stated by way of the October 2013 Responses was incorrect. In circumstances where Mattiske's own knowledge was seriously deficient and where he ensured that those with a far better understanding of the relevant facts were directly involved in formulating the responses given to Cargill,[2841] there was no basis to find that, when he gave the October 2013 Responses and thereby made the Pre-Completion Representations, he knew they were false or did not genuinely believe they were true, or was reckless as to whether they were true or false.

X.35.5 Conclusion

3487 For the reason stated, Cargill Australia has failed to identify any person whose knowledge might have been attributed to Viterra who knew that the Pre-Completion Representations were made *and* also knew that they were false, or did not genuinely believe they were true, or was reckless as to whether they were true or false. In such circumstances, it cannot be found that Viterra had the state of mind alleged.

2836 See pars 1352-1353, 1399 above.
2837 See par 1485 above.
2838 See, for example, pars 1368, 1380, 1405, 1447, 1505, 1512, 1524 above.
2839 This conclusion effectively reflected Mattiske's evidence, albeit that he sought to justify the limited response on the lack of time available to carry out the investigations: see par 1320 above.
2840 See par 1467 above.
2841 That is the Reply Letters and the talking points.

3488 In summary, the Cargill Parties' submissions to the effect that certain statements were not honestly made and that there was an inexplicable and dishonest failure to disclose the Viterra Policies (including that they were wrongly stated to be the subject of International Organisation for Standardisation accreditation) did not specifically address the relevant matters. In relation to the persons identified by the Cargill Parties, it must be observed that their submissions comprised a series of matters that they contended 1 or more of Fitzgerald, Mattiske, Hughes and Mallesons knew, speaking broadly, was untrue. However, there was no attempt by the Cargill Parties to link these matters to 1 or more of the October 2013 Responses or the Pre-Completion Representations so as to identify the basis upon which it was alleged that Viterra had the requisite intent. Furthermore, the Cargill Parties submitted that Mattiske conveyed the Pre-Completion Representations, but made no submissions about how it was said that any of Fitzgerald, Mallesons or Hughes was aware each of them had been made. Although not expressly stated in their submissions, it would appear the Cargill Parties approached this issue on the basis that the knowledge of Fitzgerald, Mattiske, Hughes and Mallesons could be aggregated in order to establish the requisite intent of Viterra. If this was the correct understanding of their approach then, on the state of the authorities, this was bound to fail.

X.36 Did Viterra make the Pre-Completion Representations with the intent that Cargill Australia should rely on them by completing the Acquisition Agreement?

X.36.1 The Cargill Parties' submissions

3489 The Cargill Parties submitted that the Viterra Parties made the Pre-Completion Representations with the intent that Cargill Australia should rely on them by completing the Acquisition Agreement.[2842] It was submitted that there could be no other reason for the Viterra Parties to have responded in the way that they did.

3490 Further, it was submitted that Mattiske knew that Cargill would in fact rely on

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2842 The Cargill Parties pointed to Mattiske's evidence that he "believed that Cargill would consider carefully [his] response to the questions or concerns that it had raised".

Glencore's responses to the Cargill 22 and 29 October Letters. The Cargill Parties submitted that Mattiske's principal concern in October 2013 was to ensure Cargill would complete. They contended he did not wish to defer Completion,[2843] as it would have had the undesired consequence of leaving the Viterra Parties in control of Joe White and he did not wish to continue running the Joe White Business.[2844] It was submitted that Mattiske behaved accordingly in drafting and sending talking points to Fitzgerald and Lindner stating that "we will still close on the 31st October. And will proceed to this effect".[2845] They also noted that, after his conversation with Purser on 24 October 2013 but before the 25 October Reply Letter was drafted, Mattiske wrote an email to Fitzgerald, Lindner and Pappas which said that he "mentioned [C]ompletion about 3 times regarding 31 October is very close, [Purser] made no gestures or remarks in regards to deferral of the date".[2846].

3491 Furthermore, they referred to the evidence that following a conversation with Mattiske, Walt told King that Mattiske had conveyed his view to work towards closing and "to close and deal with a potential warranty claim thereafter".[2847]

X.36.2 The Viterra Parties' submissions

3492 The Viterra Parties submitted that Cargill Australia did not discharge its burden of proving that it was induced to act upon the Pre-Completion Representations.[2848]

3493 It was submitted that the October 2013 Responses occurred within a tight timeframe and "concentrated" on the Reply Letters. Further, they contended that Cargill anticipated that it would not receive any useful information in response to the Cargill 22 October Letter, and in particular:

(1) A file note from a teleconference on 18 October 2013 recorded that even

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2843 See fn 4545 below.
2844 See par 1181 above.
2845 See par 1351 above.
2846 See par 1377 above.
2847 See par 1454 above.
2848 The Viterra Parties relied on *Gould v Vaggelas* (1984) 157 CLR 215, 237.5-239.3 (Wilson J). See also par 3153 above.

though a letter would be sent to Glencore, Cargill would not be able to obtain any further information in relation to the effect of the Operational Practices and the cost to remedy them.[2849]

(2) After the Cargill 22 October Letter was sent, Viers discussed with Eden or Van Lierde that if Cargill did not inform the Viterra Parties of the specific financial effect caused by the Operational Practices, then Cargill would not receive an appropriate response.[2850]

(3) A proposed board paper for the Cargill board, prepared by Eden on 24 October 2013, noted that Joe White engaged in practices inconsistent with Cargill's guiding principles and stated that Cargill had "put Glencore on notice as per the [Acquisition Agreement] conditions. Our discovery of the details and costs to remedy will happen post close."[2851]

3494 Furthermore, the Viterra Parties submitted that the responses were provided in the context of Sale Process Disclaimers and the acknowledgements in clause 13.4 of the Acquisition Agreement,[2852] which demonstrated that the Viterra Parties did not intend for their statements to be relied upon. The Viterra Parties submitted that clause 13.4(a) operated to indicate reliance was absent by reason of the words "in proceeding to Completion".

3495 Moreover, it was submitted that the terms of the responses by the Viterra Parties did not support any suggestion that the Viterra Parties intended for Cargill Australia to rely upon them. It was contended the responses could not be relied upon, for the following reasons:

(1) The Viterra Parties repeatedly referred to the tight timeframes which limited their ability to investigate the matters raised in the Cargill 22

2849 See pars 1187-1188 above.
2850 See par 1271 above.
2851 See par 1411 above. See also pars 1409-1410, 1412 above.
2852 The Viterra Parties relied upon cl 13.4(a), (b), (d), (f)(i) and (ii), and 13.5: see par 1029 above.

October Letter.[2853]

(2) The Viterra Parties consistently made it clear that they were doing no more than passing on what they had been told by the Joe White executives.[2854]

(3) The responses did not seek to provide any firm information as to the extent of the Operational Practices,[2855] which would have been included if any communication was designed to encourage reliance. Therefore, in the absence of firm information as to the extent of the Operational Practices, no reliance was possible.

X.36.3 Analysis

3496 The question for determination was the intent of Viterra. Although the terms of the Acquisition Agreement were clearly relevant in considering this question, what was stated in the Acquisition Agreement (or, for that matter, the Confidentiality Deed) was not determinative.

3497 Upon receiving the Cargill 22 October Letter, the Viterra Parties had a number of options. One of those options was to refer to the Acquisition Agreement or the Confidentiality Deed (or both) and to indicate to Cargill that it was the Viterra Parties' position that whatever was said in response could not be relied upon. Despite the Viterra Parties conferring with expert lawyers in this field on how they should respond, they chose to give no such indication. Rather than take a legalistic approach, Mattiske assured Purser the Viterra Parties would act in good faith. This must have been, at least in part, because the Viterra Parties fully appreciated that Cargill took the matters that had been raised very seriously,[2856] such that if satisfactory responses were

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2853 See, for example, pars 1320, 1370 above.

2854 See, for example, par 1370 above.

2855 See par 1405 above.

2856 This was indicated to the Viterra Parties in a number of ways, including the contents of the Cargill 22 October Letter (see par 1236, including the reference to investigations and the necessity of remedying the situation before Cargill took control), the subject matter (being the possibility of conduct in breach of customers' contracts) and what Purser stated to Mattiske: see pars 1319-1322 above.

not communicated then there was a real risk that Cargill Australia would seek to defer Completion until satisfactory answers had been given.[2857] In this context, Mattiske fully understood that any response given would be viewed carefully by Cargill.[2858]

3498 Further, the Viterra Parties perceived it was strongly in their interests to ensure that Completion occurred as scheduled.

3499 In these circumstances, the obvious and only reasonable inference open was that by the Viterra Parties responding in the manner in which they did in the Reply Letters, coupled with Mattiske's discussions with Purser, it was intended that Cargill would rely upon the responses given, at least to the extent that it would cause Cargill to proceed with Completion. None of the matters put forward by the Viterra Parties provided any compelling reason to find that such an inference ought not be drawn.

3500 *First,* any suggested expectation by Cargill of whether or not Cargill would receive any useful information in response to the Cargill 22 October Letter did not directly address the issue of Viterra's intention. The extent to which, if at all, Viterra could have expected that Cargill would have anticipated that Cargill would not receive any useful information this would only be 1 factor relevant to the issue of whether or not Viterra intended for Cargill Australia to rely on the positive representations made. In any event, for reasons explained above,[2859] the evidence relied upon by the Viterra Parties did not establish that Cargill anticipated that it would not receive any useful information in response to the Cargill 22 October Letter. The position of Cargill as expressly stated by Purser was that Cargill expected the matters raised to be treated as serious.[2860] Unsurprisingly, what was stated by Purser properly reflected Cargill's position when it was on the cusp of paying $420 million.

2857 This appreciation was evidenced by Mattiske asking Purser on numerous occasions whether or not Cargill was going to proceed to Completion as agreed: see pars 1377, 1449, 1506 above. If Mattiske's evidence was intended to suggest he had no concern in this regard (in fairness, it was a little unclear from the questions put and answers given), then this contemporaneous evidence was more probative than any evidence Mattiske gave of his belief some 5 years after the relevant events: see par 1377 above.

2858 See fn 2842 above. See also pars 1489, 1508, 1521 above.

2859 See par 1412 above.

2860 See pars 1319-1321, 1372 above.

3501 *Secondly,* the short time between the requests for information and the time for Completion highlighted the weight Cargill placed upon the responses to its queries. With Completion as imminent as it was, and with the prospect of Cargill being able to access all information for itself only 8 to 10 days away,[2861] the fact that Cargill sought to raise the matters formally in writing and demanded a response before Completion was a clear indication to the Viterra Parties that those matters were of considerable significance.

3502 Further, this tight timeframe did not detract from the fact that Cargill was aware that the Viterra Parties had more than enough time to speak with the relevant operational executives to obtain a substantive account as to the existence and implementation of the Operational Practices and the likely extent to which any cessation would have impacted upon the Joe White Business.[2862]

3503 The suggestion by Mattiske that the timeframes were tight did not amount to an indication that the positive statements contained in the Reply Letters and the representations made by way of the October 2013 Responses were not accurate or could not be relied upon. On the contrary, Mattiske conveyed to Purser that the timeframe meant that the issues raised could not be fully investigated. However, he did not suggest in any way that the unequivocal statement that Cargill's concern about the ability of Joe White's plants to meet customers' specifications was unfounded might need to be qualified in some way, or that the stated position might change if further time had been available to investigate the issues.

3504 *Thirdly*, the Pre-Completion Representations were in part made in part orally and in part in writing by Mattiske, whose intention was to close the deal. Mattiske had a conversation with Purser on 24 October 2013, before the 25 October Reply Letter was drafted, where he mentioned Completion numerous times. Mattiske accepted that he did not raise with Purser the option of deferring the Acquisition to enable a proper

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2861 Depending on whether you include 22 October 2013 or 31 October 2013, or both.
2862 See par 3323 above.

investigation.[2863] After the Cargill 22 October Letter had been sent, and before the 25 October Reply Letter, Mattiske added to the talking points for an upcoming call with Cargill that the Viterra Parties still intended to close,[2864] evidencing the Viterra Parties' clear intention. Further, after receiving the Cargill 29 October Letter, Mattiske's view was to complete and deal with a potential warranty claim thereafter, which was conveyed to King and Walt.[2865]

3505 *Fourthly*, the fact that the Viterra Parties made it clear that they were passing on what they had been told by the Joe White executives said little, if anything, about the intention of the Viterra Parties. The Joe White executives were expected to be the source of much of the information about the operations of Joe White. Cargill had no reason to suspect that the executives under the direction of Glencore and Viterra would provide anything but reliable information.

3506 *Fifthly*, the Pre-Completion Representations provided relevant information as to the extent of the Operational Practices.[2866] In relation to each of the Operational Practices, the 3 responses given in both Reply Letters conveyed that they had occurred only to an insignificant extent.[2867] In circumstances where these very general responses were given to the specific questions raised, and were coupled with the assurance that any resulting loss or damage would not be significant, the only available inference sensibly open was that the Pre-Completion Representations were made to encourage Cargill to complete as scheduled without the need for Cargill to receive any definitive information.

3507 With regard to the Sale Process Disclaimers and clause 13.4 of the Acquisition Agreement, the Viterra Parties' submissions did not identify how these provisions prevented Viterra or Glencore from intending for Cargill Australia to rely on the Pre-Completion Representations. Put simply, they did not alter the objective fact that the

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2863 See fn 4545(8) below. For completeness, Mattiske gave evidence that if he believed he was dealing with a serious issue then he *may* have considered deferring Completion.

2864 See par 1351 above.

2865 See par 1454 above.

2866 See par 1405 above.

2867 See issue 25 above.

Viterra Parties chose to respond in terms that conveyed that the issues raised were not of any significance, and did so with the intention of ensuring Completion would proceed as scheduled.[2868]

X.37 Did Glencore know that the Pre-Completion Representations, or any of them, were or was false and/or did Glencore not genuinely believe the representations were true and/or was Glencore reckless as to whether they were true or false?

3508 For the same reasons issue 35 was answered in the negative, the answer to each of the questions raised in this issue is no.

X.38 Did Glencore make the Pre-Completion Representations with the intent that Cargill Australia should rely on them by completing the Acquisition Agreement?

3509 The Viterra Parties indicated that where their submissions for issue 36 above applied to Viterra, they applied equally to Glencore. They made no further submissions. For the same reasons that issue 36 was answered in the affirmative, the answer to the question raised in this issue is yes.

X.39 Is Viterra, by the operation of clause 31.15 of the Acquisition Agreement, deemed to have known of the facts, matters and circumstances pleaded in paragraphs 19 and 30 of the Statement of Claim, for the purposes of the Warranties?

3510 Clause 31.15 provided that where a Warranty was given to a Seller's awareness or knowledge, the Seller would be deemed to know of a particular fact, matter or circumstance *only* if 1 or more of Rees, Fitzgerald, Mann or Mattiske were actually

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2868 In light of this finding, it is not necessary to make any determination about whether the operation of clause 13.4(a) was confined to statements, representations, warranties, conditions, promises, forecasts or other conduct up until the execution of the Acquisition Agreement, or whether it also related to such conduct after execution and before Completion. However, the wording of the clause strongly suggested that it only related to conduct up until the time of execution as it was concerned with statements, etc which "may have been made" and made no reference to statements, etc which might be made after the Acquisition Agreement had been entered into: see par 1029 above.

aware of it on the date the Warranty was given *or would have been aware had he made reasonable enquiries* on the date the Warranty was given.[2869]

3511 In the Statement of Claim, Cargill Australia alleged that each of Rees, Fitzgerald and Mattiske knew of the facts, matters and circumstances concerning the Undisclosed Matters, or would have been aware of those facts, matters and circumstances had they made reasonable enquiries. This knowledge was alleged to have existed from at least early 2013, and further or alternatively at all material times from around mid-October 2013. It was further alleged that, by reason of these matters, Viterra was deemed to know of the Undisclosed Matters and that the Financial and Operational Performance Representations were false.

X.39.1 The Cargill Parties' submissions

3512 The Cargill Parties described the effect of clause 31.15, identified the individuals whose knowledge was relevant for the purposes of clause 31.15, and listed the Warranties provided to the Seller's awareness or knowledge, being Warranties 4.2(b), 7.3, 9.2 and 12(b) and (c). Further, they relied on their submissions with respect to each of these Warranties in submitting that Viterra ought to be deemed to know the relevant facts, matters and circumstances.[2870]

3513 However, in stark contrast to what was pleaded in the Statement of Claim, there was no attempt to make any submission as to how, by operation of clause 31.15, Viterra was deemed to have known of the facts, matters and circumstances pleaded in paragraphs 19 or 30 of the Statement of Claim.[2871] Accordingly, this issue will be addressed on the more limited basis in which the Cargill Parties chose to agitate it.[2872]

2869 For the complete wording of the clause, see par 1033 above.

2870 See issues 42, 43, 44 below. Despite what was stated in this part of their submissions, the Cargill Parties did not press any claim based on Warranty 4.2(b).

2871 Whether inadvertently or otherwise, the Cargill Parties' submissions identified this issue not by setting out the question as agreed, but rather recorded the question for issue 39 as to whether Viterra was deemed to have known *any* of the facts, matters or circumstances pleaded in paragraphs 19 and 30 of the Statement of Claim.

2872 In light of the Viterra Parties' submissions, it would appear this was the manner in which they approached it as well: see par 3517 below.

X.39.2 The Viterra Parties' submissions

3514 The Viterra Parties again submitted that the existence of the Undisclosed Matters had not been established, that the Financial and Operational Performance Representations were not conveyed, or if conveyed, were not false. Further or alternatively, they submitted that Cargill Australia had not established that Mattiske, Fitzgerald or Rees knew of the Undisclosed Matters,[2873] or that they would have been aware of them had they made "reasonable enquiries", or that the Financial and Operational Performance Representations were false. All these matters have already been addressed.[2874]

3515 The Viterra Parties correctly noted the Warranties were given on 2 occasions and that Viterra's knowledge was required to be considered as at both 4 August 2013 and at 31 October 2013.

3516 In relation to the language in clause 31.15, the Viterra Parties submitted it was concerned with attributing knowledge to the Sellers. They submitted that "deemed" in this context was a synonym for "attributed to" or "treated as having" or "considered for the purposes of the Warranties as having". They also submitted that "deemed" might not have been the happiest synonym.

3517 They further submitted that the focus of the court's considerations should be on knowledge of the circumstances alleged to constitute breach of any Warranty, namely:

(1) what were the facts, matters or circumstances alleged to constitute the breach; and

(2) in respect of each of Rees, Fitzgerald or Mattiske, was he either actually aware of those facts, matters or circumstances, or would he have been aware if he had made reasonable enquiries on the date the Warranty was given.

3518 In relation to reasonable enquiries, the Viterra Parties made the following

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2873 The Cargill Parties did not seek to establish the knowledge of Mann for the purposes of this or any other issue.

2874 See issues 10, 11, 15, 16, 22 above.

submissions:

(1) "Reasonable" for the purposes of "reasonable enquiries" depended on all the circumstances on the date the Warranty was given, including what enquiries could have been made on that date.

(2) Cargill Australia did not plead or particularise the reasonable enquiries that they contended that Rees, Fitzgerald and Mattiske ought to have made, and simply sought to draw an inference from the facts relied upon for allegations of actual knowledge.

(3) Rees, Fitzgerald and Mattiske were informed of the Warranty verification process and participated in the investigations following receipt of the Cargill 22 October Letter. Each of them should be held to have satisfied any obligation, to the extent it existed, to make reasonable enquiries.

3519 In relation to the Viterra Policies being available on Pulse, the Viterra Parties made the following submissions.

3520 *First*, in their written submissions, the Viterra Parties submitted that the evidence did not establish that any of Rees, Fitzgerald or Mattiske would have had access to the Viterra Policies on Pulse if they had searched for them. When it was put to the Viterra Parties' senior counsel that it would be an extraordinary inference for the court to draw that, in the absence of any evidence, neither the chief executive officer nor the general counsel of a company could have access to documents on the company's intranet, it was submitted that possibly they could have had access but they were not running the Joe White Business. The Viterra Parties contrasted the position of these 3 individuals with Argent. It was further submitted that while Mattiske was conducting some level of oversight, he was "2 levels up the chain". Further, it was submitted the evidence demonstrated that Mattiske did not look at any policies on Pulse that were specific to Joe White's operations and had not seen the Viterra Policies prior to giving

evidence. Furthermore, it was contended that there was no evidence that Rees had knowledge of the Viterra Policies.

3521 *Secondly*, it was submitted there was no reason for Fitzgerald, Mattiske or Rees to make enquiries into Joe White's operational practices or procedures, by looking at Pulse or otherwise, prior to entry into the Acquisition Agreement.[2875]

3522 *Thirdly*, it was contended by the Viterra Parties that the evidence did not support Cargill Australia's assertion that, if any of these individuals had made reasonable enquiries, they would have learned about the Viterra Practices or Policies. They submitted it could be inferred that if these individuals had asked the Joe White executives they would have been told that the Information Memorandum Statements and the Warranties were correct. The Viterra Parties relied on Hughes and Argent's verification of the Information Memorandum Statements, and Hughes, Argent, Youil, Wicks and Stewart's verification of the Warranties to contend that Rees, Fitzgerald and Mattiske would not have been informed of the extent to which any of the Information Memorandum Statements or the Warranties were inconsistent with the Undisclosed Matters.

X.39.3 Analysis

3523 The specific Warranties in question, namely 7.3, 9.2, and 12(b) and (c), are addressed in issues 43, 44 and 42 below respectively, including the arguments addressing clause 31.15 of the Acquisition Agreement in relation to those Warranties. However, it is convenient to consider here the more general submissions made, to the extent that they remain in light of the approach taken by the Cargill Parties.

3524 There was no real issue raised between the parties about the meaning of "deemed" in clause 31.15. Any of the suggested meanings put forward by the Viterra Parties was suitable. In essence, "deemed" in this context meant Viterra's knowledge being

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2875 This submission did not address the evidence that Fitzgerald was responsible for following up disclosure of "Company Policies" in the Data Room: see par 3608 below.

treated as the fact if a named person[2876] had actual knowledge or if reasonable enquiries on the specific dates would have disclosed the relevant information to 1 or more of those named persons.[2877]

3525 As to what "reasonable enquiries" entailed, the Viterra Parties were correct in submitting that what was reasonable depended on the circumstances, including the ability to make relevant enquiries. There was no suggestion that there were any availability issues in relation to any of the Joe White executives. On the contrary, the evidence indicated that they were effectively on-call (at least during office hours). Accordingly, for the purpose of considering reasonable enquiries that could have been made on 4 August 2013 or 31 October 2013, it must be presumed that any of Rees, Fitzgerald or Mattiske could have readily had access to the Joe White executives.

3526 With respect to the Warranty verification process, it was relevant to the question of what enquiries were reasonable on 4 August 2013 that each of Rees, Fitzgerald and Mattiske knew that Wilson-Smith had carried out some form of verification process. However, each of them being informed of the fact that it had purportedly been carried out did not equate to reasonable enquiries having been properly made on their part.[2878] Before it could be said that on 4 August 2013 any reasonable enquiries of Rees, Fitzgerald or Mattiske were limited or curtailed for the purposes of clause 31.15 based on the surrounding circumstances, the reasonable enquiries so diminished would have still included making such enquiries as were necessary to be reasonably satisfied that the verification process had been conducted in a manner that was likely to mean that the Warranties had been properly verified. In fact, no one from Viterra or Mallesons properly oversaw the steps Wilson-Smith took. Thus, to the extent it might have been argued that "reasonable enquiries" for the purposes of clause 31.15 might have included enquiries made of Wilson-Smith or someone else involved, for

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2876 Relevantly, Rees, Fitzgerald or Mattiske.

2877 In relation to the approach to construing, and the meanings of, "deemed" in different statutory contexts, see: *Macquarie Bank Ltd v Fociri Pty Ltd* (1992) 27 NSWLR 203, 207E (Gleeson CJ, with whom Cripps JA agreed); *Federal Commissioner of Taxation v Comber* (1986) 10 FCR 88, 96.4 (Fisher J); *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49, 65.5-65.8 (Windeyer J); *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693, 696.5 (Griffith CJ). As for an example of a contractual context, see: *Regal Consulting Services Pty Ltd v All Seasons Air Pty Ltd* [2017] NSWSC 613, [35]–[36] (McDougall J).

2878 See par 996 above.

the reasons explained in issue 125.6 below, on no view could it have been said that the process engaged in would have satisfied the criteria. Further, on the basis of what occurred with respect to the Warranty verification process, it could not be presumed that the reasonable enquiries would have been satisfied by simply asking any employee involved if the Warranties had been properly verified, as any such enquiry (other than the most superficial in nature) would have been highly likely to have resulted in a negative response.[2879]

3527 In circumstances where Viterra had an established intranet system, upon which all material policies and procedures were required to be available,[2880] reasonable enquiries would necessarily have included taking steps to check whether material policies on Pulse concerning Joe White's operations had been included in the Data Room.[2881] It was instructive that, when Wilson-Smith had been given the task of compiling documents including company policies for the Data Room, 1 of the steps he took was to conduct a search on Pulse in an attempt to obtain relevant policies.[2882]

3528 In relation to the submission that there was no reason for Rees, Fitzgerald or Mattiske to make enquiries into Joe White's operational practices or procedures prior to the Acquisition Agreement being entered into, this cannot be accepted in its entirety. Despite the terms of the Data Room Protocol to the effect that there was no obligation to disclose anything, Viterra engaged in the exercise of determining what documents ought to be included in the Data Room, no doubt in part in anticipation of some form of warranties which were intended to be given in due course.[2883] In this regard, Fitzgerald had a primary responsibility to ensure material company policies were included.[2884] Such a responsibility gave reason for Fitzgerald, either himself or by someone else under his supervision, to look at Pulse and to make other enquiries to ensure material operational policies were located. In any event, even if there was no reason for any of Rees, Fitzgerald or Mattiske to consider operational practices,

2879 See further issue 42 below.
2880 See pars 191-192 above.
2881 See Warranties 12(b) and 12(c).
2882 See par 669 above.
2883 See also par 619 above.
2884 See par 618 above.

policies or procedures *before* 4 August 2013, that situation in itself did not determine the question of what comprised reasonable enquiries as at 4 August 2013 for the purposes of clause 31.15. (Of course, there was no obligation for the reasonable enquiries to have actually been made. The question was of what any reasonable enquiries would have made each of them aware.)

3529 To the submission by the Viterra Parties that if reasonable enquiries had been made, none of Rees, Fitzgerald or Mattiske would have learned about the Viterra Practices or the Viterra Policies, the evidence strongly suggested to the contrary. Again, insofar as this submission relied upon a Warranty verification process having taken place before 4 August 2013, that did not establish that each of the Third Party Individuals had actually verified the truth of the Warranties in question. In fact, they did not.[2885] Further, to the extent this submission relied upon what occurred in relation to the preparation and finalisation of the Information Memorandum, the evidence concerning this aspect of the sale process was of limited probative value in any determination of what would have occurred if reasonable enquiries had been made of Hughes concerning the accuracy of the Warranties.[2886] Assisting in the preparation of a marketing document at the direction of Glencore and in accordance with its agenda to portray Joe White in a very positive manner was a fundamentally different exercise to responding to any enquiries about whether particular Warranties were true and correct. Although it has been found that Hughes falsely verified that the contents of the Information Memorandum were true and correct,[2887] it did not follow from this that he would have been likely to also falsely verify the Warranties if a proper enquiry had been made in that regard. The events in October 2013 demonstrated the response Hughes would have been likely to have made if any of Rees, Fitzgerald or Mattiske

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2885 See issue 125.6 below.

2886 There is no need to consider the position of Argent as there was no evidence that he was aware of the Viterra Practices or the Viterra Policies at any time before 31 October 2013. It suffices to say, that it would be unlikely that reasonable enquires would have resulted in queries being raised with Argent as he was not directly involved in operations. That this was so was reflected by what occurred in October 2013 when Mattiske, Fitzgerald, Rees and Norman only made enquiries of the Joe White executives involved in operations.

2887 See issue 22 above.

made reasonable enquiries of him about the accuracy or otherwise of the Warranties. Speaking broadly, at the very minimum Hughes would have been highly likely to have disclosed the existence of the Viterra Policies if the relevant circumstances had been explained to him as part of reasonable enquiries having been made.[2888]

3530 These observations in relation to reasonable enquiries were equally applicable to 4 August 2013 and 31 October 2013. Further, after the Cargill 22 October Letter the level of enquiries that were required to be made in order to be reasonable were far more extensive, in light of the queries raised by Cargill and the manner in which they were raised.[2889]

3531 In summary, for the reasons given below in addressing issues 42, 43 and 44, Viterra was deemed to have known of facts, matters or circumstances that meant that Warranties 12(b) and (c), 7.3 and 9.2 respectively were untrue and incorrect. Otherwise, as the Cargill Parties made no submissions on the point, no finding is made as to whether or not, by operation of clause 31.15, Viterra was deemed to have known more generally of the facts, matters or circumstances pleaded in paragraphs 19 and 30 of the Statement of Claim.

X.40 Are any of the Warranties to be read down or qualified pursuant to clause 13.3(a) of the Acquisition Agreement by any information that was fairly disclosed to Cargill Australia or otherwise within its knowledge which is inconsistent with the relevant Warranty?

3532 Speaking broadly, clause 13.3 qualified the Warranties set out in the Acquisition Agreement by requiring them to be read down to exclude from their operation information fairly disclosed to Cargill Australia during the sale process, and also information within Cargill Australia's knowledge before the Acquisition Agreement was signed.[2890] Although clause 13.1 concerned the time at which the Acquisition Agreement was entered into and the time of Completion, clause 13.3 did not

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2888 This is explained in more detail below when dealing with the particular Warranties in question: see esp issue 42 below.

2889 See pars 1234, 1319-1322, 3321, 3323-3324, 3497 above.

2890 See par 1029 above for cl 13.3 set out in full.

incorporate matters disclosed to Cargill in the period between when the Acquisition Agreement was entered into and the time of Completion.

3533 The Viterra Parties alleged, in effect, that Cargill Australia had knowledge of: (1) the Alleged Industry Practices; (2) the Undisclosed Matters; and (3) the Operational Practices.[2891] In accordance with this knowledge, it was submitted that the court should read down and qualify each Warranty in the Acquisition Agreement.

3534 This submission cannot be accepted for 3 reasons.

3535 *First*, the Viterra Parties did not discharge their burden of establishing that the Alleged Industry Practices were standard practices in the malting industry.[2892] Consequently, it could not be inferred that Cargill Australia had knowledge of these practices being standard within the industry.[2893] For the avoidance of doubt, the evidence disclosed that Cargill was aware of some nefarious practices in the malting industry, such as pencilling,[2894] but there was no evidence that anyone from Cargill believed anything similar to the Operational Practices were standard practices in the industry; quite the contrary.

3536 *Secondly*, what was said to have been disclosed in the Information Memorandum and during the Due Diligence in relation to the Undisclosed Matters fell short of establishing that Cargill Australia had knowledge of any of the Undisclosed Matters.[2895]

3537 *Thirdly*, the alleged disclosures to Cargill Australia in relation to Certificates of

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2891 In the case of the Undisclosed Matters, it was submitted that certain disclosures were made during the sale process by the Viterra Parties such that Cargill was informed of the Undisclosed Matters or some of them. Cargill's knowledge in this regard has been dealt with in issue 12 above. In the case of the Operational Practices, it was submitted that Cargill had certain knowledge pertaining to Certificates of Analysis, barley varieties, the use of gibberellic acid and grades of barley. Cargill's knowledge in respect of these matters has been dealt with in issue 21 above.

2892 The Viterra Parties bore the onus of establishing that the Alleged Industry Practices existed for the purpose of the Defence. See further issue 13 above.

2893 For completeness, any such inference would be directly contrary with Purser's evidence (which I accept) that Cargill's position in October 2013 was that none of the Operational Practices was standard industry practice: see par 1372 above.

2894 See issues 12, 13.3 above.

2895 See issue 12 above.

Analysis, barley grades and varieties, and the use of gibberellic acid, did not disclose anything that, objectively, gave any notification of the Undisclosed Matters or the Operational Practices.[2896] Therefore, any matters that were disclosed to Cargill Australia did not advance the Viterra Parties' defence on this issue.

3538 It follows that without having established: (1) the existence of the Alleged Industry Practices; (2) knowledge of any of the Undisclosed Matters; or (3) knowledge of the Operational Practices, there were no grounds for qualifying the Warranties with respect to what was alleged to have been disclosed to or known by Cargill Australia.

X.41 Did Viterra breach Warranties 4.2(a), (b) and (c) regarding its Records on the date of the Acquisition Agreement (4 August 2013) or at Completion (31 October 2013)?

3539 The Warranties and definitions are set out above.[2897] Warranty 4.2 was as follows:

> **4.2 Records**
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> The Records:
>
> (a) have been compiled and maintained in good faith;
>
> (b) to the best of the Share Seller's knowledge and awareness, do not contravene any Law; and
>
> (c) are complete and up-to-date in all material respects.

X.41.1 The Cargill Parties' submissions

3540 In relation to Warranty 4.2(a), the Cargill Parties submitted that, in the context of a contractual obligation requiring a particular act to be performed, the words "in good faith" meant to do the act: (1) honestly; (2) observing reasonable commercial standards of fair dealing in a particular line of business; and (3) absent an intention to defraud. The Cargill Parties submitted that the first and third were subjective elements, and the second element was objective.

3541 The Cargill Parties submitted that the "Records" were misleading, with reference to

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2896 See issue 21 above.
2897 See pars 1022, 1034 above.

their submissions to issue 16 above. Specifically, the Cargill Parties submitted that the Financial and Operational Information, conveyed in part by the Information Memorandum, the Management Presentation and the Commercial and Operations Calls, was misleading because it did not make reference to the existence, nature or extent of the Viterra Practices.

3542 With reference to their submissions in relation to issue 22 above, the Cargill Parties submitted that the misleading nature of the Financial and Operational Information was known to Hughes and his knowledge could be attributed to his employer, Viterra Ltd, and to the business in which he worked, being the business of Viterra Malt.

3543 As a result, the Cargill Parties submitted the "Records" had not been compiled in good faith because they could not have been compiled in a way they would have been if ordinary reasonable commercial standards had been observed.

3544 The Cargill Parties did not press their claim for breach of Warranty 4.2(b).

3545 In relation to Warranty 4.2(c), the Cargill Parties submitted that "complete" should mean "entire, thorough" and "without defect".[2898] Further, the Cargill Parties submitted that "material" should be understood as referring to something of importance to Cargill in its capacity as purchaser of Joe White.

3546 The Cargill Parties submitted that neither the Information Memorandum nor the Financial and Operational Information made any reference to the Viterra Practices or the Viterra Policies. Further, the Cargill Parties submitted that there was no explanation of the financial and operational effect of the Viterra Practices and the Viterra Policies on the Joe White Business.

3547 The Cargill Parties submitted that if their submissions on non-disclosure and the misleading nature of the Information Memorandum and the Financial and Operational Information were accepted,[2899] the only conclusion available was that the "Records" were incomplete due to the omission of any reference to the Viterra

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2898 Relying on the Oxford English Dictionary (2nd ed).

2899 See issues 16, 22, 26 above.

Practices and Policies. On the basis of the significant effect of the Viterra Practices on the value of the Joe White Business, the Cargill Parties submitted this was a "material" omission for the purposes of Warranty 4.2(c) such that that Warranty was breached.

3548 The Cargill Parties accepted that between entry into the Acquisition Agreement and Completion some information was provided to Cargill concerning the Viterra Practices. In this context, clause 13.8 of the Acquisition Agreement was addressed.[2900] The Cargill Parties submitted that this new information resulted in Cargill having knowledge that the Operational Practices might have existed, but that did not include any knowledge of their nature or extent, or impact on the performance of the Joe White Business.[2901] Therefore, the Cargill Parties submitted, the information disclosed in October 2013 could not support a conclusion that Warranties 4.2(a) and (c) were corrected or no longer misleading, as full and truthful disclosure was required to engage clause 13.8.

3549 Finally, the Cargill Parties submitted that the Defence was flawed on this issue.[2902] They submitted, to the extent it referred to information allegedly disclosed, the omitted information concerning the Viterra Practices was not included in the Defence and, to the extent it relied on obligations of confidence imposed or disclaimers made prior to entry into the Acquisition Agreement, these were not relevant as they must give way to express terms in the subsequent Acquisition Agreement.

X.41.2 The Viterra Parties' submissions

3550 *First*, the Viterra Parties submitted that the Information Memorandum and the Financial and Operational Information did not constitute "Records" for the purpose of Warranty 4.2.

3551 The Viterra Parties submitted that the Information Memorandum did not form part of the "Records" because this would be inconsistent with other clauses of the Acquisition

2900 See par 1029 above.

2901 Reference was made to their submissions in issue 24 above.

2902 In the Defence, in response to the allegation that each subclause of Warranty 4.2 had been breached, the Viterra Parties referred to pars 12, 15-21, 25, 26, 26A, 26B, 30-33, 37, 44-48, 54-62 of the Defence (the detail of which is unnecessary to refer to) without further elaboration.

Agreement. The Viterra Parties contended Records did not have the wide meaning suggested because "Records" were required to be:

(1) The subject of "reasonable access" by representatives of Cargill Australia prior to Completion, pursuant to clause 9.4.

(2) Handed over at Completion, pursuant to clause 5.4(d).

(3) Subject to retention obligations, pursuant to clause 23.

The Viterra Parties submitted that it was nonsensical to speak of these clauses operating in relation to the Information Memorandum. Therefore, it was submitted, it was not sensible to treat the Information Memorandum as part of the defined term, "notwithstanding the breadth of the definition".

3552 In relation to the Financial and Operational Information, the Viterra Parties noted that the definition of this term in the Statement of Claim referred to information "disclos[ed]" in the Information Memorandum and during the Due Diligence, which was alleged to have "conveyed" the Financial and Operational Performance Representations. On this basis, the Viterra Parties submitted that the Financial and Operational Information must only refer to information concerning Joe White's actual performance conveyed in the Information Memorandum or otherwise provided during the Due Diligence and not some broader concept of Joe White's records, as information not provided during the sale process could not have been "disclos[ed]", nor "conveyed" anything, to the Buyer.

3553 The Viterra Parties submitted that Cargill Australia had not sought to be precise in the Statement of Claim and that Cargill Australia's claim that this other unspecified financial and operational information should be considered to be "Records" should be rejected for lack of particularity. Further, the Viterra Parties submitted that if this submission was not accepted then, for the purposes of Warranty 4.2, the Financial and Operational Information must be the "Summary Historical Financials" section of the

Information Memorandum,[2903] subject to their submission that the Information Memorandum was not a "Record". Furthermore, the Viterra Parties submitted that if any underlying records were to be included, these must be the Data Books.

3554 *Secondly*, the Viterra Parties submitted that an inference should be drawn that Hughes believed that the Warranties, including Warranty 4.2, were true and correct and therefore no breach of Warranty 4.2 could be established.

3555 *Thirdly*, the Viterra Parties submitted that Warranty 4.2(a) had not been breached. In relation to the Financial and Operational Information, the Viterra Parties submitted that the figures in the summary historical financials section reflected the actual results obtained by Joe White and there was no evidence that the figures were falsified. Further, there was no reason to conclude that the summary historical financials were not compiled and maintained in good faith. Furthermore, the Viterra Parties noted that the Information Memorandum was prepared by King, who they submitted acted with care, noting that he gave evidence that he paid close attention to the section of the Information Memorandum dealing with financials. Finally, the Viterra Parties submitted that the Cargill Parties' loss expert[2904] accepted that he did not conclude that any financial statements of Joe White were incorrect or unreliable.

3556 *Fourthly*, in relation to Warranty 4.2(c), the Viterra Parties submitted that the only breach Cargill Australia relevantly relied upon was non-disclosure of the alleged Undisclosed Matters (in particular the Viterra Practices and the Viterra Policies) and there was no allegation that the Records were not up to date. Further, the Viterra Parties submitted that the summary historical financials conveyed high-level figures, and that there was no evidence that they were incomplete or out of date.

X.41.3 Analysis

X.41.3.1 The allegations

3557 The breaches of clause 4.2 were alleged in a number of ways. Relevantly, it was alleged Warranty 4.2(a) was breached because the Records included the Information

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2903 Appearing on page 42 of the Information Memorandum: see annexure B to these reasons.

2904 This was a reference to Klein: see par 3946 below.

Memorandum and the Financial and Operational Information, and each of them conveyed the Financial and Operational Performance Representations and was incomplete as the Undisclosed Matters (in particular the Viterra Practices and the Viterra Policies) were not disclosed, and Viterra knew of these matters or was deemed to have known them. As to the alleged breach of Warranty 4.2(c), it was alleged the Records were not complete and up-to-date in all material respects simply because the Undisclosed Matters were not disclosed in the Information Memorandum and the Financial and Operational Information.

X.41.3.2 What fell within the meaning of "Records"

3558 The definition of "Records" was broad. It provided for a number of examples which incorporated or extended the definition of, relevantly, "reports", "data" and "documents and other material of [Joe White] or exclusively or predominantly relating to [Joe White] or the [Joe White] Business", to include "sales literature, market research reports, brochures and other promotional material" and "all trading and financial records".[2905] The Information Memorandum clearly fell within the definition of a "Record" as it was "sales literature" or "promotional material" that "exclusively or predominantly" related to Joe White.

3559 Further, the Viterra Parties' submission that a number of clauses of the Acquisition Agreement made it nonsensical to apply "Records" to the Information Memorandum must be rejected. Where the definition of "Record" was so broad, it was unsurprising that not every description of "Records" in the Acquisition Agreement would apply neatly to each individual "Record". Thus, while some obligations related to "Records" (such as enabling reasonable access or handing them over at Completion) may have been unnecessary in relation to a relatively small number of "Records" already in the Buyer's possession, this situation did not justify excluding such materials from the definition of "Records". This is particularly so when such a document fell squarely within the definition as "sales literature" or "promotional material". Further, the definition of "Records" suggested by the Viterra Parties was inconsistent with the clear words of the definition appearing in the Acquisition Agreement. If there were a

2905 See par 1022 above.

real conflict between the clear definition and the clauses referred to, then a sensible construction of these clauses would simply limit their operation to the extent that the conflict existed, but not otherwise.[2906]

3560 However, as the Cargill Parties correctly submitted, there was no inconsistency as alleged. Clause 1.1 of the Acquisition Agreement specified that the words defined in that clause had the meanings stated unless the contrary intention appeared. To the extent that "Records" as defined might be said to be contrary to the intention of a particular clause, then the meaning of Records for that clause would be construed as being refined accordingly. For example, Records in clause 5.4(d) would simply be read as referring to records within the definition of Records that had not been delivered already. Similarly, clause 9.4 would be confined to records to which access had not been given already. Finally, it was not explained why a document like the Information Memorandum would need to be excluded from the retention obligations under clause 23, but assuming that were the case, then the meaning of Records for the purposes of that clause would be limited accordingly.[2907]

3561 Further, to the extent that the Viterra Parties' submissions referred to "'Records' of Joe White" in responding to this issue, if such language was intended to be exhaustive of documents that fell within the definition, then it was misplaced. As reflected by the reference to "its" in the framing of issue 41 (that is, "its Records" signifying Viterra's Records), "Records" was not confined to Joe White's records. The documents of the Sellers that came within the definition of "Records" were caught by the definition.[2908] For the reasons already discussed, the Information Memorandum came within that

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2906 Naturally, in construing a contract, consistency in the meaning of a term is ordinarily what would be expected to have been the common intention of the parties, but each contract must be construed according to its terms to discern objectively the intention of the parties.

2907 In response to this position, the Viterra Parties submitted it was not a question of looking for a contrary intention, but rather a question of finding "the" meaning having regard to the whole of the context. This submission ran contrary to the structure of the intended operation of the definitions which expressly contemplated that the meanings could be different depending on context.

2908 As may be seen from the definition, "Records" was not only concerned with documents "of the Company" but also encapsulated documents (and the other materials referred to in the definition) "exclusively or predominantly relating to [Joe White] or the [Joe White Business]": see par 1022 above. To the extent that the documents of the latter category fell within the definition of Assets (see par 1022 above), the Sellers were required to procure their transfer to Cargill Australia upon Completion pursuant to cl 17.1 of the Acquisition Agreement: see par 1031 above.

definition, and had been prepared by Viterra (in conjunction with, and under the control of, Glencore) for Viterra's sale of the shares in Joe White and the assets exclusively used in connection with the Joe White Business.

3562 In relation to the Viterra Parties' submission concerning the manner in which Financial and Operational Information was defined in the Statement of Claim, they were correct in contending that it was confined to the financial and operational performance as reported in the Financial and Operational Information disclosed in the Information Memorandum and during the Due Diligence. However, this observation concerning the manner in which Financial and Operational Information was defined did not appear to take the matter much further. As a general observation, "Undisclosed Matters" was not so confined and concerned the entirety of Joe White's financial and operational performance for the period from financial year 2010 to part of financial year 2013. Further, the way in which these allegations were made in the Statement of Claim referred to the Records as *including* the Information Memorandum and the Financial and Operational Information. In any event, as the allegations concerning alleged breaches of Warranty 4.2 were limited to being based upon the Information Memorandum and the Financial and Operational Information being incomplete, it is unnecessary to address the submission further.

3563 Equally, little need be said about the Viterra Parties' complaint concerning lack of particularity. There was no application to strike out the pleading on this basis, and the case must be determined on the pleadings as they stand.[2909]

3564 For the purposes of considering Warranty 4.2(a), the Financial and Operational Information included the financial and operational information disclosed in the Information Memorandum, the Management Presentation (including the Management Presentation Memorandum), and the summaries of the Operations Call and the Commercial Call. All these documents fell within the description of Records and the definition of Financial and Operational Information.

2909 Naturally, subject to any allegation that was not pressed by way of closing submission.

3565 For the purposes of considering Warranty 4.2(c), it is sufficient to consider the Financial and Operational Information conveyed within the Information Memorandum.

X.41.3.3 Warranty 4.2(a)

3566 The Financial and Operational Performance Representations have been found to have been made and have been found to have been misleading.[2910] The Financial and Operational Performance Representations were conveyed by the Financial and Operational Information, including in the Information Memorandum Statements.[2911]

3567 It has been determined elsewhere that the misleading nature of the Financial and Operational Information was known to Hughes and that this knowledge was attributable to Viterra.[2912]

3568 In the context of an implied contractual term, "good faith" has been described as being associated with "fair and reasonable".[2913] As a result of the materially misleading nature of the Financial and Operational Information, including as conveyed in the Information Memorandum, and to the knowledge of Viterra, the relevant "Records" were not compiled in good faith.

3569 The Viterra Parties' submissions that the Information Memorandum was prepared carefully by King, together with references to the Cargill Parties' loss expert's conclusion regarding the financial statements of Joe White, were not to the point. The fact that King exercised care in the process did not alter the fact that the Information Memorandum was materially misleading to the knowledge of Viterra. Further, the Viterra Parties' submission as to the position of Cargill's expert did not properly

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2910 See issues 15 and 16 above.

2911 Note, although the Information Memorandum, the Management Presentation, the Operations Call and the Commercial Call were relied on in the Statement of Claim in addition to the Financial and Operational Information to establish the Financial and Operational Performance Representations, to the extent these documents and calls conveyed the representations by definition they formed part of the Financial and Operational Information.

2912 See issue 22 above.

2913 *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, 570 [169]-[173] (Sheller, Beazley and Stein JJA). See also *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228, [28] (Buchanan JA, with whom Warren CJ and Osborn AJA agreed).

reflect the entirety of his evidence on the point.[2914]

3570 The above analysis applies equally in relation to the date of entry into the Acquisition Agreement and on Completion. Although some information was provided (and therefore Records containing more information were created) in the lead up to Completion, being the October 2013 Responses, these failed to disclose the Viterra Policies or the true nature and extent of the Viterra Practices.[2915] As a result, this information did not correct the misleading nature of the Information Memorandum or the Financial and Operational Information, or rectify the unsatisfactory manner in which, relevantly, the Records were compiled and maintained.

X.41.3.4 Warranty 4.2(c)

3571 It has been found that the Undisclosed Matters were not disclosed in the Information Memorandum, during the Due Diligence, or otherwise in the Financial and Operational Information.[2916] Further, it has been found that the financial and operational performance of Joe White in the period of financial years 2010 to 2013 (in part) was substantially underpinned by Joe White's implementation of the Viterra Practices, including the Viterra Policies.[2917]

3572 The submissions of the Cargill Parties on the meaning of "complete" and "material" were not seriously contested and should be accepted.[2918] In circumstances where the Viterra Practices underpinned the Joe White Business, the non-disclosure of the Viterra Practices in the Information Memorandum was clearly material and as a result the Records, relevantly, were not complete in all material respects, in breach of Warranty 4.2(c). The fact that the Viterra Policies were documents that formed part of the Records could not be said to have completed the Records. They were marked and filed in a manner that meant the Records remained incomplete.[2919] Further, there were no documents forming part of the Records which dealt with the Varieties Practice or

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2914 See the findings concerning the reliability of the historical financial statements of Joe White and the expert evidence in that regard at pars 4002-4003, 4218-4222, 4234, 4245 below.

2915 See issue 24 above.

2916 See issues 10 and 12 above.

2917 See issue 10.12 above.

2918 See par 3545 above.

2919 See further par 3574 below.

the Gibberellic Acid Practice.

3573 The above analysis applies equally in relation to the date of entry into the Acquisition Agreement and on Completion. Similar to the position with Warranty 4.2(a), the information disclosed in the lead up to Completion did not rectify the incompleteness of the the "Records",[2920] so that on the basis as pleaded the "Records" were not complete in all material respects at Completion.

3574 For completeness, the extraordinary manner in which the Viterra Policies were documented and archived must be noted. The marking of the Viterra Policies as "obsolete" and filing them on that basis in the Records System so as to mislead customers' auditors and auditors more generally meant that the Records had not been compiled or maintained in good faith, and were not complete or up-to-date.[2921] However, as this was not the manner in which the relevant allegations were pleaded, this fact *of itself* does not form the basis of the findings in relation to this issue.[2922]

X.42 Did Viterra breach Warranties 12(a), 12(b) and 12(c) regarding the Data Room Documentation on the date of the Acquisition Agreement (4 August 2013) or at Completion (31 October 2013)?[2923]

3575 The Warranties and related definitions are set out above.[2924] The matters the subject of Warranty 12 read as follows:

> **12 Data Room Documentation**
>
> (a) The Data Room Documentation has been collated and disclosed in good faith and with reasonable care.

2920 See issue 24 above.

2921 See pars 287-292, 1533, 2113 above and 4900 below.

2922 But was still relevant to the question of whether the Records more broadly were materially complete in light of the Information Memorandum also forming part of the Records (as discussed in par 3572 above).

2923 The different definitions of "Data Room Documentation" in the Statement of Claim and the Defence both did not faithfully replicate the definition of that term in the Acquisition Agreement: see fn 1337 above. As this issue concerned breach of Warranties in the Acquisition Agreement, obviously the term as defined in the Acquisition Agreement must be adopted as the relevant definition.

2924 See pars 1022, 1029, 1034 above.

(b) To the Share Seller's knowledge and awareness, no material information has been omitted from the Data Room Documentation.

(c) To the Share Seller's knowledge and awareness, the Data Room Documentation is true and accurate in all material respects.

X.42.1 The Cargill Parties' allegations and submissions

3576 The Cargill Parties referred to all the documents comprising the Data Room Documentation. They submitted the Data Room Documentation contained the Financial and Operational Information, and the list of the Data Room Documentation included reference to the Information Memorandum, Management Presentation Memorandum and summaries of the Operations Call and Commercial Call.[2925] The Cargill Parties subsequently withdrew this submission insofar as it related to the Information Memorandum.[2926]

3577 Cargill Australia pleaded certain matters that were alleged to give rise to these Warranties being breached. The first premise alleged to give rise to a breach was the Data Room Documentation was claimed to have included the statements to the effect set out in paragraph 2146(1) and (2) above (defined in the Statement of Claim as "the Data Room Statements"), the Operations Call Statements and the Commercial Call Statements. As to the Data Room Statements, these were alleged to have arisen on a different basis to the corresponding Information Memorandum Statements, namely from the Data Books, management reports for the period November 2010 to April 2013, an unadjusted trial balance of Joe White as at 31 October 2012 and a detailed breakdown of customers' sales volumes. It was further alleged that these statements conveyed the Financial and Operational Performance Representations, which were false. The second premise alleged was that the Data Room Documentation did not disclose the Undisclosed Matters, which comprised or contained material

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2925 In fact, the Management Presentation Memorandum and summaries of the Operations Call and Commercial Call were included in the Data Room, however the Information Memorandum was not.

2926 Ultimately, after seeking to advance a number of alternate bases to maintain the submission that the reference to Information Memorandum was appropriate, the Cargill Parties accepted the reference to it in their submissions should be removed.

information.[2927]

3578 It was further alleged that the Share Seller, Viterra Malt, knew or was deemed to have known of the matters set out in the preceding paragraph, and as a result, each of the subclauses of Warranty 12 was breached.

3579 In their submissions as to how it was contended Warranty 12 was breached, the Cargill Parties first addressed interpretation. In relation to Warranty 12(a), the Cargill Parties referred to their submissions above regarding the meaning of "good faith".[2928] The Cargill Parties submitted that in tort the standard of reasonable care is determined by consideration of the care a reasonable person would take, which is to be ascertained objectively. While acknowledging that to breach a contractually imposed duty to take care, such as that imposed by Warranty 12(a), does not strictly concern negligent conduct, they submitted that often the same facts would amount to both the tort and a breach of contract. With regard to reasonable care in the context of Warranty 12(a), the Cargill Parties submitted that the obligation would be breached if the Data Room Documentation did not include information that was reasonably accessible to the Sellers and likely to be considered necessary by a potential purchaser of the Joe White Business.

3580 The Cargill Parties submitted that each subclause of Warranty 12 was breached because the Data Room Documentation omitted the Viterra Practices and Policies. Further, they submitted the consequence of this omission was the Data Room Documentation was misleading regarding the production volumes, sales volumes and financial returns set out in the Financial and Operational Information. This contention was put on the basis that those volumes and returns were dependent upon the existence of the Viterra Practices, the implementation of which was in breach of sales contracts.

2927 Noting that the definition of Undisclosed Matters was a reference to each and all of the components of that definition: see par 1851 above. The Cargill Parties erroneously submitted that the expression "material information" had been discussed earlier in their submissions "and should likewise be given the same meaning". They later clarified the position by acknowledging the phase had not been previously referred to.

2928 See issue 41 above.

3581 The Cargill Parties further submitted that the omitted and misleading information was not corrected prior to Completion (when the Warranties were given again as at 31 October 2013).

3582 The Cargill Parties identified the key issue for Warranties 12(b) and 12(c) as whether the breach was within Viterra Malt's knowledge. In relation to entry into the Acquisition Agreement, the Cargill Parties relied on the deemed knowledge of Fitzgerald and Mattiske "by way of" Hughes' actual knowledge; presumably referring to what they would have become aware of had they made reasonable enquiries on the dates each Warranty was given. In this regard, the Cargill Parties relied on their submission in issue 11 above in relation to Hughes' knowledge of the existence and extent of the Viterra Practices, and on their submissions in issue 22 above in relation to Hughes' knowledge that the Financial and Operational Performance Representations were false.

3583 In relation to Mattiske's and Fitzgerald's knowledge, the Cargill Parties submitted that Mattiske and Fitzgerald would have known about the allegedly incomplete and misleading nature of the Data Room Documentation if they had made reasonable enquiries of Hughes or Stewart, or both, for the following reasons:

(1) Hughes and Stewart were asked to verify the Warranties, but the process of Warranty verification was inadequate and bordering on incompetent. It was submitted that, had Viterra properly conducted the Warranty verification process, it was likely that Hughes and Stewart would have disclosed, at least, that the Viterra Policies were not in the Data Room. Further, it was submitted that the Viterra Policies would have been readily disclosed, which was apparent from what occurred in October 2013.

(2) Fitzgerald was aware of the Viterra Code's introduction in 2010 and related circumstances; his knowledge said to be apparent from the email

sent on 11 August 2010,[2929] and Fitzgerald being asked to assist to co-ordinate a response to employees refusing to sign the Viterra Code.

(3) Fitzgerald was responsible for collating the policies for disclosure in the Data Room, including by supervising others. The Cargill Parties contended he failed to take steps, or ensure others took steps, to locate any policies relating to the Joe White Business other than policies relating to safety, health and the environment.[2930] It was submitted Fitzgerald should have made enquiries of Hughes or Stewart as to what policies were material. Had he done so he would have become aware of the Viterra Policies.

(4) As general counsel, Fitzgerald should have made enquiries as to the continued application of the Viterra Certificate of Analysis Procedure.

3584 In relation to Viterra's knowledge at Completion, the Cargill Parties submitted that Viterra had knowledge that the Data Room Documentation was incomplete because Fitzgerald knew that the Viterra Certificate of Analysis Procedure had not been disclosed in the Data Room.[2931] Further, based on what had been stated by the Joe White executives, it was submitted that each of Mattiske, Fitzgerald and Rees knew in October 2013 that the Viterra Practices had a material impact on the financial and operational performance of the Joe White Business.

3585 Finally, the Cargill Parties submitted that Mattiske, Fitzgerald and Rees failed to conduct a reasonable investigation into the matters raised by Cargill in October 2013, in particular the impact of those matters on the financial and operational performance of the Joe White Business. On this basis, it was submitted that each of them was deemed to know that the Data Room Documentation was incomplete.

X.42.2 The Viterra Parties' submissions

2929 See pars 156-157 above.
2930 See pars 618, 669-670 above.
2931 See pars 1323-1333 above.

3586 The Viterra Parties submitted that the documents disclosed in the Data Room were only alleged to have conveyed representations because they included the summaries of the Operations Call and the Commercial Call. This was contended on the basis that in paragraph 27 of the Statement of Claim the Data Room Statements were not alleged to form part of the Financial and Operational Performance Representations. The Viterra Parties submitted that allegations concerning the Operations Call Statements and the Commercial Call Statements in paragraph 27 of the Statement of Claim were limited to having contributed to the following of the Financial and Operational Performance Representations:

(1) Joe White had not withheld or concealed material information from customers.

(2) The assets of the Joe White Business were sufficient for Joe White to sell malt in the volumes and for the returns stated in the Financial and Operational Information.

(3) When procuring barley, Joe White gave priority to obtaining barley that best met its customers' specifications and requirements.

3587 Further, the Viterra Parties noted that each of the representations referred to immediately above were also alleged to have been made or contributed to by statements in the Information Memorandum and Management Presentation Memorandum (which were not the subject of the relevant allegations in this section of the Statement of Claim).

3588 The Viterra Parties noted that the remainder of Cargill Australia's pleaded allegations were the non-disclosure of the Undisclosed Matters, which were alleged to comprise or contain material information.

3589 On the basis that Hughes was not called and their contention that he verified the Warranties, the Viterra Parties submitted that an inference should be drawn that Hughes believed each of the Warranties, including Warranties 12(a), (b) and (c), were

true and correct.

3590 In relation to Warranty 12(a), the Viterra Parties submitted that unless Viterra's knowledge of the Viterra Practices was established, a lack of good faith should not be found. Further, it was submitted "reasonable care" should be understood in the context of the sale process, being a sale to a sophisticated and well-advised corporate group with experience in malting and express disclaimers and acknowledgements. Furthermore, the Viterra Parties submitted that the process of setting up the Data Room was entirely regular for a transaction of this nature; and referred to Bickmore working with Argent to collate documents, to the Warranty verification process and to evidence to the effect that confirmation was sought that all documents had been provided in the Data Room.[2932] Moreover, the Viterra Parties submitted that the fact that the Viterra Policies were not included in the Data Room did not mean it was set up without reasonable care, particularly where they contended the Viterra Policies were not known to Viterra.

3591 In relation to Warranty 12(b), the Viterra Parties submitted that Cargill Australia must establish both the omission of material information and Viterra Malt's knowledge as confined by clause 31.15 of the Acquisition Agreement. The Viterra Parties submitted that the emails demonstrated that Fitzgerald first became aware of the Viterra Certificate of Analysis Procedure on 23 October 2013 and at that time believed it had been disclosed in the Data Room. They referred to Mattiske's evidence that he had not seen the Viterra Certificate of Analysis Procedure until the trial. Further, the Viterra Parties submitted that there was no evidence that Rees was aware of this document, and no evidence that Mattiske, Fitzgerald or Rees were aware of the Malt Blend Parameters Procedure.

3592 The Viterra Parties referred to the communications between the Viterra Parties and Cargill in October 2013 and the fact that Cargill was informed that Joe White issued

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2932 This evidence was given by Lindner, but was very vague. Lindner gave evidence that "we went through a process to confirm that all relevant documentation had been provided in the Data Room", but could only say she suspected she participated in the process and that she had an "understanding" that Wilson-Smith was coordinating the process.

Certificates of Analysis in compliance with a documented procedure. They relied upon the fact that Cargill did not ask to see the procedure despite this information. Further, the Viterra Parties referred to the circumstance that Cargill Australia spoke to the Joe White executives in the 15 October Meeting.

3593 The Viterra Parties submitted that Cargill Australia could not now rely on the non-disclosure of the Viterra Policies in the Data Room because Cargill knew prior to 4 August 2013 that:

(1) Joe White used the Malt Proficiency Scheme, and Eden acknowledged this would alert someone to an analytical approach relating to 2 standard deviations.

(2) Joe White must have had policies concerning the production of Certificates of Analysis but did not ask to see them, despite being aware of the Alleged Industry Practices, aspects of the Undisclosed Matters (as submitted in issue 12 above) and matters relating to Certificates of Analysis (as submitted in issue 21 above).

3594 As a result, the Viterra Parties submitted that Warranty 12(b) should be read down pursuant to clause 13.3(a).[2933]

3595 In relation to Warranty 12(c), the Viterra Parties submitted that non-disclosure should not be regarded as a circumstance capable of giving rise to a breach of this Warranty, because this was covered by Warranty 12(b) which related to omissions. In addition, the Viterra Parties submitted that Cargill Australia was required to show that any lack of truth or accuracy was material and to Viterra Malt's knowledge. Further, the Viterra Parties submitted that Viterra was not aware of the Viterra Practices or Policies until after the Data Room closed. Furthermore, they contended the verification of the subclauses in Warranty 12 by the Joe White executives meant that any breach was not to Viterra Malt's awareness. The Viterra Parties repeated their submissions in relation to Warranty 12(a) in relation to the setting up of the Data Room. Finally, the Viterra

2933 See issue 40 above.

Parties referred to their submissions that the Financial and Operational Performance Representations were not made or, in the alternative were not false. Thus, it was submitted there was no breach of this Warranty.

X.42.3 Analysis

X.42.3.1 Related findings and the pleaded issue

3596 Findings already made relevant to this issue include that the Viterra Parties have not established the existence of the Alleged Industry Practices.[2934] Further, it has not been found that Cargill knew of the matters or had the state of mind as alleged in paragraph 31A of the Defence.[2935] Furthermore, it has been found that Viterra Malt knew of the Viterra Practices and Policies on 4 August 2013.[2936] Moreover, for reasons discussed below,[2937] to the extent that the Viterra Parties' submissions relied upon a duly performed Warranty verification process, those submissions cannot be accepted.

3597 It is convenient to address the Viterra Parties' submission concerning what was alleged in the Statement of Claim. It was correct to point out that paragraph 27 of the Statement of Claim made no reference to the Data Room Statements. However, it did not follow from that that the allegations concerning this issue were confined to the Operations Call Statements and the Commercial Call Statements. There were 3 reasons why this was so.

3598 *First*, it was alleged that the Data Room Statements were to the general effect alleged in the first 2 of the Information Memorandum Statements. Accordingly, the allegations in paragraph 27 of the Statement of Claim (which referred expressly to all the Information Memorandum Statements) included the substance of what was alleged to be the Data Room Statements.

3599 *Secondly*, the Data Room Statements necessarily fell within the definition of Financial and Operational Information in paragraph 19 of the Statement of Claim, those statements being Financial and Operational Information disclosed during the Due

2934 See issue 13 above.
2935 See issue 21 above.
2936 See issue 22 above.
2937 See issue 125.6 below.

Diligence. The Financial and Operational Information was also expressly referred to in paragraph 27 of the Statement of Claim, thereby incorporating the Data Room Statements (amongst other things).

3600 *Thirdly*, regardless of what was contained in paragraph 27, paragraph 44(a) of the Statement of Claim expressly alleged that the Data Room Statements, in conjunction with the Operations Call Statements and the Commercial Call Statements, conveyed the Financial and Operational Performance Representations. Therefore, whatever might have been said about what was or was not pleaded in paragraph 27 about the Data Room Statements conveying the Financial and Operational Performance Representations, the specific allegation was made in the relevant part of the pleading for the purposes of this issue.

3601 That said, in relation to the manner in which this issue was actually pleaded, the first premise from which Cargill Australia pleaded that Warranty 12 was breached must be rejected. It has not been established that the Data Room Statements, the Operations Call Statements and the Commercial Call Statements, or any combination of them, conveyed the Financial and Operational Performance Representations independent of the other statements relied upon to establish the Financial and Operational Performance Representations. Indeed, the Statement of Claim identified precisely how it was alleged the 10 representations comprising the Financial and Operational Performance Representations were made, and none of them were defined by reference only to statements to the effect of the Data Room Statements,[2938] the Operations Call Statements and the Commercial Call Statements. Tellingly, the Cargill Parties made no submission to this effect and in their closing submissions did not address this aspect of their pleading. In summary, although the Financial and Operational Performance Representations have been found to have been made,[2939] the alleged basis for these representations being conveyed by these 3 sets of statements was materially different to the manner in which it was principally pleaded that the

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2938 That is, the first 2 Information Memorandum Statements.

2939 See issue 15 above.

Financial and Operational Performance Representations were made.

3602 Accordingly, only the second premise on which Cargill Australia pleaded that the clause 12 Warranties were breached (namely, that the Data Room Documentation did not disclose the Undisclosed Matters, so material information was omitted and the Data Room Documentation was misleading regarding production volumes, sales volumes and financial returns) will be considered further. It has been determined elsewhere that the Undisclosed Matters were not disclosed during the Due Diligence, which finding necessarily included that they were omitted from the Data Room Documentation,[2940] as was the fact.

X.42.3.2 Knowledge or deemed knowledge

3603 To reiterate, Warranty 12(a) was not confined to matters of "the Share Seller's knowledge and awareness". Accordingly, in considering the knowledge of the existence and extent of the Viterra Practices in relation to both the questions of good faith and reasonable care, the exercise was not confined to matters the subject of clause 31.15 of the Acquisition Agreement. Warranties 12(b) and 12(c) were subject to Viterra Malt's knowledge and awareness, which was required to be established in accordance with clause 31.15.[2941] Pursuant to clause 31.15, Viterra Malt was deemed to have had knowledge of a fact, matter or circumstance only if any named individuals, including Mattiske and Fitzgerald, were aware of the relevant matter on the 2 dates the Warranty was given or would have been aware had they made reasonable enquiries on those dates.[2942]

3604 Turning to the relevant circumstances, had Fitzgerald made reasonable enquiries he would have been aware of at least the Viterra Policies, and that they had not been included in the Data Room, both on the date of entry into the Acquisition Agreement and at Completion. This is established by the following evidence.

3605 *First*, as discussed above,[2943] it has been found that Hughes had knowledge of the

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2940 See par 2746 above.
2941 See par 1033 above.
2942 See issue 39 above.
2943 See issue 22 above. See also par 2668 above.

Undisclosed Matters prior to entry into the Acquisition Agreement. Any basic enquiry of him would have revealed much if not all of this, which was substantially what occurred in late October 2013. Further, it was beyond dispute that Hughes knew of the Viterra Policies.[2944]

3606 *Secondly*, the most senior person at Viterra given the responsibility to ensure the verification process was properly carried out was Fitzgerald, who was also aware it was being conducted by Wilson-Smith.[2945] If Fitzgerald had conducted, or caused to be conducted, an adequate verification process of the Warranties, it is likely Hughes and others would have revealed the existence of significant aspects of the Undisclosed Matters, including at least the existence of the Viterra Policies. This position is supported by the fact that on a number of occasions Hughes had raised aspects of the Viterra Practices with others. In addition to this occurring within Viterra in 2010 (although the details were limited given the absence of a trial witness able to give direct evidence on the matter),[2946] and with Cargill at the 15 October Meeting (again, not in as much detail as might have been the case), most significantly Hughes described the Viterra Practices in detail, and explained that the Reporting Practice was documented, to Fitzgerald and others at and soon after the meeting on 23 October 2013.[2947]

3607 Without being exhaustive, a verification process, properly carried out so that each executive fully understood the relevant circumstances (including the meaning of the relevant clause, what documents had been included in the Data Room, and the seriousness of the occasion), that involved any of Warranties 4.2, 6.1(e), 7.3, 12, 13.4 or 17(a) would have been highly likely to have resulted in disclosure that material information had been omitted from the Data Room Documentation and that the Data Room Documentation was not true and accurate in all material respects. I so find.

3608 *Thirdly*, Fitzgerald was responsible (with his subordinate, Wilson-Smith) for following

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2944 See pars 90, 287 above.
2945 See pars 668 above and 4956, 4958 below.
2946 See par 162 above.
2947 See pars 1103-1132, 1279-1288, 1314-1316 above.

up disclosure of "Company Policies" in the Data Room.[2948] Regardless of how any Warranty verification process was conducted, had Fitzgerald made, or caused to be made, reasonable enquiries on 4 August 2013 about material company policies relevant to operations, including simply by asking Hughes or Stewart, he would have been highly likely to have discovered the existence of the Viterra Policies. The fact that the Refusal of Certain Terms included Viterra rejecting specific reference to the Joe White executives in clause 31.15,[2949] which was acceded to by Cargill, did not mean that reasonable enquiries did not include enquiries of the Joe White executives.

3609 To elaborate, the removal of any reference to the Joe White executives by Mallesons was part of an attempt to confine the operation of clause 31.15 to actual knowledge of 2 individuals, which attempt was unsuccessful. Not only was the list of individuals expanded to include Mann and Mattiske, but the ambit of the clause was further expanded to provide that Viterra's deemed knowledge would include the knowledge the named individuals would have had had they made reasonable enquiries.[2950] The reinstatement of this aspect of the deemed knowledge without express reference to the Joe White executives did not mean the Joe White executives were to be excluded from what any reasonable enquiries might have entailed. Rather, it simply meant that they were not necessarily included. Given the subject matter of the possible enquiry concerning Warranty 12(b) or 12(c), Hughes was the obvious person to approach concerning the material completeness, truth or accuracy of the Data Room. So much was demonstrated by the events in October 2013, when Hughes was immediately approached when Cargill raised queries about the Operational Practices in the Cargill 22 October Letter. In particular with respect to Hughes, it would be an absurd construction of the clause to suggest that reasonable enquiries excluded enquiries of the person most suitable to respond to such enquiries. In any event, even if it had been considered that someone other than Hughes ought to have been approached about reasonable enquiries, an enquiry of any senior employee involved in the operations of Joe White would have been highly likely to have resulted in that person

2948 See par 618, 669-670 above.
2949 See par 989 above.
2950 See par 992 above.

referring to the omission of the Viterra Policies given the integral part they played in the way Joe White operated. I so find.

3610 Further, the Viterra Policies were also available on Pulse, for anyone internally at Viterra to access.[2951] The Malt Blend Parameters Procedure had been on Pulse since 2012. Stewart gave evidence that the Viterra Certificate of Analysis Procedure was also on Pulse as well as Viterra's Records System. Had Fitzgerald searched for "certificate of analysis" the system would have brought up the Viterra Certificate of Analysis Procedure.[2952] Although the Viterra Policies had been marked "obsolete", reasonable enquires would have established their status. So much is clear from the position adopted by Fitzgerald on 23 October 2013, which demonstrated he was under no illusion about whether the Viterra Policies were current.[2953]

3611 *Fourthly*, upon discovering 1 or both of the Viterra Policies, reasonable enquiries both on 4 August 2013 and at Completion would have encompassed confirming whether they had been included in the Data Room. This must follow from the fact that the Viterra Policies were material to the operations of the Joe White Business.

3612 In short, whatever factual scenario might have been expected to have arisen if reasonable enquiries had been made, if any of Mattiske, Fitzgerald or Rees (all of whom on the evidence had no meaningful knowledge of how the Joe White Business operated) were to have made reasonable enquiries concerning Warranty 12(b) or 12(c) at the very least it would have involved 2 steps. The first of these would have been to ascertain what had been actually been included in the Data Room. Then, it would have been necessary to enquire of someone with knowledge about what material documentation needed to be included in order for there to have been no material omission and for the Data Room Documentation to be true and accurate in all material respects. There could be no real doubt that if such steps had been taken they would

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2951 See pars 192, 278 above. Stewart's unchallenged evidence on this issue has been accepted (see par 278 above); but even if there could be said to be some doubt about his evidence, there could be no real doubt that someone as senior as Fitzgerald would have been able to access policies on Pulse: see par 3476 above. In October 2013, there was no evidence to suggest any impediment existed: see par 1324 above. The Viterra Policies were also on the Records System.

2952 See par 192 above.

2953 See par 1324 above.

have resulted in policies which materially affected the manner in which every single customer order was met, namely the Viterra Policies, being disclosed as having been omitted and the enquirer being informed that their absence meant the Data Room Documentation was not being true and accurate in all material respects.

3613 As a result, by operation of clause 31.15, Fitzgerald was deemed to have knowledge of the relevant circumstances; being the existence of the Viterra Policies and their omission from the Data Room both as at the date of entry into the Acquisition Agreement and the date of Completion. It follows that Warranties 12(b) and 12(c) were breached on both of these occasions.

3614 Additional evidence relevant to the date of Completion supported this conclusion concerning the later point in time. It was incontrovertible that by this date Fitzgerald was aware of the Viterra Certificate of Analysis Procedure.[2954] On 23 October 2013, Fitzgerald stated that he believed it had been disclosed in the Data Room and that this was being checked. Reasonable enquiries included confirming whether the document was in the Data Room; a simple check would have revealed it was not there. Accordingly, in the unlikely scenario that he did not know of the document's omission as a matter of fact shortly after he sent his email on 23 October 2013,[2955] Fitzgerald was deemed to have been aware it was not in the Data Room at this time.

3615 The Cargill Parties also relied on Fitzgerald being aware of the email sent by Hughes to Gordon in August 2010, however it has been found that it is not possible to objectively form any view as to what Fitzgerald understood to be the true position at that time.[2956]

3616 Insofar as the Viterra Parties' submissions related to Fitzgerald's actual knowledge, these submissions only addressed part of the issue. For the reasons explained, deemed knowledge was sufficient for the purposes of clause 31.15 of the Acquisition Agreement and therefore Warranty 12(b) and (c).

2954 See par 1324 above.

2955 This point was effectively conceded by the Viterra Parties in closing submissions: see par 1327 above.

2956 See par 166 above.

3617 Given the conclusion in relation to Fitzgerald, it is unnecessary to consider Mattiske's knowledge or deemed knowledge.

3618 The Viterra Parties' argument that Cargill Australia could not rely on disclosure of the Viterra Policies because of what was actually disclosed prior to 4 August 2013 must be rejected. Neither the Viterra Policies themselves, nor the fact that they or some similar document existed which entrenched the conduct recorded in the Viterra Policies, were disclosed during this period.[2957]

X.42.3.3 Matters specific to Warranty 12(a)

3619 The meaning of the term "good faith" has been discussed previously.[2958] The Viterra Policies were significant to Joe White; it has been found that Joe White's financial and operational performance was substantially underpinned by Joe White supplying malt pursuant to the Viterra Practices, of which the Viterra Policies were a material part.[2959] It would be reasonably expected that such significant policies would be disclosed in the Data Room.[2960] Through Hughes, Viterra had knowledge of the Undisclosed Matters, including the existence of the Viterra Policies, and their effect on the Financial and Operational Information.

3620 The Cargill Parties have not shown that Viterra deliberately chose not to include the Viterra Policies in the Data Room.[2961] The evidence indicated that Hughes' involvement in the compilation of the Data Room was peripheral. Also, although Argent participated at a far greater level in collating documents, there was no evidence that he knew of, or was asked to make enquiries about, the Viterra Policies or company policies concerning operations of a similar nature. Further, there was evidence that Fitzgerald mistakenly believed that the Viterra Policies had been disclosed.[2962] This left open the real possibility that the Viterra Policies simply may have been inadvertently omitted from the Data Room, despite Viterra's knowledge of their existence. Given the seriousness of the allegations involving a deliberate

2957 See par 2744 above and issue 12 more generally.
2958 See par 3568 above.
2959 See par 2609 above.
2960 See pars 495-497, 619 above.
2961 See pars 662, 1324 above.
2962 See par 1324 above.

decision to exclude the Viterra Policies, the Cargill Parties have not established on the balance of probabilities that the Data Room Documentation was not collated and disclosed in good faith at the time the Acquisition Agreement was executed. This position was not altered by the further matters that were exposed in late October 2013. On the terms of the Acquisition Agreement, there was no obligation or occasion to add to the Data Room after the Acquisition Agreement had been entered into.

3621 In contrast, the facts demonstrated that the Data Room Documentation was not collated and disclosed with reasonable care. The division of the responsibility at different times between Bickmore and Wilson-Smith without proper supervision of the overall process was unsatisfactory.[2963] Further, Hughes or another senior executive engaged in the operations of the Joe White Business (such as Youil, Wicks or Stewart) ought to have been spoken to directly about the existence or otherwise of documents material to how the operations of the Joe White Business were conducted. Given their significance to Joe White, had Viterra acted with reasonable care and made the appropriate enquires it would have discovered that the Viterra Policies had not been disclosed in the Data Room and taken the reasonable step of including them. Furthermore, the evidence of Lindner on the topic of checking the Data Room Documentation was imprecise and speculative.[2964] It amounted to little more than her understanding of what had occurred. In short, there was no probative evidence that anyone did a meaningful check that all material documents, including any material policies concerning operations, had been included in the Data Room. On the evidence, it must be inferred that no such check was ever carried out. If it had been, it would have resulted in the disclosure of the Viterra Policies. As a result, Warranty 12(a) was breached upon entry into the Acquisition Agreement and upon Completion.

3622 The Viterra Parties' submission concerning the absence of any request by Cargill for the documented procedures cannot result in a different finding. *First*, whether or not Cargill made the request did not answer the question of whether or not reasonable

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2963 See pars 661-670 above.
2964 See fn 633 above.

care had been exercised by the Sellers absent such a request.[2965] *Secondly*, in circumstances where the Joe White Business was represented in the positive manner that it had been, including in relation to responses given during the Due Diligence, and ultimately Viterra Malt represented and warranted that no material information had been omitted, it was perfectly understandable that Cargill proceeded on the basis that there were no further material documents to be provided.[2966] *Thirdly*, although only relevant to the position before Completion, Mattiske positively represented to Cargill that the relevant documentation had been included in the Data Room,[2967] contrary to the fact.

X.42.3.4 Matters specific to Warranty 12(b)

3623 The omission of the Viterra Policies, which were clearly material to the Joe White Business operations, meant that material information was omitted from the Data Room Documentation. For the reasons explained above,[2968] Fitzgerald, and therefore Viterra Malt, was deemed pursuant to clause 31.15 of the Acquisition Agreement to be aware of the existence of the Viterra Policies and their omission from the Data Room Documentation. As a result, the omission was to Viterra Malt's knowledge and Warranty 12(b) was breached both upon entry into the Acquisition Agreement and upon Completion.

3624 The submission that Warranty 12(b) ought to be read down is rejected. For reasons already explained,[2969] disclosure of the Malt Proficiency Scheme did not amount to disclosure of the Reporting Practice or anything of that nature. Further, Eden's evidence did not suggest otherwise.

X.42.3.5 Matters specific to Warranty 12(c)

3625 The Viterra Parties' submission that omission *alone* was not sufficient to give rise to a breach of Warranty 12(c) may be correct. However, on no sensible reading of subclauses (b) and (c) together could it be considered that subclause (c) would not be

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2965 Naturally, if any such request had been made it may have increased the level of care required to have been duly considered as exercising reasonable care.

2966 A proposed warranty to this effect was included in the draft forwarded by Cargill on 29 July 2013.

2967 See par 1378(2) above.

2968 See pars 3540-3613 above.

2969 See par 223 above.

engaged despite the Data Room Documentation not being true and accurate because the reason for that state of affairs was some material information had been omitted. In other words, there was no apparent reason why both subclauses should not be construed according to the language used despite the fact that that might mean there was some overlap so that both subclauses might breached because of particular conduct. Further, to read subclause (c) down as a result of the language and operation of subclause (b) would be contrary to the express direction to construe each Warranty independently, as provided in clause 13.2 of the Acquisition Agreement.[2970]

3626 Turning to the facts, the omission of the Viterra Policies rendered the Data Room Documentation not true and accurate in material respects. *First*, the Viterra Policies were material to the operations of the Joe White Business but were not included in the Data Room or otherwise disclosed in the Due Diligence at any time.[2971] *Secondly*, the Data Room Documentation included Financial and Operational Information.[2972] *Thirdly*, the Financial and Operational Information as reported was substantially underpinned by Joe White's practice of supplying malt pursuant to the Viterra Practices and Policies. Therefore, as a result of the non-disclosure of the Viterra Policies, the Financial and Operational Information was rendered misleading, including the information included in the Data Room Documentation when viewed as a whole. Thus, to the extent it included misleading Financial and Operational Information, the Data Room Documentation was not "true and accurate in all material respects".

3627 In addition, to the extent that the Data Room Documentation did not include a material document relating to the operations of Joe White, it was also in breach of this Warranty because the material omission also meant that the Data Room Documentation was not true and accurate in all material respects.

3628 It was obvious that the Data Room Documentation included the Financial and Operational Information, and this must have been known to Fitzgerald. It has been

2970 See par 1029 above.
2971 See par 2744 above.
2972 See par 4825 below.

found above that Fitzgerald, and therefore Viterra Malt, was deemed to be aware of the existence of the Viterra Policies and their omission from the Data Room Documentation. The significance of the Viterra Policies to the Financial and Operational Information would either have been clear to Fitzgerald from the nature and content of the Viterra Policies themselves, or revealed by reasonable enquiries by Fitzgerald regarding the significance of the policies upon becoming aware of them. As a result, Fitzgerald is deemed to have known that the Data Room Documentation that contained Financial and Operational Information was not "true and accurate in all material respects". As a result, Warranty 12(c) was breached upon entry into the Acquisition Agreement and at Completion.

3629 The Viterra Parties' submission that Viterra did not become aware of the Viterra Practices or Policies until after the Data Room was closed was incomplete to the extent that it did not address Fitzgerald's deemed knowledge. Further, the fact the Data Room had closed was not a complete answer to whether these Warranties were breached, particularly in relation to the date of Completion when so much more information had been brought to Fitzgerald's attention concerning the Viterra Practices and Policies.

3630 With respect to the submission concerning Hughes' absence from the witness box, the fact that he was not called did not provide a basis for an inference that he would have given evidence that he believed the Warranties were true and correct. Leaving aside the unsatisfactory manner in which the Warranty verification process was conducted, in circumstances where the Viterra Policies were omitted from the Data Room, on no sensible view could it have been said that the Data Room Documentation had been collated and disclosed with reasonable care, or that no material information had been omitted from the Data Room, or that the Data Room Documentation was true and accurate in all material respects. Thus, it could not be inferred Hughes would have given any evidence to this effect.

3631 What is stated in the preceding paragraph also addresses the Viterra Parties' submission that the mere omission of the Viterra Policies did not demonstrate an

absence of reasonable care. It did not matter how sophisticated or well-advised the parties were, documents critical to how the operations of Joe White were conducted ought to have been included in the Data Room, and with the most elementary level of enquiries, it is highly likely that they would have been. Indeed, the sophistication and level of advice available to Glencore and Viterra made the oversight with respect to the Viterra Policies even more glaring than it might otherwise have been.

X.42.4 Conclusion

3632 Accordingly, Viterra breached Warranties 12(a), 12(b) and 12(c) on the date of the Acquisition Agreement and again at Completion.

X.43 Did Viterra breach Warranty 7.3 regarding defaults under Material Contracts on the date of the Acquisition Agreement (4 August 2013) or at Completion (31 October 2013)?

3633 Warranty 7.3 was as follows:

> **7.3 No default by the Company**
>
> To the Share Seller's knowledge and awareness, the Company is not in material default of any Material Contract, nor has anything occurred or been omitted which would be a material default but for the requirement of notice or the lapse of time or both.

3634 In relation to contracts for the sale of malt, Material Contract was defined in the Acquisition Agreement to include:

> [A]ny contract entered into by [Joe White] pursuant to which at least 20,000 tonnes of malt is supplied by [Joe White] over the term of that contract.

X.43.1 The Cargill Parties' submissions

3635 The Cargill Parties submitted that Joe White entered into Material Contracts with the following customers:

(1) San Miguel.

(2) Beer Thai.

(3) Beer Thip Brewery 1991 Co Ltd ("Beer Thip").

(4) Thai Beverages.

(5) Asia Pacific Breweries.

(6) SABECO.

(7) SAB Miller.

(8) Sapporo.

(9) HABECO.

3636 The Cargill Parties submitted that Joe White breached the Material Contracts for the sale of malt as a result of the supply of malt to customers pursuant to each of the Operational Practices. In relation to the Reporting Practice, they submitted Material Contracts were breached because of the incorrect reporting of customer specifications and as a result of supplying malt with a falsified Certificate of Analysis where the accurate reporting of malt test results was required under the terms of the contract.

3637 In relation to the meaning of "material default", the Cargill Parties referred to their general submissions in relation to contractual interpretation in respect of Warranty 4.2.[2973] Further, the Cargill Parties submitted that, in the context of "material breach", "material" should be found to mean "important" and to connote "significance".[2974] Furthermore, the Cargill Parties submitted that the focus was on the materiality of the breach, rather than the materiality of the obligation, and involved an evaluation of whether the particular breach had had a serious effect on the benefit the other party would have enjoyed if not for the breach.[2975]

3638 The Cargill Parties submitted that the breaches of the Material Contracts for the sale of malt were material because they had a serious effect on the benefit the customers would otherwise have been intended to gain. Further, the Cargill Parties submitted the breaches went to the characteristics of the product supplied to customers by Joe White and thus went to the core of trust and reliability between a supplier and its customers.

2973 See issue 41 above.

2974 *Androvitsaneas v Members First Broker Network* [2013] VSCA 212, [89] (Redlich and Priest JJA and Macaulay AJA).

2975 Ibid, [90]-[92].

3639 The Cargill Parties submitted that each of the Material Contracts in relation to the sale of malt included an implied term that Certificates of Analysis reporting the properties of malt delivered would not misrepresent the properties of that malt or whether compliance with contractual specifications had occurred.[2976]

3640 The Cargill Parties made submissions with respect to each of the 9 customers identified above separately. Only the submissions in relation to Asia Pacific Breweries are dealt with below. The other customers need not be considered in light of the conclusions reached in relation to Asia Pacific Breweries to the effect that Joe White was in material default of this Material Contract.

3641 In relation to Asia Pacific Breweries, the Cargill Parties first addressed the contractual requirements. The Cargill Parties submitted that the contract between Joe White and Asia Pacific Breweries required Joe White to supply malt according to Heineken's specifications for quality and other requirements and that the Heineken specifications expressly prohibited the use of additives including gibberellic acid. Further, the Cargill Parties submitted that the initially approved barley varieties were Gairdner, Stirling, Sloop and Schooner and from November 2011 the approved varieties were Gairdner, Stirling, Sloop, Baudin, Vlamingh and Flagship.

3642 In relation to the Gibberellic Acid Practice, the Cargill Parties submitted there was specific evidence that established that gibberellic acid was used for shipments of malt produced for Asia Pacific Breweries. The evidence relied on included the following:

(1) On 22 October 2013, Stewart requested Joe White production managers cease using gibberellic acid for "additive free" customers in preparation for Completion, specifically noting Asia Pacific Breweries.

(2) At around that time, Stewart prepared the Key Recommendations Memorandum for Hughes,[2977] in which Stewart confirmed it would take 6 months for Joe White to meet additive free requirements for Asia

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2976 This submission need not be considered in light of the conclusions reached below.

2977 See pars 1210-1217 above.

Pacific Breweries.

(3) The Customer Review Spreadsheet, as prepared by Stewart on 28 October 2013, recorded that Asia Pacific Breweries had a requirement to be additive free but that it was not currently additive free.

3643 With respect to the Varieties Practice, the Cargill Parties relied on the Barley Analysis.[2978] The Cargill Parties submitted that the Barley Analysis demonstrated that, for 75.32 percent of malt shipments to Asia Pacific Breweries, the malt was produced using non-contractual barley varieties. Further, the Cargill Parties submitted that the Customer Review Spreadsheet recorded that Joe White was unable to supply Asia Pacific Breweries with malt produced using the correct barley varieties for the remainder of financial year 2012-2013 or for financial year 2013-2014. Furthermore, the Cargill Parties submitted that the high proportion of orders that contained non-conforming barley varieties demonstrated the disregard with which Joe White treated the barley variety requirement for Asia Pacific Breweries.[2979]

3644 In relation to the Reporting Practice, the Cargill Parties submitted that the Barley Analysis demonstrated that 89.87 percent of malt shipments to Asia Pacific Breweries contained malt that failed to meet 1 or more customer specifications but it was reported in the Certificate of Analysis that that specification had been met.

3645 The Cargill Parties referred to their submissions at issue 11 above and the factual narrative for issues 25 to 29 above in relation to the Share Seller's knowledge and made further submissions, outlined below.

3646 *First,* in relation to knowledge prior to entry into the Acquisition Agreement, the Cargill Parties made submissions regarding Fitzgerald's knowledge. The Cargill Parties referred to the email sent to Fitzgerald on 11 August 2010 regarding staff members' refusal to sign the Viterra Code and concerns expressed by Hughes to Gordon, and submitted that these matters were, or could have been, conveyed to

2978 See pars 2311-2317, 2426-2543 above.
2979 See also pars 1335-1336 above.

Fitzgerald.[2980] Further, the Cargill Parties submitted that Fitzgerald was aware of the malt cost review aspect of the Malt Cost Reduction Transformation Project, and he had been provided information referring to the use of "off specification grades" and a proposal to use 75 percent off-grade barley.[2981] It was submitted that the relationship between the use of off-grade barley and the "false certification concerns" raised by Joe White staff should have been clear to Fitzgerald; and that once Fitzgerald was aware that inaccurate Certificates of Analysis were being provided, reasonable enquiries would have included ascertaining whether Joe White was complying with contracts. The Cargill Parties submitted that information about customer contracts was readily available within the Joe White Business, and reasonable enquiries would have resulted in Fitzgerald becoming aware that Joe White was in material default of customer contracts, including the contract with Asia Pacific Breweries dated 24 November 2008. Further, the Cargill Parties submitted that as the Viterra Parties did not call Fitzgerald, a *Jones v Dunkel*[2982] inference should be drawn regarding enquiries made by Fitzgerald in 2010 when he was notified of staff members' refusal to sign the Viterra Code.

3647 *Secondly,* in relation to knowledge prior to Completion, the Cargill Parties made submissions in relation to Fitzgerald, Mattiske and Rees. The Cargill Parties referred to the Cargill 22 October Letter, received by Mattiske and Fitzgerald.

3648 In considering Fitzgerald's knowledge, the Cargill Parties relied on specific evidence including the following:

(1) On 22 October 2013, Fitzgerald was copied to an email from Hughes referring to the Customer Review Spreadsheet.[2983]

(2) On 23 October 2013, Fitzgerald conducted interviews with Hughes, Youil, Stewart and Wicks.[2984] During these interviews, Hughes informed Fitzgerald that Joe White had some contracts where it was

2980 See pars 156-157 above.
2981 See par 131 above.
2982 (1959) 101 CLR 298.
2983 See pars 1265-1266 above.
2984 See pars 1276-1311 above. The submissions erroneously submitted Rees also attended these meetings.

using non-approved barley and that Joe White was routinely using gibberellic acid when not permitted. Stewart informed Fitzgerald that Joe White was changing the results in Certificates of Analysis and customers were not being informed that the incorrect barley variety was being used.

(3) On 24 October 2013, Fitzgerald was informed by Stewart that Joe White had complied with contractual requirements regarding barley variety on only 74 percent of shipments packed in the week of 9 to 15 September.[2985]

3649 In relation to Fitzgerald, Mattiske and Rees, the Cargill Parties relied on a meeting on 29 October 2013, after receipt of the Cargill 29 October Letter.[2986] The Cargill Parties submitted that after this meeting Mattiske reported to others that gibberellic acid was used to produce approximately 70,000 tonnes of malt for Asia Pacific Breweries when not permitted and that Joe White had insufficient quantities of required barley varieties to supply malt to Asia Pacific Breweries.[2987]

3650 The Cargill Parties further submitted in relation to Fitzgerald and Rees that a *Jones v Dunkel*[2988] inference should be drawn that their evidence would not have assisted the Viterra Parties to establish that Fitzgerald or Rees had made reasonable enquiries in October 2013 concerning Joe White's material default of Material Contracts.

3651 Finally, the Cargill Parties submitted that no facts or circumstances inconsistent with Warranty 7.3 were fairly disclosed to Cargill prior to entry into the Acquisition Agreement so that clause 13.3 of the Acquisition Agreement did not operate to modify Warranty 7.3.

X.43.2 The Viterra Parties' submissions

3652 The Viterra Parties submitted that Warranty 7.3 referred to Joe White not being "in" material default and so only related to contracts, or defaults, that were currently

2985 See pars 1387-1389 above.
2986 See pars 1457-1466 above.
2987 See par 1467 above.
2988 (1959) 101 CLR 298.

subsisting at the relevant date and did not relate to concluded contracts or historical defaults. The Viterra Parties made a number of submissions in relation to the contracts relied upon by the Cargill Parties (including some contracts that were concluded by the date of the Warranties), express contractual terms and the clarity of specifications.[2989] For the purpose of this issue, these submissions will be dealt with only to the extent they related to Asia Pacific Breweries.

3653 The Viterra Parties submitted that many specification documents were tendered in relation to Asia Pacific Breweries so it was difficult to determine which specification applied in respect of a particular shipment. Further, the Viterra Parties noted that various agreements were expressly governed by foreign law, or contained dispute resolution clauses, making the question of breach complicated as a matter of fact and law. A number of examples were given which did not include Asia Pacific Breweries.

3654 In relation to the implied term relied on by the Cargill Parties, the Viterra Parties submitted that Certificates of Analysis did not misrepresent the properties of the malt delivered.[2990]

3655 The Viterra Parties submitted that Cargill Australia provided little specific evidence going to breach of any particular contract in any particular respect. The Viterra Parties described Cargill Australia's claim as follows:

(1) Impermissible use of gibberellic acid, sought to be proved by way of reliance on the matters raised in issue 10 above.

(2) Use of unauthorised barley varieties in reliance on the Barley Analysis and the particulars in schedule E to the Statement of Claim.

(3) Misstatements in Certificates Analysis in reliance on the Parameters Analysis, contended to be based on data from the Laboratory Information System and not by reference to any contractual document.

2989 For matters relevant to some of these submissions, see pars 2299-2301 above.

2990 Again, these submissions need not be considered in light of the conclusions reached below.

3656 The Viterra Parties submitted that these matters were directed to establishing that Joe White conducted its business "routinely" in accordance with the Viterra Practices and Policies and contended that the Cargill Parties had failed to establish this. Further, the Viterra Parties submitted that the court should not accept this global approach and that the Cargill Parties had failed to establish that a particular term of a particular Material Contract was breached by particular conduct to amount to a material default. It was contended, therefore, that the Cargill Parties had failed to prove breach of Warranty 7.3 on the relevant dates.

3657 On the basis that Hughes was not called and the Viterra Parties' contention that he verified the Warranties before the Acquisition Agreement was entered into, the Viterra Parties submitted that an inference should be drawn that Hughes believed each of the Warranties, including Warranty 7.3, was true and correct.

3658 In relation to materiality, the Viterra Parties submitted that, in all the circumstances, none of the matters relied on were material, including any breach as at the date of entry into the Acquisition Agreement or at Completion. This was put on the basis that it was unlikely that any breach would have been material as Material Contracts were in respect of at least 20,000 tonnes of malt over the life of the contract and therefore any shipments the subject of presently subsisting breaches were likely to have been of relatively small amounts when considered against the context of the whole agreement.[2991]

3659 In relation to knowledge, the Viterra Parties submitted that, to the extent Joe White was in any material default of Material Contracts, Viterra Malt was not aware of that fact. The Viterra Parties submitted that, for example, Fitzgerald's knowledge following the Cargill 22 October Letter was entirely dependent on what he was told by the Joe White executives and was consistent with what was conveyed to Cargill Australia in the Reply Letters.[2992] It was contended that what Fitzgerald knew from

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2991 Again, the Viterra Parties submitted Cargill Australia had not established the Undisclosed Matters existed and that the Alleged Industry Practices were engaged in by other commercial malthouses. These submissions are contrary to the findings in issues 10 and 13 above.

2992 This submission has been rejected elsewhere: see, for example, pars 1373-1375 above.

the events in October 2013 could not amount to knowledge of a material default.

X.43.3 Analysis

3660 Subject to the issue of knowledge or deemed knowledge, Warranty 7.3 would have been breached if Joe White was in "material default" in relation to *any* Material Contract. As a result, it is sufficient to consider the contract for supply of malt to Asia Pacific Breweries.

3661 The contract with Asia Pacific Breweries was a "Material Contract" pursuant to the Acquisition Agreement. The contract was for Joe White to supply a guaranteed volume of 80,000 tonnes of malt per year. It was on foot at both relevant dates as it ran for the period from 1 April 2010 to 31 March 2014. For the reasons discussed below, Joe White was in material default in relation to this contract both upon entry into the Acquisition Agreement and on Completion.

3662 The Cargill Parties' submissions that the term "material default" should be attributed the meaning "important" and connoted "significance" should be accepted.[2993] This interpretation was not resisted by the Viterra Parties.

3663 The Gibberellic Acid Practice and the Varieties Practice each amounted to a material default in relation to the relevant contract. The undisclosed deliberate use of gibberellic acid when expressly prohibited by Asia Pacific Breweries was reprehensible conduct and unquestionably was a material default. Equally, the undisclosed deliberate use of a barley variety or barley varieties other than that permitted by the contract was a material default. There could be no doubt that Heineken would have treated it as such,[2994] and objectively it would have been entirely justified in doing so.[2995]

2993 *Androvitsaneas v Members First Broker Network* [2013] VSCA 212, [89] (Redlich and Priest JJA and Macaulay AJA).

2994 See, for example, pars 1709, 1817-1819, 1822, 1835 above.

2995 The Reporting Practice need not be considered for the purpose of this issue given the conclusions reached in relation to the Gibberellic Acid Practice and Varieties Practice. This is not to say the implementation of the Reporting Practice for the Asia Pacific Breweries contract did not also amount to a material default. Lest there be any doubt, it almost goes without saying that the deliberate covert

3664 To elaborate, in relation to the Gibberellic Acid Practice, it has been found that Asia Pacific Breweries prohibited gibberellic acid and that gibberellic acid was used routinely when it should not have been at all relevant times up until Completion.[2996] Further, the Customer Review Spreadsheet provided specific evidence that gibberellic acid was used in malt for Asia Pacific Breweries. Although this document was created in October 2013, there was nothing to suggest such conduct was only a recent occurrence; quite the contrary. The contract in question was an ongoing supply contract that resulted in malt being supplied continuously pursuant to 129 orders between July and October 2013 and the Gibberellic Acid Practice was implemented routinely. As such, Joe White must have been in material default at the time the Acquisition Agreement was entered into and at Completion.[2997]

3665 In relation to the Varieties Practice, it should first be noted that there may have been some inconsistency between the Customer Review Spreadsheet, which listed 3 approved varieties for Asia Pacific Breweries (Gairdner, Stirling and Sloop, and the Cargill Parties' submissions that from November 2011 the approved varieties were Gairdner, Stirling, Sloop, Baudin, Vlamingh and Flagship.[2998] This reflected what was pleaded in the Statement of Claim (which was alleged to be the contractual position). This possible inconsistency was immaterial for the purposes of resolving this issue.[2999] On the more expansive list of approved varieties, non-approved varieties were used for 272 orders in the period of 1 January 2010 to 31 October 2013.[3000] Further, although these orders spanned a number of years, the evidence also showed non-approved barley varieties were supplied to Asia Pacific Breweries on numerous occasions every

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misstating of results of analyses conducted of malt delivered to customers was also a material default.

2996 See pars 2544, 2553 above.

2997 It is unnecessary for the purpose of this finding to make any determination about whether malt was delivered precisely on 4 August 2013 and 31 October 2013. The concept of breach of contract, including anticipatory breach, does not mean that a contract is breached only for a moment in time.

2998 It has been found elsewhere that the evidence suggested the Customer Review Spreadsheet was accurate or substantially accurate: see pars 1434-1436 above. Further, the Customer Review Spreadsheet stated the position as at October 2013, and these particular details may have changed from the position in November 2011.

2999 The more likely explanation for the difference was not that there was an inconsistency, but that the approved varieties changed after November 2011; as it was confirmed on 29 October 2013 that the only approved varieties for Asia Pacific Breweries were Gairdner, Stirling and Sloop: see par 1462 above.

3000 See pars 2428, 2484 above. Further, if the tighter list of approved varieties was used, non-approved varieties were used for 561 orders.

month from July to October 2013. In addition, the Customer Review Spreadsheet made clear there was an ongoing issue as there was an inability to supply all barley varieties as required.

3666 The Viterra Parties' submissions are rejected for the following reasons.

3667 *First*, the specifications in relation to Asia Pacific Breweries were sufficiently clear to determine that there was a material default in relation to the contract for supply of malt to Asia Pacific Breweries. At a bare minimum, it was sufficient that it has been established that the contract prohibited the use of gibberellic acid. To that end, the Cargill Parties have established that a particular material term of a particular Material Contract was being breached at the relevant times, namely the additive free requirement in the contract for supply of malt to Asia Pacific Breweries.

3668 *Secondly*, it was incorrect to suggest that "any shipment(s) the subject of presently subsisting breach(es) were likely to have been of relatively small amounts when considered against the context of the whole of the agreement" *and therefore* any breach was not likely to be material. As at the date of entry into the Acquisition Agreement, Joe White was, and continued to be, in material default in respect of their contract with Asia Pacific Breweries due to the numerous instances of the supply of malt with prohibited gibberellic acid and with non-approved barley varieties during the period of the contract to that time. Breaches in the period from the contracts' commencement remained unremedied at the date of Acquisition Agreement and at Completion. As a result, the Viterra Parties' submission that only some subset of those breaches were relevant, which were "presently subsisting" at date of the Acquisition Agreement or at Completion, cannot be accepted. Even if it were accepted, the evidence demonstrated subsisting breaches.[3001] Moreover, given the serious deception involved in such a flagrant breach of contractual requirements, even relatively small quantities that were delivered because of the errant conduct must be considered to have been a material default.

3001 See pars 3664-3665 above.

3669 Warranty 7.3 was subject to Viterra Malt's knowledge and awareness, which must be established in accordance with clause 31.15 of the Acquisition Agreement.[3002]

3670 With respect to knowledge prior to entry into the Acquisition Agreement, the Cargill Parties relied on Fitzgerald's knowledge. In relation to Fitzgerald's actual knowledge, it has been found that he must have had some knowledge of some practices or strategies of Joe White, however the evidence did not establish he had full knowledge of the extent of such practices or strategies, nor specific knowledge of the Reporting Practice, the Varieties Practice or the Gibberellic Acid Practice.[3003] The specific matters relied on by the Cargill Parties, including the emails sent in 2010 and the Malt Cost Reduction Transformation Project, were therefore insufficient to establish his knowledge of material defaults of Material Contracts.[3004] As a result, actual knowledge has not been established. However, for the same reasons as discussed in relation to issue 42 above, had Fitzgerald made reasonable enquires he would have become aware of material breaches of the contract for supply of malt to Asia Pacific Breweries (and other major customers). Fitzgerald was the most senior person with responsibility for the verification process and had that process been conducted adequately it is likely Hughes and others would have revealed significant aspects of the Undisclosed Matters, including non-compliance with customer contracts. Had Fitzgerald then conducted reasonable enquiries he would have discovered the material defaults in relation to contracts for the supply of malt to customers, including Asia Pacific Breweries.[3005] Further, independent of any verification process, the most basic of enquiries about any policies concerning operations of Joe White would have revealed the existence of the Operational Practices, and thus the ongoing material defaults of Material Contracts.[3006]

3671 In relation to knowledge prior to Completion, at the meetings held on 23 October 2013

3002 See par 1033 above.
3003 See pars 2684-2687 above.
3004 It has been found elsewhere that it is not possible to objectively form any view as to what Fitzgerald understood to be the true position as a result of the August 2010 emails: see pars 166, 3615 above.
3005 See pars 3606-3607 above.
3006 See par 3608 above.

Fitzgerald was informed that Joe White was in default of contracts for the supply of malt as a result of using non-approved barley varieties and non-approved gibberellic acid.[3007] As a result, Fitzgerald had actual knowledge that Joe White was in default in relation to contracts for the supply of malt, including to Asia Pacific Breweries.[3008] If it was not already clear that this default was material (which seemed highly unlikely), reasonable enquiries would have confirmed this to have been the case. Mattiske's knowledge was also evidenced by what was said at the meeting held after receipt of the Cargill 29 October Letter.[3009] After this meeting, Mattiske reported to others the supply to Asia Pacific Breweries of at least 70,000 tonnes of malt produced using gibberellic acid and that sufficient quantities of the barley varieties Asia Pacific Breweries expected to receive were not available in Australia.[3010]

3672 As a result, the material default of Material Contracts was within the knowledge of the Share Seller pursuant to clause 31.15 of the Acquisition Agreement for the purposes of Warranty 7.3 both on 4 August 2013 and on 31 October 2013.

X.43.4 Conclusion

3673 In the interests of not making these lengthy reasons unnecessarily lengthier, the analysis of this issue has been confined to the position of Asia Pacific Breweries. For the reasons stated above, Warranty 7.3 was breached in relation to Asia Pacific Breweries both on the date of the Acquisition Agreement and the date of Completion. Such a finding makes it unnecessary to consider other Joe White customers identified by the Cargill Parties.

3674 However, for the sake of completeness it should be added that, having reviewed the submissions and evidence in relation to each of these other customers identified by the Cargill Parties, subject to some possible exceptions, Warranty 7.3 was also breached in relation to the Varieties Practice on at least 1 or both of the 2 dates in question by reason of material defaults with respect to the Material Contracts on foot.

3007 See pars 1281-1282 above.
3008 See, for example, par 1462 above.
3009 See also pars 1460-1461 above.
3010 See pars 1447-1467 above.

Those exceptions were for: (1) Beer Thai, Beer Thip and Cosmos Brewery Thailand Co Ltd where it appeared the supply contracts may have expired before 4 August 2013; and (2) SAB Miller where there was no evidence of incorrect barley varieties being used for any of the months from July to October 2013.

X.44 Did Viterra breach Warranty 9.2 regarding facts capable of giving rise to a Claim on the date of the Acquisition Agreement (4 August 2013) or at Completion (31 October 2013)?

3675 Warranty 9.2 was as follows:

> **9.2 No claims or disputes**
>
> At the date of this agreement, there are no Claims or disputes relating to the Business and, to the best of the Share Seller's knowledge and awareness, there are no facts or circumstances which may give rise to a Claim or to any legal, administrative or government proceedings.

X.44.1 The Cargill Parties' submissions

3676 The Cargill Parties referred to their submissions in respect of issue 43 above in relation to material default of the Material Contracts related to the sale of malt and the knowledge of Fitzgerald, Mattiske and Rees.

3677 The Cargill Parties relied on the existence of the Operational Practices, and the fact that they were not disclosed to customers, as facts or circumstances which may have given rise to a Claim against Joe White. The Cargill Parties submitted that Joe White engaged in this conduct and misled its customers in contravention of section 18 of the Australian Consumer Law. Further, the Cargill Parties submitted that Joe White breached the terms of the Material Contracts related to the sale of malt by failing to supply malt in accordance with contractual specifications by engaging in the Operational Practices. The Cargill Parties submitted this was so regardless of the fact that there was no evidence that any Claims had been made at the date of the Acquisition Agreement or the date of Completion, or had arisen after Completion.

3678 Furthermore, the Cargill Parties submitted, relying on their submissions in relation to issue 21 above, that no facts or circumstances inconsistent with Warranty 9.2 were

fairly disclosed to Cargill in the Disclosure Material or Transaction Documents or otherwise were within Cargill's knowledge, nor were they disclosed in writing during the Due Diligence. Thus, it was contended that clause 13.3 of the Acquisition Agreement did not operate to modify Warranty 9.2.

X.44.2 The Viterra Parties' submissions

3679 The Viterra Parties referred to the allegations made in the Statement of Claim and noted there was no allegation of any existing Claim at the date of the Acquisition Agreement or the date of Completion; rather, the relevant allegations were confined to prospective Claims against Joe White, or existing facts or circumstances that could give rise to Claims because of the failure of Joe White to comply with customer contracts, including customer specifications. Accordingly, it was submitted that it was necessary for Cargill Australia to establish that Viterra Malt was aware of the facts or circumstances relied on for the purposes of clause 31.15 of the Acquisition Agreement.

3680 Further, the Viterra Parties relied on their submissions at issue 10 above in relation to the existence of the Undisclosed Matters and at issue 43 above, in submitting that Cargill Australia's allegations lacked specific evidence of any breach. They also repeated their submission that an inference should be drawn that Hughes believed each of the Warranties, including Warranty 9.2, was true and correct.

3681 The Viterra Parties further relied on their submissions at issue 39 above, including the Warranty verification process, to submit that, to the extent there were prospective Claims, Viterra Malt was not aware of them.

3682 Finally, the Viterra Parties submitted that breach could only result in nominal damages in the absence of any prospective Claims eventuating.

X.44.3 Consideration

3683 The Operational Practices have been found to have existed, to have not been disclosed to customers, and to have constituted material defaults of customer contracts,

including Material Contracts.[3011] The Operational Practices, together with their non-disclosure to customers, clearly amounted to facts or circumstances "which may [have] give[n] rise" to a Claim by any affected customers. This was so regardless of whether or not Claims ultimately arose as a result of the facts or circumstances. Thus, any lack of specificity in relation to the allegations made could be of no moment.[3012] In proving that the Viterra Practices were implemented throughout the relevant years, the Cargill Parties have established that customer contracts were being breached systemically by reason of each of the Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice. Hughes was fully aware of this (as were others) and could not have been expected to give evidence that the Warranties were true and correct, including not being able to state that there were no facts and circumstances as at 4 August 2013 or 31 October 2013 which might have given rise to a Claim.

3684 The conclusion has been reached in respect of issue 43 above that the Operational Practices were within Viterra Malt's knowledge and awareness for the purposes of the Share Seller's Warranties, upon entry into the Acquisition Agreement and at Completion, at the very least because they would have been uncovered by reasonable enquiries by 1 or more of the relevant persons. It was axiomatic that knowledge or deemed knowledge of the Operational Practices necessarily meant knowledge or deemed knowledge of facts or circumstances which might have given rise to a Claim against Joe White by its customers. As a result, Warranty 9.2 was breached both upon entry into the Acquisition Agreement and at Completion. The position as at Completion was even more certain. In light of what Fitzgerald was told by Hughes, Youil, Wicks and Stewart after the Cargill 22 October Letter,[3013] there could be no doubt that he had actual knowledge of facts and circumstances which might have

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3011 See issues 10 and 43 above.

3012 In fact, the Cargill Parties' closing submissions provided details of alleged breaches of customer contracts between 2010 and 2013 because of the Varieties Practice which ran for 83 pages, with as many as 25 orders per page (most of which were alleged to be orders in which the barley variety supplied was in breach of contract). It is unnecessary to discuss these individually in light of the finding made immediately above and also because of the findings made concerning the Barley Analysis: see issue 10 above.

3013 See par 1311 above.

given rise to a Claim.[3014]

3685 In light of the findings concerning the operation of clause 15.4(b) of the Acquisition Agreement,[3015] it is unnecessary to discuss any issue in relation to damages.

X.45 Did Viterra breach Warranties 13.4 and 17(a) regarding the conduct of the Joe White Business on the date of the Acquisition Agreement (4 August 2013) or at Completion (31 October 2013)?

3686 Warranties 13.4 and 17(a) were as follows:

> **13.4 Business carried on**
>
> Since the Last Balance Sheet Date, the [Joe White] Business has been conducted in the ordinary course in a proper and efficient manner, without any interruption or alteration in its nature, scope or manner.
>
> …
>
> **17 Compliance with Laws**
>
> (a) The [Joe White] Business has been conducted in accordance with applicable Laws and ISO Standards in all material respects.

X.45.1 The Cargill Parties' submissions

3687 In their written submissions, the Cargill Parties submitted that Warranty 13.4 had 2 limbs. The *first*, "in the ordinary course", was a warranty that the business was being managed in the routine way in which a malt business is conducted. The *second*, "proper and efficient manner", was submitted to mean what it said without any elaboration. Somewhat paradoxically, in oral closing submissions on this issue, the Cargill Parties referred to a case in which it was contemplated that "proper" in the phrase "proper and efficient manner" could have a variety of meanings.

3688 That case, *Montedeen Pty Ltd v Bamco Villa Pty Ltd,*[3016] concerned a franchise agreement, in which a franchisor's obligation was to conduct a system in a "proper and efficient

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3014 Although not relied upon by the Cargill Parties in their submissions, it should be pointed out that the evidence demonstrated that Viterra was on express notice of quality claims being on foot as at 2 August 2013 and there was no evidence to suggest they were resolved by 4 August 2013 or 31 October 2013: see par 5033 below.

3015 See pars 5294-5325 above.

3016 [1999] VSCA 59 (Brooking, Charles and Chernov JJA).

manner". The Court of Appeal adopted a definition of proper from the Oxford English Dictionary that referred to "genuine, true or real".[3017] In so doing, they held the franchisor was required to conduct the system with due regard for the interests of its franchisees.[3018] However, the Cargill Parties' senior counsel baulked at any suggestion that the meaning adopted in that case could be adapted to the context in which the phrase appeared in Warranty 13.4. Ultimately, the Cargill Parties did not put forward precisely the meaning they adopted, but submitted that in this context "proper"[3019] was inconsistent with running a business that falsified Certificates of Analysis, represented that malt was something that it was not and systematically cheated its customers.

3689 The Cargill Parties submitted that Warranty 17(a) required the Joe White Business to be conducted in accordance with "applicable Laws". "Law" was defined in the Acquisition Agreement to include the common law, principles of equity and any Australian statute. Further, the Cargill Parties submitted "applicable Laws" and "ISO Standards" should be read separately so there could be a breach of a Law without any infringement of ISO Standards. The Cargill Parties submitted that a principal feature of the manner in which the Joe White Business was conducted, by reference to the Viterra Practices, was the systematic cheating of customers. The Cargill Parties submitted that this was not an ordinary, proper or efficient manner to conduct any lawful business and was plainly illegal, or at least in breach of contract and tortious.

X.45.2 The Viterra Parties' submissions

3690 The Viterra Parties relied upon previous submissions: (1) in respect of issue 10 above, that Cargill Australia failed to establish that the Undisclosed Matters existed; (2) in respect of issue 43 above, in relation to the contracts relied upon by Cargill Australia and the alleged lack of specific evidence of breach; (3) in respect of issue 44 above, in relation to the absence of evidence of any Claims eventuating; and (4) an inference

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3017 In fact, it was only part of the definition: "genuine, true, real, regular, normal".

3018 [1999] VSCA 59, [73].

3019 The Cargill Parties referred to the possible meaning being genuine, true, real, regular, normal, strict, exact or correct.

should be drawn that Hughes believed that each of the Warranties, including Warranties 13.4 and 17(a), were true and correct.

3691 In relation to Warranty 13.4, the Viterra Parties submitted that the Warranty must be read as a whole, and was directed to preserving the status quo demonstrated in the most recent balance sheet of 31 October 2012. The Viterra Parties submitted that "proper" in this context should be construed as part of the promise that nothing had changed. They contended that this Warranty was not directed towards compliance with legal requirements as other Warranties were directed towards such issues. Alternatively, they submitted that if "proper" were to be construed more broadly, it was not accepted that there had been a breach of Warranty by reason of the existence of the Operational Practices.

3692 In relation to Warranty 17(a), the Viterra Parties submitted that section 18 of the Australian Consumer Law was not an "applicable Law" for the purposes of this Warranty, nor was any common law obligation to perform contracts. Rather, the Viterra Parties submitted that this Warranty was confined to the "types of laws that regulated the conduct of a business", such as those concerning occupational health and safety, discrimination and environmental regulation. The Viterra Parties submitted that this interpretation was supported by the fact that other Warranties, such as Warranties 7.3 and 9.2, were directed to customer disputes.

3693 In the event that the court were to find that section 18 of the Australian Consumer Law or a common law obligation to perform contracts were "applicable Laws", the Viterra Parties submitted that Cargill Australia relied on the same matters as it did in seeking to establish the existence of the Undisclosed Matters and provided little specific evidence that conduct was misleading or deceptive in respect of customers or that any customer contract was breached.

3694 Finally, the Viterra Parties submitted that, if it were found that the Joe White Business was not conducted in accordance with "applicable Laws", this would not be in "material respects" because they alleged that the Undisclosed Matters did not exist

and the Alleged Industry Practices were engaged in by other commercial malthouses.

X.45.3 Analysis

3695 Before turning to each of these Warranties separately, an aspect of the Viterra Parties' approach to construing these provisions needs to be addressed. With respect to both Warranties, the Viterra Parties submitted their construction ought to be affected by what was contained in other Warranties such that certain words should not be construed as contended for by the Cargill Parties because the subject matter said to be captured by the Warranty was dealt with in other Warranties.[3020]

3696 To the extent the Viterra Parties relied on the subject matter and scope of other Warranties to read down Warranty 13.4 or 17(a), their submissions must be rejected. Clause 13.2 of the Acquisition Agreement expressly provided that each Warranty was to be construed independently and was not limited by reference to any other Warranty.

X.45.3.1 Warranty 13.4

3697 The Viterra Parties' submission that, read as a whole, Warranty 13.4 was only directed towards preserving the status quo cannot be accepted. The effect of this construction would be that no matter how improperly or inefficiently the Joe White Business was being conducted, it would not be a breach of the Warranty provided that the Joe White Business was conducted in an equally unsatisfactory manner before the Last Balance Sheet Date. This would make little commercial sense. While the words "in the ordinary course" did suggest a level continuity between the manner in which the business was conducted prior to the Last Balance Sheet Date, the words "in a proper and efficient manner" plainly added more. The remaining words of the Warranty did not detract from this approach, although they implied that the Joe White Business was being operated in a proper and efficient manner as at the Last Balance Sheet Date. Further, if Warranty 13.4 was intended to do no more than require that the Sellers warranted that the Joe White Business had been being conducted without interruption or alteration in the same manner as it had been conducted since the Last Balance Sheet

3020 See pars 3691-3692 above.

Date, it could have said so by limiting the language of the Warranty to these words. In short, to accept the Viterra Parties' submission would be to give no substantial meaning or operation to the words "in a proper and efficient manner".

3698 As to the meaning of "proper and efficient manner", it is a term that is not infrequently used in commercial documents to describe how a business or a part of a business is or ought to be conducted.[3021] Naturally, the phrase must be understood by reference to the context in which it appears. Plainly enough, for a business to be conducted in a proper and efficient manner, it must be conducted both properly and efficiently. It is convenient to initially focus on the meaning of proper in this context.

3699 Given the manner in which the Joe White Business was being conducted from 31 October 2012 until 4 August 2013, and further until 31 October 2013, it is unnecessary to decide definitively what the precise meaning of "proper" was in this Warranty. Whether the descriptions the Cargill Parties adopted (namely genuine, true, real, regular, normal, strict, exact or correct), or whether another potential meaning, or a combination of other potential meanings was attributed to this word in this context,[3022] on no view could a business that engaged in conduct which involved the Viterra Practices, or the routine implementation of any of them, be considered to be a business conducted in a proper manner. Without going into extensive detail, it suffices to say that, in circumstances where the Viterra Practices involved deliberate deception and a consciously implemented system to conceal the deliberate breaches of customer contracts on an ongoing basis, the Joe White Business was not being conducted in a way that remotely resembled a proper manner. It necessarily followed that no level of efficiency in operating the Joe White Business in this manner could amount to it being conducted in "a proper and efficient manner".

3021 Of the many examples that could be given, see *Re 700 Form Holdings Pty Ltd* [2014] VSC 385, [11] (Robson J); *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47, [24] (Elliott J); *Arhanghelschi v Ussher* [2013] VSC 253, [28], [34] (Ferguson J); *Bearingpoint Australia Pty Ltd v Hillard* [2008] VSC 115, [5] (Habersberger J); *Montedeen Pty Ltd v Bamco Villa Pty Ltd* [1999] VSCA 59, [20], [73] (Brooking, Charles and Chernov JJA). See also *Corporations Act*, ss 283BB(a), 283CB(a).

3022 In *Montedeen Pty Ltd v Bamco Villa Pty Ltd* [1999] VSCA 59, [73], other meanings referred to included "strictly belonging or applicable; that is in conformity with the rule; strict, accurate, exact, correct, literal not metaphorical" and "such as a thing of the kind should be; excellent, admirable, commendable, capital, fine, goodly, of high quality … of good character or standing; honest, respectable, worthy".

3700 Accordingly, although the Cargill Parties have not shown that there was any interruption or alteration in the way that the Joe White Business was conducted before and after the Last Balance Sheet Date, or that the Joe White Business was not conducted "in the ordinary course" when compared to how it was being conducted on the Last Balance Sheet Day, nevertheless they have established Warranty 13.4 was breached because the Joe White Business was not being conducted in a proper and efficient manner.

X.45.3.2 Warranty 17(a)

3701 In relation to Warranty 17(a), the Cargill Parties' submission that it should be read as imposing 2 separate requirements should be accepted. The natural meaning of the clause was that both requirements had to have been satisfied on the relevant dates. Thus, if the Joe White Business was not conducted in accordance with applicable Laws in all material respects the Warranty was breached, irrespective of the position in relation to ISO Standards. The same would hold if the Joe White Business were not conducted in accordance with the ISO Standards, however it is unnecessary to consider this alternative as the ISO Standards were never tendered at trial.

3702 In relation to the first requirement, given the very broad definition of "Law", there was no basis in the text, context or purpose of the Warranty to read this as confined to only specified types of laws. Further, the Viterra Parties failed to provide any cogent support for why the laws they submitted fell within the definition should be included to the exclusion of other laws. In particular, "types of laws that regulate the conduct of a business" was not a clearly defined set of laws. Furthermore, even if "applicable Laws" were interpreted to mean "types of laws that regulate the conduct of a business", it is difficult to conceive why the *Competition and Consumer Act* would not be such a type of law; section 18 being a statutory norm under which persons engaging in conduct in trade or commerce in Australia are required to operate.

3703 In short, nothing more need be said than, for the purpose of construing Warranty 17(a), "Laws" had a meaning that accorded with "Law" as defined in the Acquisition Agreement. The Australian Consumer Law was clearly within the defined meaning

of "Law" and therefore, to the extent its provisions applied to the operation of the Joe White Business, they were "applicable Laws".

3704 Equally, contractual law fell within the definition of "Law". Leaving aside the question of any technical breaches, material defaults of contract such as must have existed by reason of the Viterra Practices meant that Warranty 17(a) was also breached for this reason.

3705 To elaborate, the Reporting Practice and the Varieties Practice involved false statements to customers in Certificates of Analysis,[3023] which falsity was not disclosed to the customers. Self-evidently, this conduct amounted to a contravention of section 18 of the Australian Consumer Law. Further, although the Gibberellic Acid Practice did not involve positive statements at around the time of delivery as to whether or not exogenous gibberellic acid had been included when it was prohibited by the customer, providing malt knowingly including a customer-prohibited additive without disclosing the fact was equally self-evidently conduct that was misleading in contravention of section 18. Further, it has been found that such conduct also amounted to breaches of customer contracts.[3024] Furthermore, the Operational Practices continued right up until Completion.[3025]

3706 The Viterra Parties' submissions in reliance on the non-existence of the Undisclosed Matters as alleged and on the Alleged Industry Practices must be rejected on the basis of conclusions reached elsewhere that the Undisclosed Matters did exist and it has not been established that the Alleged Industry Practices existed.[3026]

3707 Having concluded the Joe White Business was not conducted in accordance with all "applicable Laws", the final question is whether this amounted to a failure to comply "in all material respects". The breaches of contract have been found to have been material.[3027] As a result of those breaches of contract, the Joe White Business had not

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3023 Noting that not all instances of the Varieties Practice involved express misstatements in Certificates of Analysis.
3024 See issue 43 above.
3025 See pars 1555-1556 above.
3026 See issues 10, 13 above.
3027 See issue 43 above.

been conducted, and was not being conducted at the specific dates, in accordance with "applicable Laws … in all material respects". Further, it need not be determined whether any particular contravention of section 18 of the Australian Consumer Law was material. The Reporting Practice and the Varieties Practice have been found to have been engaged in routinely. The systemic engagement in misleading or deceptive conduct clearly fell well short of the Joe White Business being conducted in accordance with "applicable Laws … in all material respects".

3708 As already noted, the Cargill Parties failed to tender the ISO Standards.[3028] Further, no submissions were made articulating how the ISO Standards were breached. As breach of the other requirement in Warranty 17(a) has been established, the failure to put evidence of the ISO Standards did not affect the overall result as to whether there had been a breach.

X.45.4 Conclusion

3709 In conclusion, each of Warranty 13.4 and Warranty 17(a) was breached upon entry into the Acquisition Agreement and on Completion.

X.46 Did Viterra breach Warranty 6.1(e) on the date of the Acquisition Agreement (4 August 2013) or at Completion (31 October 2013)?

3710 In closing submissions, the Cargill Parties stated that they did not press this issue.

X.47 Did Viterra breach clauses 13.1 and 13.8 of the Acquisition Agreement?

X.47.1 Clause 13.1

3711 To view it in its context, clause 13.1 is set out above.[3029] It provided:

> The Sellers represent and warrant to the Buyer that each Warranty is correct and not misleading on the date of this agreement and will be correct and not misleading on the Completion Date as if made on and as at each of those dates except where otherwise provided in the Warranty.

3028 For completeness, it might have also been expected that the Viterra Parties would have tendered the ISO Standards in light of the contents of the Reply Letters: see pars 1405, 1512, 1524 above.

3029 See par 1029 above. See also par 1022 above for relevant definitions.

X.47.1.1 The Cargill Parties' submissions

3712 The Cargill Parties submitted that clause 13.1 was not independent of the Warranties and incorporated each of those Warranties and promises to the effect that each was correct and not misleading It followed, the Cargill Parties submitted, that if any Warranty had been breached there was an automatic breach of clause 13.1.

X.47.1.2 The Viterra Parties' submissions

3713 The Viterra Parties submitted that clause 13.1 was the operative clause in respect of the Warranties, and the conclusions in relation to issues 41 to 46 above flowed through to issue 47 above.

X.47.1.3 Analysis

3714 For the reasons outlined above,[3030] Viterra has been found to have breached (in the order of the issues as determined) Warranties 4.2(a), 4.2(c), 12(a), 12(b), 12(c), 7.3, 9.2, 13.4 and 17(a) at the dates of entry into the Acquisition Agreement and of Completion. As a result, it was not the case that "each Warranty [was] correct and not misleading" at each of those dates. Quite the opposite. Accordingly, clause 13.1 was breached both at the date of entry into the Acquisition Agreement and of Completion.

X.47.2 Clause 13.8

3715 Clause 13.8 is also set out above.[3031] It provided:

> (a) In the period from the date of this agreement until Completion, the Sellers must as soon as reasonably practicable disclose to the Buyer in writing any fact, matter or circumstance of which it becomes aware and which in its reasonable opinion would result or would be likely to result in any Warranty not being correct or being misleading in any material respect and for the purpose only of this clause 13.8 any reference in a Warranty to the term "as at the date of this agreement" shall be disregarded.[3032]
>
> (b) Subject to clause 13.8(c), the Seller must use all reasonable endeavours to remedy (if capable of remedy) the relevant fact, matter or circumstance before Completion.

3030 See issues 41, 42, 43, 44 and 45 above.

3031 See par 1029 above. See also par 1022 above for relevant definitions.

3032 The term "as at the date of this agreement" was relevant to Warranties 6.1(e), 9.2: see par 1034 above. In the Viterra Parties' closing submissions, it was contended these words added little to the obligation under cl 13.8 and that it would make more sense if the words were instead replaced with "as at the Completion Date". This matter was not raised on the pleadings. When it was raised with the Viterra Parties' senior counsel, he simply stated that, "You can't replace the words".

(c) Nothing in clause 13.8(b) will require the Sellers or a Related Body Corporate of a Seller to pay any money or provide other valuable consideration to or for the benefit of any person or otherwise take any action which, in that Seller's reasonable opinion, would or may impact adversely on or otherwise be contrary to its interests or the interests of a Related Body Corporate of the party.

X.47.2.1 The Cargill Parties' submissions

3716 The Cargill Parties submitted that clause 13.8(a) required disclosure of information that came to light that would have indicated that a Warranty was not correct or was misleading and clause 13.8(b) required the breach to be remedied before Completion. Further, it was submitted that the unstated assumption behind clause 13.8(a) was that the relevant information came to light between entry into the Acquisition Agreement and Completion.

3717 The Cargill Parties submitted that, even if (contrary to its primary submission) Viterra was not aware of the Viterra Practices and Policies prior to entry into the Acquisition Agreement, there was no doubt it had become aware of them by Completion. The Cargill Parties relied on their submissions in relation to the Pre-Completion Representations concerning the knowledge of the Viterra Parties.[3033] Further, the Cargill Parties submitted that the nature and extent of the Viterra Practices was not disclosed to the Cargill Parties prior to Completion.

X.47.2.2 The Viterra Parties' submissions

3718 The Viterra Parties submitted that clause 13.8 required Viterra to disclose in writing, in the period between execution and Completion, matters of which they were aware, and that, in Viterra's reasonable opinion, would likely result in a material breach of Warranty. The Viterra Parties characterised the Cargill Parties' submissions as essentially claiming that: (1) Viterra knew more than it disclosed in the October 2013 Responses; (2) to Viterra's knowledge, the pleaded Warranties were likely to be breached in a material respect; and (3) Viterra did not disclose this to Cargill Australia. They submitted that this had not been established.

3719 The Viterra Parties referred to their submissions in relation to the facts relevant to this issue and to issue 35 above concerning Viterra's knowledge of the of the veracity of

3033 See issue 25 above.

the Pre-Completion Representations, and submitted that *Viterra* was informed by Cargill Australia of the alleged practices and conducted an investigation by which they adequately informed Cargill Australia of the results. The Viterra Parties submitted that in the context of the dialogue between Cargill Australia and Viterra in response to the Cargill 22 October Letter, it could not be said that Viterra "failed to disclose" any matters of which it was "aware" and that in Viterra's "reasonable opinion" would likely result in a "material" breach of Warranty.

3720 The Viterra Parties' submissions did not specifically address clause 13.8(b).

X.47.2.3 Analysis

3721 The requirements of clause 13.8(a) were not in dispute.[3034] Leaving aside the finding already made that the knowledge of Hughes was the knowledge of Viterra,[3035] it has been established based on what Hughes, Youil, Wicks and Stewart told Mallesons, Fitzgerald and Norman in October 2013 that Viterra knew significantly more than it disclosed to Cargill before Completion.[3036] Viterra was aware of numerous facts, matters or circumstances which would have resulted, or would have been likely to have resulted, in multiple Warranties being incorrect or being misleading in a material respect. Given the substantial body of information about the existence and prevalence of the Viterra Practices and serious breaches of supply contracts (including Material Contracts),[3037] no reasonable opinion could have been held to the contrary.

3722 The matters disclosed to Mallesons, Fitzgerald and Norman[3038] have been addressed

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3034 On a strict reading of cl 13.8(a), if Viterra already knew of a breach and failed to disclose it at the time of entry into the Acquisition Agreement then it could not have become aware of the matter in the period from the date of the Acquisition Agreement to Completion and therefore the clause could not be enlivened. No such submission was put by any party. The better construction of the clause was that there was an ongoing obligation to disclose if the matter was known to Viterra and had not been disclosed. In any event, if such a construction were correct and operated to exclude any obligation under cl 13.8, then it would follow that Viterra would have been in breach of the relevant Warranty or Warranties at the time the Acquisition Agreement was entered into in any event.

3035 See issue 11 above.

3036 See pars 1285-1288, 1311, 1373-1375, 1405, 1512, 1524 above and par 5164 below, and annexure C to these reasons.

3037 Ibid. See also issue 42 above in relation to Warranties 12(b) and 12(c), issue 43 above in relation to Warranty 7.3, issue 44 above in relation to Warranty 9.2.

3038 The disclosure is described this way in light of the findings that Viterra already knew of such matters because of the knowledge of Hughes.

extensively.[3039] In light of the fact that it was necessary for there to be merely a single Warranty that was incorrect or misleading, or even likely to have been incorrect or misleading, for this provision to be enlivened, some straightforward illustrations will suffice in order to demonstrate why Viterra could not have reasonably had any other opinion.

3723 Mallesons, Fitzgerald and Norman were told on 23 October 2013 that gibberellic acid was used routinely in breach of contract,[3040] including with Heineken and Sapporo whose audits did not detect its use.[3041] Also in the context of gibberellic acid, they were told that the specifications of the malt as supplied were often outside of contractual specifications. For reasons already explained,[3042] the existence of this conduct amounted to a breach of Warranty 7.3. Even though some of what was communicated did not specifically state which contracts had been breached (it would appear from Lindner's notes that no one asked), learning that Joe White acted in such a way routinely or often and at all of Joe White's plants when it should not have was, at the very least, knowledge that it was likely that Warranty 7.3 (amongst others, including 9.2, 13.4 and 17(a)) was not correct or was misleading. In any event, Wicks' express referral to Heineken and Sapporo could have left no doubt that there were material defaults in relation to Material Contracts.

3724 Mallesons, Fitzgerald and Norman were also told that incorrect barley varieties could not be used and that as a result there was a legal exposure for Joe White from 1 November 2013.[3043] They were further told that Joe White had been required by Viterra to source cheaper barley in the past and that there would be issues with obtaining required barley varieties until March 2014, which could be significant financially.[3044] Also on 29 October 2013, Viterra was expressly informed that issues concerning the inability to supply the correct barley varieties included Asia Pacific

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3039 See pars 1285-1288, 1311, 1373-1375, 1405, 1512, 1524 above and par 5164 below, and annexure C to these reasons.
3040 See par 1282 above.
3041 See par 1308 above.
3042 See pars 3663-3664 above.
3043 See par 1299 above.
3044 See par 1281 above.

Breweries and that Heineken were dogmatic.[3045] Knowledge of such matters meant Viterra knew before 31 October 2013 that it was irrefutable that Joe White was operating in breach of its supply contract with Asia Pacific Breweries, which meant that there were matters of which it was aware which would result in a Warranty not being correct or being misleading, including Warranty 7.3.

3725 Further, it was conveyed that specifications were often outside of contract and that if Joe White was required to supply in accordance with its contractual obligations from 1 November 2013 it would be commercial suicide and the brand would be decimated.[3046] This information also raised issues under Warranty 7.3 (amongst others, including 9.2, 13.4 and 17(a)).

3726 These matters were never conveyed in writing to Cargill before Completion.[3047] As a result, Viterra breached clause 13.8(a).

3727 Clause 13.8(b) required Viterra to use all reasonable endeavours to remedy (if capable of remedy) the relevant fact, matter or circumstance before Completion. Reasonable endeavours would have required, at least, attempts to completely cease the Operational Practices prior to Completion. The evidence shows that, to the extent they were capable of remedy, Viterra took some limited steps to remedy the Operational Practices in the lead up to Completion.[3048] However, this fell far short of using all reasonable endeavours. The Viterra Parties did not make submissions to the contrary. The Viterra Practices continued right up until Completion.[3049] As a result, Viterra breached clause 13.8(b).[3050]

3045 See pars 1462, 1467, 1478-1479, 1482, 1487-1490 above.

3046 See par 1307 above.

3047 For the purpose of determining whether a breach of cl 13.8(a) had occurred, it is unnecessary to consider what Mattiske may or may not have said orally to Purser in response to Cargill's queries. To comply with cl 13.8(a), any notification was required to be in writing.

3048 For example, Mattiske gave a direction that the Gibberellic Acid Practice should stop immediately: see par 1254 above (however, the contemporaneous direction given by Stewart to cease using gibberellic acid for additive free customers was to commence from Completion: see pars 1263-1264 above). See more generally par 2544 above.

3049 See pars 1555-1556 above.

3050 Clause 13.8(c) did not arise for consideration.

3728 Accordingly, the answer to both questions raised in this issue is yes.

X.48 Did Viterra convey representations in the same terms as the Warranties by providing the Warranties in the Acquisition Agreement?[3051]

3729 The Warranties pleaded in paragraph 22 of the Statement of Claim were contained in schedule 4 of the Acquisition Agreement, being each of the Warranties referred to in issues 41 to 46 above. These Warranties set out statements of existing facts and matters relevant to Joe White and the operation of the Joe White Business. As discussed in issue 47 above, the Warranties were given contractual force by clause 13.1 of the Acquisition Agreement.[3052] The simple issue to be determined is whether representations were made in the same terms as the Warranties.

3730 Whether a representation was conveyed must be determined by reference to all the circumstances, including the terms of the contract.[3053] By clause 13.1, Viterra represented and warranted to Cargill Australia that each Warranty was correct and not misleading on the date of the Acquisition Agreement and on the Completion Date.[3054] On its face, it was unambiguous; clause 13.1 conveyed a warranty *and* separately a representation that the Warranties were correct.

3731 The interpretation the Viterra Parties contended for, namely that clause 13.1 did not convey a representation, would give no effect to the words "represent and". Rarely would a construction of a clause that gives no meaning or operation to express wording be adopted as the correct approach.[3055]

3732 The Viterra Parties submitted that "a warranty, of its nature, is a promise about a fact, not a statement that something is a fact" and therefore is "a promise, not a

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3051 See pars 1022, 1029, 1034 above.

3052 See par 1029 above.

3053 See, for example, *RCR Energy Pty Ltd v WTE Co-Generation Pty Ltd* [2017] VSCA 50, [64] (Weinberg, Whelan and Santamaria JJA); *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 322 [35] (French CJ).

3054 This clause is set out in full at par 1029 above.

3055 *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99, 109.4-110.1 (Gibbs J, dissenting).

representation".[3056] As a matter of authority, it is doubtful whether this submission, that a warranty could never amount to a representation, was correct. Any warranty in a particular case would need to be considered on its terms and in context in order to determine whether misleading or deceptive conduct had been engaged in.[3057] In any event, for the purposes of this issue, it is unnecessary to determine this point given the words "represent and" contained in clause 13.1. Such language made it clear that a representation was conveyed in addition to the respective warranty being given. This position was reinforced by the definition of "Warranties" itself, which meant "the warranties *and representations* set out in Schedule 4 …" (emphasis added).[3058]

3733 The Viterra Parties also made submissions based upon other parts of the Acquisition Agreement. They contended that the court should not find representations were made in the same terms as the Warranties because the terms of the Acquisition Agreement as a whole precluded such a finding. In particular, it was put that the fact that the Sellers had only undertaken an obligation to pay damages in the event of the breach of a Warranty, coupled with the express contractual statements that no representations or warranties were made other than the Warranties, made it plain no representation was being made. As to the *first* part of this submission, the remedy or remedies available was a separate question as to whether or not representation was made. *Secondly*, the express contractual statements referred to did not preclude a representation being made in circumstances where Warranties was defined in the

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3056 The Viterra Parties relied on a quote from *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, 505.8 (Lockhart and Gummow JJ) and suggested that their Honours' comments that "a statement [that] is embodied as a provision of a contract" may amount to misleading or deceptive conduct did not concern warranties. However, their Honours' comment was contained in a paragraph that concerned warranties and the Viterra Parties' submission appeared to be inconsistent with Lockhart and Gummow JJ's conclusion that the trial judge was correct in finding that the contractual warranty was capable of constituting misleading or deceptive conduct: at 506.9.

3057 *RCR Energy Pty Ltd v WTE Co-Generation Pty Ltd* [2017] VSCA 50, [64] (Weinberg, Whelan and Santamaria JJA); *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 322, [35]-[36] (French CJ); *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* (2010) 31 VR 575, 597-598 [90]-[91] (Buchanan and Nettle JJA); *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, 505.8-506.4 (Lockhart and Gummow JJ). For completeness, the Viterra Parties submitted French CJ conflated warranties with statements of fact in the passages referred to in *Campbell v Backoffice Investments Pty Ltd*, 322 [35]-[36]. In light of the conclusion reached on the correct construction of cl 13.1 of the Acquisition Agreement it is unnecessary to consider this beyond stating that such a submission ran counter to a number of authorities, including those referred to in this footnote.

3058 See par 1022 above.

manner referred to in the preceding paragraph.

3734 The Viterra Parties further submitted that any representation conveyed by clause 13.1 was limited by the effect of clauses 13.3 and 13.4, and subject to the limitations set out in clause 15 of the Acquisition Agreement. It was put that these terms precluded any finding that representations were conveyed in the same terms as the Warranties.

3735 Clause 13.3 provided that each Warranty was to be read down and qualified by information fairly disclosed to Cargill Australia in specified ways. The inclusion of clause 13.3 in the Acquisition Agreement did not preclude a representation being conveyed by clause 13.1. Naturally, information disclosed in accordance with clause 13.3 would affect the scope of the relevant representation conveyed by 13.1. However, this would go to the content and extent of the representation made, as opposed to whether a representation was conveyed or not.[3059]

3736 The Viterra Parties also relied on clause 13.4,[3060] in which Cargill Australia acknowledged and agreed that it did not rely on any statement, representation, warranty, condition, promise, forecast, or other conduct which may have been made on behalf of Viterra, except the Warranties. Clause 13.4 was not relevant to whether or not representations were made, but rather it spoke to Cargill Australia's reliance, or non-reliance, on any representations made. In fact, far from precluding a representation having been conveyed, clause 13.4 expressly recognised the possibility that representations may have been made by Viterra by reason of the Warranties.[3061]

3737 Clauses 15.8, 15.9 and 15.11 limited Viterra's liability, by imposing a maximum liability in the absence of fraud, a bar on recovery for indirect loss and an obligation to mitigate, respectively. Contrary to the Viterra Parties' submissions, these clauses did not prevent clause 13.1 conveying a representation and did not require it to be construed in the manner suggested. Rather, these further clauses would become

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3059 Relevant disclosures could possibly have the effect that no representations were conveyed if the disclosures were inconsistent with all aspects of the Warranties given. However, this was clearly not what occurred.

3060 See par 1029 above.

3061 The effect of clause 13.4 in relation to the question of reliance by Cargill is addressed at par 3726 below.

relevant when assessing loss for the claims to which they may have applied.

3738 Further, the surrounding circumstances leading up to the Acquisition were consistent with the Cargill Parties' position. Clause 10.4 of the Confidentiality Deed expressly contemplated that a subsequent separate agreement could contain both representations and obligations.[3062]

3739 Accordingly, in the terms set out in schedule 4, in the manner set out in clause 13.1 and subject to the other provisions of the Acquisition Agreement (such as clauses 13.2 and 13.3), representations were made in addition to warranties given in the terms of the Warranties. To repeat, this interpretation was consistent with the definition of "Warranties" in clause 1.1 of the Acquisition Agreement. The definition of "the warranties and representations set out in Schedule 4" indicated that the statements of existing fact contained in schedule 4 were themselves representations. Accordingly, the Sellers made representations in the same terms as Warranties 4.2, 6.1(e), 7.3, 9.2, 12, 13.4 and 17(a) ("the Warranty Representations").

X.49 Did Cargill Australia rely on the Warranty Representations in entering into the Acquisition Agreement?

X.49.1 The Cargill Parties' submissions

3740 The Cargill Parties submitted that the fact that Cargill Australia relied on the Warranty Representations was established in 2 ways. *First*, the Acquisition Agreement contained an express acknowledgement in clause 13.7(a) by Viterra that Cargill Australia had entered into the agreement and would complete in reliance on the Warranties as they were given on the terms of the agreement.[3063]

3741 *Secondly*, the Cargill Parties submitted that the subject matter of the Warranty Representations was materially the same as that of the Financial and Operational Performance Representations, and reliance was shown by the same factors which the Cargill Parties identified for the purpose of issue 20 above. They contended the

3062 See par 590 above.
3063 See par 1029 above.

relevant factors in relation to the subject matter were:

(1) The representations were of a kind calculated to induce Cargill to enter into the transaction, by unambiguously conveying that Joe White was a producer of high quality malt made from high quality barley, whose business model was trained closely on meeting customers' requirements exactly.

(2) Cargill made a careful assessment of the information it received from the Viterra Parties, making decisions within a rigorously structured process which required justification and accountability, rather than the mere enthusiasm of Cargill executives.

(3) The characteristics of Joe White conveyed by the representations were the foundation upon which Cargill created its valuation of the Joe White Business.

(4) Cargill's assessments of the value and desirability of Joe White could not have rationally been made had the Viterra Practices been disclosed.

(5) Cargill carefully and thoroughly assessed the risks of the transaction within the limits of the Due Diligence, and raised and pursued potential risks with the Sellers, receiving unambiguous reassurances in answer to its questions.

(6) Cargill's senior executives gave evidence that they would not have approved the Acquisition, or would have withdrawn approval for the Acquisition before making any legal commitment, had the Viterra Practices been disclosed.[3064]

X.49.2 The Viterra Parties' submissions

3742 The Viterra Parties submitted the court should not find that the Warranty

[3064] See issue 33 above.

Representations were made, but that if they were made then it should not be found that Cargill Australia relied on the Warranty Representations. They set out 4 factors which they contended weighed against such a finding.

3743 *First*, they contended that express contractual statements made in the Acquisition Agreement were inconsistent with Cargill Australia's claimed reliance. Referring to clause 13.4, they submitted that the Acquisition Agreement expressly provided that Cargill Australia did not rely on any representation or warranty other than the Warranties, and that this provision represented a solemn and binding statement of fact.

3744 *Secondly*, it was submitted that the attitude of Cargill to the Acquisition was such that Cargill Australia would have acquired Joe White regardless of the Warranty Representations. In support of this submission, the Viterra Parties referred to the November 2012 process by which Cargill had identified "must have acquisitions",[3065] and noted that during this process Cargill's malt business unit had nominated the Acquisition as "pivotal" to its business and identified Joe White as the missing "pearl" in the business unit's "string of pearls".

3745 *Thirdly*, they submitted Cargill had knowledge of the Alleged Industry Practices, and learned during the Due Diligence that Joe White was, or that there was a real possibility that it was, engaging in the Alleged Industry Practices. Accordingly, it was submitted that Cargill could not succeed in establishing that it had relied on any of the Warranty Representations which were inconsistent with what it already knew.

3746 *Finally*, the Viterra Parties submitted that Cargill decided to enter into the Acquisition Agreement prior to the making of any Warranty Representations. The Warranties were provided by Viterra executing the Acquisition Agreement, and it followed that any Warranty Representations could not have been made any earlier than the time of entry into the Acquisition Agreement. As a result, it was contended that Cargill Australia could not have entered into the agreement in reliance on any such

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3065 See pars 706-707 above.

representations.

3747 Further to this final point, the Viterra Parties submitted that the evidence showed that the decision to enter into the Acquisition Agreement was made at the moment the Cargill leadership team decided to approve the final bid, which was prior to the Warranties being finalised. They contended that the evidence of Cargill Australia's reliance was limited to the reference to the negotiations on 2 August 2013 in respect of the increase in the final bid price,[3066] and that the only reference to the Warranties in this evidence was that re-statement of the Warranties at Completion as 1 of the conditions imposed by Cargill for its increased bid.

X.49.3 Analysis

3748 Put succinctly, the terms of the Acquisition Agreement referred to below are determinative of the outcome of this issue. Additionally, as noted in issue 20 above,[3067] where a representation is made which is calculated to induce a person to enter into a contract, and the person in fact enters into the contract, there arises a fair inference of fact that they were induced to do so by the representation.[3068] A material representation which is objectively likely to induce a party to enter into a contract may be treated as calculated to do so.[3069] The Warranty Representations were material, and were by their content objectively offered and made to induce Cargill Australia to enter into the Acquisition Agreement. In light of the expressly agreed position as set out in the Acquisition Agreement, it is probably unnecessary to make a finding; but, if it be necessary, the fair inference to be drawn from the terms of the Warranty Representations was that Cargill Australia did rely on the Warranty Representations in entering into the Acquisition Agreement. I so find. This finding is buttressed by the fact that on 2 August 2013 Cargill required the Warranties to be given both at the

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3066 See issues 54-60 below.

3067 The legal principles relevant to determining issues of reliance are set out in issue 20.2 above.

3068 See par 3156 above. Of course, whether an inference ought to be drawn involves a consideration of all the relevant circumstances.

3069 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 657 [55] (French CJ, Crennan, Bell and Keane JJ).

date of the Acquisition Agreement and at the date of Completion.[3070]

3749 The factors listed by Viterra did not rebut the inference that Cargill Australia relied on the Warranty Representations when entering into the Acquisition Agreement. In relying on clause 13.4(a) of the Acquisition Agreement,[3071] the Viterra Parties failed to grapple with the fact that the definition of "Warranties" in the Acquisition Agreement included "the warranties *and representations* set out in Schedule 4 …" (emphasis added).[3072] Read in light of this definition, reliance by Cargill Australia on the Warranty Representations was entirely consistent with the acknowledgement in clause 13.4(a).

3750 The second factor raised by the Viterra Parties placed too much emphasis on the superseded view held that the possible acquisition was "pivotal" to Cargill Malt. As the Viterra Parties properly acknowledged, before any decision to acquire Joe White was made this classification had been downgraded from "pivotal" to "desirable" from the perspective of the Cargill leadership team.[3073] It has been found that, although the Acquisition was a high priority for Cargill, this did not amount to Cargill having an intention to purchase Joe White regardless of its manner of operation, its value or the ability of Cargill to conduct a business consistently with the guiding principles outlined in the Cargill Code.[3074] Had Viterra declined to agree to the Warranties (being the making of the Warranty Representations and the giving of warranties as set out in the Warranties) when requested, it would probably have been considered as most uncharacteristic for a transaction such as this, and in any event would have put Cargill on notice about potential issues with Joe White. Further, it would at the very least have prompted Cargill to ask further questions and to seek an explanation as to why anticipated warranties would not be given, Cargill's enthusiasm notwithstanding. The submission that Cargill Australia would have proceeded with

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3070 See also par 3758 below.

3071 The clause provided that in entering into the Transaction Documents and in proceeding to Completion, the Buyer did not rely on any statement, representation, warranty, condition, promise, forecast or other conduct which may have been made by or on behalf of a Seller, except the Warranties.

3072 See par 3732 above.

3073 See para 707 above.

3074 See paras 3390-3394 above.

the Acquisition regardless of whether the Warranty Representations were made was contrary to a significant body of evidence which has been found to fairly reflect Cargill's position.

3751 The third factor relied on was the existence of the Alleged Industry Practices. As the Viterra Parties have failed to establish that the Alleged Industry Practices existed, this need not be considered further.[3075]

3752 The final factor relied on by the Viterra Parties was that Cargill Australia could not have relied on the Warranty Representations in entering into the Acquisition Agreement because the Warranty Representations were not made until the Acquisition Agreement was already entered into. As noted above,[3076] it is necessary for recovery under the Australian Consumer Law that causation is satisfied, and questions of reliance are a "tool of analysis" in determining whether as a matter of fact the causation requirement is met.[3077] On the Viterra Parties' submission, the causation requirement could not be satisfied because they contended the reliance was alleged to have occurred *before* the conduct relied upon, so the alleged cause occurred *after* the alleged effect. Consideration of this submission requires specific identification of both the moment at which the Warranty Representations were made and the moment at which reliance occurred.

3753 As outlined above,[3078] the Warranty Representations were conveyed by operation of clause 13.1 of the Acquisition Agreement, which relevantly said "The Sellers represent and warrant to [Cargill Australia] that each Warranty is correct and not misleading on the date of this agreement and … on the Completion Date …". The use of "represent and warrant", with both verbs in the same simple present tense, carried an implication that the act of representing occurred simultaneously with the act of warranting.

3075 See issue 13 above.

3076 See par 3148-3149 above.

3077 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 351 [143] (Gummow, Hayne, Heydon and Kiefel JJ); *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 128 [56]-[57] (Gaudron, Gummow and Hayne JJ); *Henville v Walker* (2001) 206 CLR 459, 469 [14] (Gleeson CJ), 494 [109] (McHugh J, with whom Gummow J agreed), 509 [163] (Hayne J, with whom Gummow J agreed). See also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 356.8-357.2 (Brennan J) and generally issue 20.2 above.

3078 See pars 1029, 3731-3732 above.

Plainly, the act of warranting occurred, and the Warranties were given, at the time of contract formation. Equally, the simultaneous conduct of representing occurred upon the contract being entered into.

3754 The conclusion that the Warranty Representations were not made until the point of contract formation was affirmed by consideration of a counterfactual where, immediately prior to contract formation, Cargill Australia had changed its mind and declined to enter into the contract. In this counterfactual, Cargill Australia would not be able to rely upon or seek remedies based on the Warranties, including not being entitled to rely on the Warranty Representations. If Cargill Australia, in this counterfactual, sought in some other proceeding to allege reliance on the Warranty Representations as an element of a claim, Viterra could rightly have said that since the contract was not entered into, the Warranties were never given and accordingly the Warranty Representations were never made.

3755 All of that said, in any event the answer to this submission by the Viterra Parties is found in clause 13.7(a), which stated that the Sellers acknowledged that:[3079]

> [Cargill Australia] has entered into this agreement and will Complete in reliance on the Warranties as they are given on the terms of this agreement.

The express acknowledgement in clause 13.7(a) of entry by Cargill Australia in reliance on the Warranties (which included the Warranty Representations) militated against a construction of the Acquisition Agreement which would have the Warranty Representations made after the point of entry into the contract by Cargill Australia.

3756 The language of each of clauses 13.1, 13.4(a) and 13.7(a) made plain that both the making of the Warranty Representations and reliance upon them could not have occurred either before or after Cargill entered into the contract; these events having occurred on the entry of Cargill Australia into the Acquisition Agreement. Thus, the moment of reliance coincided with the time of the making of the Warranty Representations.

3079 See par 1029 above.

3757 The Viterra Parties attempted to identify an earlier moment at which the decision to invest occurred (and therefore, they contended, the moment of any reliance), being the moment at which the Cargill leadership team decided to approve the making of the final bid at the meeting on 24 July 2013.[3080] In essence, it was submitted the decision to invest occurred before the Warranty Representations were made, and therefore no reliance could have been placed subsequently on the Warranty Representations.

3758 As well as being inconsistent with the express language of clause 13.7(a), this submission mischaracterised the decision of the Cargill leadership team, which was to make an offer to acquire Joe White *on particular terms*. The final bid which Cargill, Inc communicated to Merrill Lynch on 29 July 2013 was expressed to be "[s]ubject to the Acquisition Agreement",[3081] and was sent with a draft acquisition agreement tracked with Cargill's proposed amendments.[3082] As acknowledged in the Viterra Parties' submissions, the materials connected with the Cargill leadership team meeting on 24 July 2013 show that the Cargill leadership team turned their minds to the proposed warranties, and expressed a desire to modify the agreement so that the then proposed warranties were to be re-stated at Completion.

3759 If, in the period between the Cargill leadership team meeting on 24 July 2013 and contract formation on 4 August 2013, the Viterra Parties had sought to materially change the expression or content of the Warranty Representations, it would have been completely open for Cargill to have taken some action in response. Depending on the extent of the changes,[3083] Cargill might have delayed signing an agreement, sought further input from the Cargill leadership team or other senior decision-makers, or walked away from the transaction. The fact that Viterra was perfectly entitled to (and in fact did) amend the Warranties as proposed and that, if it had materially done so, Cargill could have taken these steps at this interval illustrated that the moment of

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3080 See par 958 above.
3081 See par 977 above.
3082 See par 979 above.
3083 See pars 979, 984, 989-992, 1002, 1007-1008, 1012-1014 above and 3800-3801 below in relation to the negotiations that occurred.

reliance did not occur on 24 July 2013 or any time before the Acquisition Agreement was entered into.

3760 It follows for the reasons stated that the answer to issue 49 is yes.

X.50 Were the Warranty Representations false because the Warranties the subject of the Warranty Representations were breached and did Viterra thereby engage in misleading or deceptive conduct within the meaning of section 18 of the Australian Consumer Law?

X.50.1 Submissions

3761 The Cargill Parties submitted that the Warranty Representations were false at the date of the Acquisition Agreement for the same reasons that each Warranty, and clause 13.1, was breached on the date of the Acquisition Agreement, as set out in their submissions on issues 39 to 45 and 47 above. The Cargill Parties relied on the observation of French CJ in *Campbell v Backoffice Investments Pty Ltd*[3084] that the "[t]he giving of a warranty embodying a false statement of present fact may be characterised as misleading or deceptive conduct simply because it involves the making of that false statement".[3085]

3762 The Viterra Parties submitted that if, as they contended, the Warranty Representations were not made, there could be no question as to their falsity, and that if the Warranty Representations were made, they must have been made at the time of entry into the Acquisition Agreement. The Viterra Parties relied on their submissions on issues 41 to 47 above to contend that the Warranty Representations were not false at that time.

3763 The Viterra Parties submitted that whether conduct was misleading or deceptive was to be determined in all the circumstances, which include, for a representation made in a contract, the circumstances in which the contract was made. The Viterra Parties referred to 3 circumstances which they submitted were relevant to characterising the

3084 (2009) 238 CLR 304.
3085 Ibid, 322 [36].

Warranty Representations.

3764 *First*, the Viterra Parties referred to Sale Process Disclaimers. It was submitted that the Acquisition Agreement must be considered in the context of the regime that had preceded it.

3765 *Secondly*, the Viterra Parties referred to Cargill Australia's acknowledgements in clauses 13.4 and 13.5 of the Acquisition Agreement that it had not relied on any representation, warranty, forecast or other conduct made by Viterra except the Warranties.[3086]

3766 *Thirdly,* the Viterra Parties referred to the fact that during the negotiations, the Viterra Parties had rejected certain amendments to clauses 13 and 31.15 of the Acquisition Agreement proposed by the Cargill Parties that concerned the scope of certain proposed warranties and the basis upon which deemed knowledge would have been attributed to Viterra.[3087] They submitted that the Refusal of Certain Terms put Cargill on express notice that the Viterra Parties would not and did not:

(1) Agree that the knowledge of the executives of Joe White was attributable to the Viterra Parties.

(2) Agree to be deemed to have knowledge of all material disclosed to Cargill in the Due Diligence.

(3) Provide any warranty in respect of whether Joe White was then, or had previously been, in default of any contracts, save for a Warranty that Joe White was not (on the date the Warranty was given) in *material default* of Material Contracts.

3767 On the basis of the circumstances listed, the Viterra Parties stated that where the Viterra Parties made it very clear that they were making no representations other than the Warranties, it could not be said that the breach of any Warranty meant that the

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3086 In particular, cl 13.4(a), (b), (d), (e) and (f), and cl 13.5 in its entirety: see par 1029 above.

3087 See pars 979, 989, 992 above.

Warranty Representation in the same terms as the Warranty was misleading or deceptive.

X.50.2 Analysis

3768 In determining this issue, a question arises as to whether the making of the Warranty Representations was conduct for the purposes of the Australian Consumer Law, and therefore capable of constituting misleading or deceptive conduct within the meaning of section 18.

3769 The Australian Consumer Law provides that a reference to "engaging in conduct" is a reference to doing or refusing to do any act, including "the making of, or the giving effect to a provision of, a contract or arrangement".[3088] There are numerous instances where courts have recognised that representations in the form of contractual terms,[3089] or warranties specifically,[3090] may constitute conduct for the purposes of the Australian Consumer Law (or its predecessor).

3770 The Victorian Court of Appeal noted, in *RCR Energy Pty Ltd v WTE Co-Generation Pty Ltd*,[3091] that the question of whether contractual promises can form representations for the purposes of the Australian Consumer Law remains "a matter of controversy".[3092] In that case, the Court of Appeal held that it was at least arguable that the contractual warranties in question were conduct for the purpose of the Australian Consumer Law,[3093] but that it was also possible for a provision of a contract, properly construed, to be nothing more than the undertaking of an obligation.[3094] As outlined above,[3095]

3088 Australian Consumer Law, s 2(2).

3089 *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647, 691-692 [222] (Edelman J); *Concrete Constructions Group Ltd v Litevale Pty Ltd* (2002) 170 FLR 290, 327.5, 329.1 (Mason P); *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217, 239.8 (Ormiston J). See also *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 322, [35] (French CJ).

3090 *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd* (2010) 31 VR 575, 598 [92] (Buchanan and Nettle JJA); *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, 505.8 (Lockhart and Gummow JJ).

3091 [2017] VSCA 50 (Weinberg, Whelan and Santamaria JJA).

3092 Ibid, [62].

3093 Ibid, [71].

3094 Ibid, [65], [72].

3095 See issue 48 above.

the phrasing "represents and warrants" in clause 13.1 of the Acquisition Agreement unambiguously conveyed both the giving of warranties in the form of the Warranties and the making of the Warranty Representations in the same terms, and so it was clear that the Viterra Parties did more than merely undertake an obligation.

3771 It has been found that clauses 13.1 and 13.8 were breached,[3096] including because of breaches of Warranties 4.2(a) and 4.2(c),[3097] 12(a), 12(b) and 12(c),[3098] 7.3,[3099] 9.2,[3100] 13.4[3101] and 17(a).[3102]

3772 The finding that each of these Warranties was breached was based upon the conclusion that the statement the subject of the Warranty was incorrect at the relevant time. It followed from the terms of the Warranties in question that a contemporaneous representation in the same terms was also incorrect. Broadly speaking, in the circumstances of this case, including by reason of the existence and non-disclosure of the Viterra Practices, these incorrect representations were misleading or deceptive.[3103] More particularly, for the reasons discussed above, independent of whether or not the relevant Warranty was breached, the conduct of making the Warranty Representations in the terms stated in the Acquisition Agreement was misleading or deceptive or likely to mislead or deceive as each of them was false because in relation to:[3104]

(1) Warranty 4.2(a), the Records had not been compiled and maintained in good faith.

(2) Warranty 4.2(c), the Records were not complete and up-to-date in all material respects.

(3) Warranty 12(a), the Data Room Documentation had not been collated

3096 See issue 47 above.
3097 See issue 41 above.
3098 See issue 42 above.
3099 See issue 43 above.
3100 See issue 44 above.
3101 See issue 45 above.
3102 Ibid.
3103 Compare *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 322 [36] (French CJ).
3104 In the order the Warranties were addressed in the issues above.

and disclosed with reasonable care.

(4) Warranty 12(b), to the Share Seller's knowledge and awareness, material information had been omitted from the Data Room Documentation.

(5) Warranty 12(c), to the Share Seller's knowledge and awareness, the Data Room Documentation was not true and accurate in all material respects.

(6) Warranty 7.3, to the Share Seller's knowledge and awareness, Joe White was in material default of Material Contracts.

(7) Warranty 9.2, there were facts and circumstances to the Share Seller's knowledge or awareness which might have given rise to a Claim.

(8) Warranty 13.4, the Joe White Business had not been conducted in a proper and efficient manner since the Last Balance Sheet Date.

(9) Warranty 17(a), the Joe White Business had not been conducted in accordance with applicable Laws in all material respects.

3773 That said, nothing in the circumstances identified by the Viterra Parties provided a basis for concluding that the Warranties identified above were breached but that the Warranty Representations in the same terms were not misleading and deceptive. The Viterra Parties' submissions did not, for example, identify how the meaning of any Warranty Representation was sufficiently modified such that as a consequence it was not misleading or deceptive, either by reason of the existence of the Sale Process Disclaimers[3105] or by the Refusal of Certain Terms. In addition, the reliance placed by the Viterra Parties on clause 13.4 failed to take into account that the Warranty Representations were captured within the definition of "Warranties" in the Acquisition Agreement, and thus fell within an express exception to the acknowledgement of no reliance in clause 13.4(a).[3106] For the same reason, it was of no assistance for the Viterra Parties to state that they made it clear that they were

3105 Considered in issue 15.3 above.
3106 See issue 49 above.

giving no representations other than the "Warranties". Further, insofar as the Viterra Parties sought to rely on the Sale Process Disclaimer or the Refusal of Certain Terms, those submissions failed to address the fact that such matters existed in the context of the Confidentiality Deed, which expressly provided that Cargill was entitled to rely upon representations set forth in (what became) the Acquisition Agreement.[3107]

3774 In conclusion, by making the Warranty Representations in the same terms as Warranties 4.2(a), 4.2(c), 7.3, 9.2, 12(a), 12(b), 12(c), 13.4 and 17(a) of Schedule 4 of the Acquisition Agreement,[3108] Viterra engaged in misleading or deceptive conduct for the purposes of section 18 of the Australian Consumer Law.

X.51 Were the Warranty Representations made in trade or commerce in Australia?

3775 There was no issue that if the Warranty Representations were made, they were made in trade or commerce in Australia.

X.52 Did Viterra know that the Warranty Representations or any of them were false and/or did they not genuinely believe the representations were true and/or were they reckless as to whether they were true or false?

X.53 Did Viterra make the Warranty Representations with the intent that Cargill Australia should rely on them by entering into the Acquisition Agreement?

3776 In closing submissions, the Cargill Parties did not press the allegations that were the subject of issues 52 and 53.

X.54 Did Glencore and/or Viterra convey the Other Bidders Representations?

3777 Cargill Australia alleges that on 2 August 2013, Glencore or Viterra, or both, represented that:

3107 Clause 10.4: see par 590 above.
3108 See par 3771 above.

(1) Glencore or Viterra, or both, had received other Phase 2 bids which were equal to or higher than the First Final Bid ("the Equal to or Better Bids Representation").

(2) Further or alternatively, that there were other bids that were close to the First Final Bid ("the Competitiveness Representation").

(3) Further or alternatively, that Cargill needed to pay an additional $15 million to secure the acquisition of Joe White ("the Necessity Representation").

(Collectively, "the Other Bidders Representations".)

X.54.1 The conduct alleged to convey the Other Bidders Representations

3778 It is first necessary to precisely identify the conduct said to convey the Other Bidders Representations.[3109] The Other Bidders Representations were alleged to have been made by a series of statements made by Mahoney in either or both of the 2 telephone calls between Mahoney and Koenig on 2 August 2013 ("the Further Bid Calls").

3779 Only Koenig gave direct evidence as to what was said during the Further Bid Calls,[3110] which occurred sometime at or around 9:15am Minneapolis time. Koenig was in his office and was not expecting a call from Mahoney. In the First Further Bid Call, Koenig's evidence was that Mahoney stated that he wanted to complete the transaction with Cargill acquiring Joe White. Mahoney said he could do it on the phone call, but he wanted Cargill to increase its First Final Bid to purchase Joe White by $15 million, to $420 million. Mahoney told Koenig that if Cargill did so a deal could be reached by verbal agreement between them.

3780 Additionally, in response to a question from Koenig as to why Cargill needed to

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3109 See, for example, *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, 464-465 [89] (Hayne J): see par 5046 below. See also *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 364 [5] (French CJ and Kiefel J).

3110 The Viterra Parties foreshadowed calling, but ultimately did not call, Mahoney.

increase its bid by $15 million to secure the purchase of Joe White,[3111] Mahoney relevantly stated that he had other bidders "there", "at that number" or "at that level".[3112] Mahoney told Koenig he had 2 hours to respond. Koenig said he would discuss it internally and get back to Mahoney within the 2 hours.

3781 At 9:31am Minneapolis time, just minutes after the First Further Bid Call, Koenig sent an email, entitled "RE: Joe White Malting – heads up", to Page, Conway, MacLennan, Hawthorne and others, copied to Van Lierde, Eden, Engle and others. Koenig's evidence was that this email provided a summary of the contents of the First Further Bid Call. In that email, Koenig stated that:

> Chris Mahoney from Glencore just called. Same message in that we are very close on details but he wants to cut a verbal agreement and get [t]his done but *needs* A$15 [million] more above our A$405 [million].
>
> He was vague on his rationale on why the A$15 [million] more *other than allegedly he's got other bidders there.* I asked him if that included the *same surety and speed of closure* and he said *we think so*.
>
> [He] was driving on his way to France. *Said he was making the rounds to the other contestants* (not sure he would be telling them) but would like a call back within 2 hours to *confirm that the deal is done* at A$420 [million] and *will have* the rest of the details sorted out.
>
> He claims he/I started this discussion[3113] and would like [to] conclude it with a verbal agreement and *it will then be a done deal*.
>
> Hard ball or comply?
>
> (Emphasis added.)

3782 There are a number of observations to make about this email. *First*, Mahoney's position concerning the necessity of a further bid was recorded. *Secondly*, it noted Mahoney had conveyed the existence of more than 1 other bidder. *Thirdly*, the

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3111 In his evidence in chief, Koenig did not refer to this aspect of the conversation, but he recalled it when cross-examined on the same topic.

3112 The variations in phrasing were not significant and, in the context, were consistent in meaning. The evidence of Mahoney referring to "at that number" or "at that level" was given by Koenig in stating what was said in the Second Further Bid Call, but Koenig also gave evidence that Mahoney was repeating the similar response that he had already given in the First Further Bid Call. The fact that Mahoney made such a statement or such statements in the First Further Bid Call was borne out by the email Koenig sent shortly after: see par 3781 below.

3113 Presumably a reference to earlier discussions: see pars 343-347 above.

reference to Mahoney stating "we think so" was plainly not Mahoney conveying any doubt about the terms of the alleged bids of others, but rather was indicating that, in Glencore's opinion, the competitors' terms reflected the same surety and speed of closure. Mahoney must have been presumed to know the relevant terms based on what he said to Koenig. Further, there could be no real doubt that he knew the details given his position and the existence of the Merrill Lynch report on the final bids.[3114] *Fourthly*, Mahoney conveyed he was still dealing with other bidders. *Fifthly*, Mahoney said he had authority to do the deal. *Sixthly*, there was only a limited window of opportunity given to Cargill to secure the Acquisition as proposed by Mahoney.

3783 Subsequently, following several telephone conferences variably involving Arndt, Conway, Eden, Engle, Hawthorne, Koenig, Page, Van Lierde and Viers,[3115] it was decided that Cargill would raise its bid for Joe White to $420 million.

3784 Not surprisingly, the Cargill executives who gave evidence of these telephone conferences had various levels of recollection.

3785 Conway could not recall them at all, though he clearly took part.

3786 Koenig recalled 1 quick telephone conversation in which Mahoney's proposal was discussed, followed by "email conversations". He had a vague recollection of others involved in the telephone conversation, and believed they included Page, Conway, Hawthorne, Van Lierde and Eden. Koenig could only recall the discussion in very general terms. He recollected that there was discussion about what Cargill should do, whether the proposal was a bluff, whether Cargill should have complied or countered, and how Cargill wanted to conduct itself. He said various opinions were expressed and the conversation concluded on the basis that further work needed to be done (including by Van Lierde and the food ingredients and systems platform team) and it was agreed to reconvene within 2 hours.

3787 Van Lierde recalled being involved, but was not sure whether it was in more than a

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3114 See par 983 above. See also par 766 above, recording Mahoney's reporting to Glasenberg and Walt about the indicative bids in Phase 1.

3115 Not all these persons participated in every call.

single conversation. Van Lierde initially stated that he did not see a reason to increase Cargill's bid all the way to $420 million, but said he was willing to increase the bid by $5 million. He recalled others responding that the bid should not be increased at all, but Koenig stating that the bid should be increased to $420 million given the discussion he had had with Mahoney. Van Lierde said he could not recall who made the final decision to increase the bid to $420 million but that, ultimately, it was a group decision.

3788 Eden was able to give an account of a telephone discussion in which he recalled Page, Conway, Koenig, Van Lierde and others being on the call. Whilst he was not able to recall everyone, Eden said the participants included 3 or 4 members of the Cargill leadership team.

3789 Eden said Koenig basically went through the matters he had set out in his email.[3116] Although he could not be specific, Eden recollected queries about whether or not what had been said by Mahoney was a true story and Conway questioning whether the position was legitimate. Eden said that Conway's query was made in a context where an auction process was being run by Merrill Lynch in a very formal way, and Mahoney's approach had deviated from the established practice. Although Eden could not remember who said it, he did recall many questions about whether there was a legitimate counterparty at $420 million.

3790 During the conversation, Eden stated he was disappointed, as he thought the parties were following a process and, at the eleventh hour, Mahoney had taken a different approach.[3117] Eden gave evidence that he stated he did not believe it was true that there was another bidder at $420 million. Having said this, Eden also stated he did not think it was in Cargill's best interest not to comply with the request and Cargill would have to take Mahoney at his word. Eden said Conway agreed with this recommendation. Eden could not recall what Page said, but agreed with the proposition put under cross-examination that the court could infer that Page agreed

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3116 See par 3781 above.

3117 Although disappointed, Eden could not have been totally surprised: see pars 950, 964 above.

that the price be increased to $420 million. Further, Eden agreed under cross-examination that it would be fair to say that ultimately, as the chief executive officer, Page "would be the decision-maker", with Conway very influential.

3791 Hawthorne gave evidence that Koenig told him, in a conversation with others, that Mahoney had asked for an additional $15 million to increase the purchase price from $405 million to $420 million, in order to conclude the transaction. Koenig also told him that Mahoney had said there were other bidders, the bidding process remained competitive, and that $15 million was required to win the deal.

3792 Hawthorne said there were various questions of Koenig about whether Mahoney was being truthful or bluffing. Hawthorne recalled there being a discussion about the fact that Mahoney was a former trader at Cargill and that, in the trading industry, Mahoney could be known to place a bluff. Hawthorne asked a number of questions about the "bona fides" of the request and what options Cargill had. He said there was also discussion about competing bidders and whether Cargill was comfortable raising its bid.

3793 After some debate, it was concluded that Cargill did not have a basis for doubting Mahoney, given what he had said to Koenig. Hawthorne also said a view was expressed that there might have been 1 or more competitors who were willing to pay the price. Further, he said Eden and Van Lierde referred to the willingness of Cargill to purchase Joe White for up to US$400 million with a 10 percent internal rate of return, and that an amount of $420 million would be within that range.

3794 Viers had a distinct recollection of a telephone discussion in which he participated while in his garage at home. The others who participated in this conversation were Van Lierde, Eden, Engle and Hawthorne.[3118] Viers said that Koenig was not on this call.

3795 According to Viers, Engle explained that Koenig had received a call from Mahoney in which Mahoney stated that if Cargill wanted to do a deal, it would need to come up

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3118 It was possible a representative of Goldman Sachs was also on the line.

with another $15 million. Engle also referred to it being an auction and that Cargill should not assume that it was the only bidder. During the course of the conversation, the question was raised as to whether it was a bluff or whether there was really another bidder. This resulted in some debate. Although Viers could not be precise as to what was said, in substance the view expressed was that the stakes were high and, therefore, what Mahoney had said should be taken at face value. The conversation ended with Van Lierde stating that Cargill should pay the additional $15 million.

3796 Engle gave an account of the telephone conversation. He said Page, Koenig, Hawthorne, Eden, Arndt and Matt Gibson from Goldman Sachs participated. Engle gave evidence that Hawthorne laid out 3 different options, staying at $405 million; increasing to $420 million; or meeting somewhere in the middle. He said Page led the discussion about those options. Page also enquired about the remaining "document items" that needed to be completed and about the results of the Due Diligence. Engle recalled a dispute about how long the warranty period would last and other matters relating to documentation. Engle also recalled an issue being raised as to whether increasing the bid to $420 million would be beyond the bounds or the guidance given by the Cargill, Inc board concerning the required internal rate of return. Engle did not give evidence about how the conversation concluded as he said he had no further recollection of what was said.

3797 As an aside, Engle worked with Le Binh to ensure such an increase in price was consistent with the board approval. That exercise showed that with a bid at $420 million, an internal rate of return of 10.1 percent could be achieved.

3798 Engle gave evidence of a further conversation, with Page, Conway, Hawthorne and others, in which he discussed the product of the work he had done with Le Binh (as referred to in the previous paragraph). Engle said it was during this conversation that it was agreed to increase the bid, conditional on transaction documents being agreed quickly and the outstanding contractual matters regarding indemnities, warranties and particular business liabilities being resolved in Cargill's favour.

3799 From these discussions, and the context in which they arose, it was apparent that ultimately each of the Cargill executives was willing to act upon what Mahoney had said. None of them was willing to call his bluff. Further, a number of senior executives were involved in reaching the decision that was ultimately made. There was no direct evidence of anything Page said to demonstrate that he chose to make a decision alone. On the contrary, the executives ultimately collaboratively considered and decided the approach to adopt. Furthermore, the decision to increase the bid by $15 million was activated by, and made directly in response to, at least principally if not entirely, what Mahoney had stated to Koenig in the First Further Bid Call.

3800 At 11:09am on 2 August 2013, Hawthorne sent an email entitled "Proj Hawk: response to Chris Mahoney" to Koenig, copied to Page, Conway, Van Lierde, Eden, Viers, Engle and Arndt. This email contained Cargill's agreed response. It authorised Koenig to make an offer of $420 million to Mahoney, on certain conditions. The email relevantly stated:

> [Thanks] for handling communication [with Mahoney]. Our agreed response:
>
> 1. While we believe A$405 [million] is a fair price and we are also delivering certainty, speed, and commercially balanced terms, *we are willing to meet your ask of A$420 [million].* Cargill's willingness to raise the price to A$420 [million] is conditioned upon:
>
> a. Immediate exclusivity
>
> b. All parties work to sign the transaction documents as expeditiously as possible (e.g. next 6-8 hours)
>
> c. Glencore's agreement to a balanced approach to resolve the remaining contract issues:
>
> i. Warranties are restated at Completion
>
> ii. Non tax claims indemnity period runs 18 months from Completion
>
> iii. Warranty recoveries from Cargill's related parties do not apply to the indemnity limit
>
> iv. Business liabilities to be restricted to only the operations of the Joe White [B]usiness with caps and time periods.
>
> …
>
> (Emphasis added.)

3801 In fact, paragraph 1(c) of the email contained a total of 6 conditions. Ten minutes later a further email was sent removing the sixth condition.[3119] Koenig's evidence was that he made Cargill's offer of $420 million to Mahoney in the Second Further Bid Call, which occurred within 2 hours of the First Further Bid Call. His evidence was he did not have any authority to negotiate further with Mahoney. He said he did not read from a script and could not be certain which email he utilised in the Second Further Bid Call when identifying Cargill's conditions.[3120]

3802 In the Second Further Bid Call, according to his evidence in chief, Koenig again asked Mahoney why Cargill needed to increase its bid by $15 million to purchase Joe White. Mahoney's responses included statements broadly consistent with the statements made in the First Further Bid Call, namely that the bidding process was "an auction" and that there were "competing parties at that level".

3803 At 11:33 am, shortly after the Second Further Bid Call, Koenig sent an email entitled "RE: Proj Hawk: response to Chris Mahoney" to Hawthorne and others. In it, Koenig stated that an agreement had been reached by which Cargill would acquire Joe White for $420 million. That email stated:

> We're done $A420 [million]. I walked [Mahoney] through the terms. He was not in a position to write them down but there was no [heart]burn or hesitation. *We discussed the price and he kept on insisting it was an auction and it was going to the highest bidder.*
>
> He will advise his people that it's done …
>
> (Emphasis added.)

3804 Under cross-examination, Koenig said he recalled commencing the Second Further Bid Call with, "Chris, please tell me 1 more time why Cargill needs to do this?". Under further cross-examination, Koenig agreed with the proposition that all that Mahoney said in the Second Further Bid Call was contained in the email referred to in the previous paragraph, and that Mahoney said nothing else. According to this further evidence, in the Second Further Bid Call Mahoney did not expressly mention any need

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3119 The fifth condition is irrelevant for present purposes.

3120 Nothing turns on it, but it is likely the later email was utilised: see par 3805 below.

for an additional $15 million.

3805 Shortly after, Mahoney spoke with King "and other members of the negotiating team" and informed them that Cargill had agreed to increase its bid. Mahoney said the quid pro quo was that Glencore conceded 5 points that were still being negotiated.[3121]

3806 The facts set out above demonstrated that Mahoney's statements said to convey the Other Bidders Representations were made.[3122] But before turning to this, some initial observations should be made.

3807 *First,* Koenig was a credible witness, notwithstanding that his recollection was, at times, imperfect. Imperfections in Koenig's recollection of the contents of each of the Further Bid Calls may be attributed to the significant period of elapsed time since those calls occurred and the time he gave evidence. That Koenig appeared to, at times, conflate aspects of the Further Bid Calls may be attributed to the short period of time that separated the Further Bid Calls and the significant overlapping of the subject matter of the conversations, in addition to the significant lapse of time. Ultimately, there was nothing to suggest that, in giving evidence, Koenig was doing anything other than giving his best recollection in the circumstances.

3808 *Secondly,* imperfections in Koenig's recollection present a less significant evidentiary obstacle than they otherwise might have because of the contemporaneous emails[3123] prepared and sent by Koenig describing the Further Bid Calls in which he participated.[3124] Those emails serve as a "reliable contemporaneous record",[3125] unaffected by the ordinary fallibility of human memory in the context of later

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3121 As to the conditions Cargill put forward: (1) Warranties being restated at Completion was reflected in cl 13.1 of the Acquisition Agreement; (2) the non-tax claims indemnity running for 18 months was reflected in cl 15.6(a)(ii); (3) in relation to Warranty recoveries from Cargill's related parties, see cl 15.8; (4) business liabilities to be restricted was reflected in cll 10.1 and 10.7; and (5) a further condition (not set out above) was reflected in cl 9.6: see par 3800 above.

3122 That is, the statements in pars 3779-3780, 3802, 3804 above.

3123 See pars 3781, 3803 above.

3124 In relation to the difficulties of proof associated with later evidence of oral conduct see: *Watson v Foxman* (1995) 49 NSWLR 315, 319.1 (McClelland CJ in Eq). See also *Woolcorp Pty Ltd v Rodger Constructions Pty Ltd* [2017] VSCA 21, [99] (Santamaria and Kyrou JJA and Elliott AJA); *Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG* [2014] VSCA 338, [687] (Tate, Santamaria and Kyrou JJA).

3125 *Watson v Foxman* (1995) 49 NSWLR 315, 319.4.

litigation.[3126] In particular, those emails substantially and satisfactorily corroborate Koenig's evidence as it related to the Other Bidders Representations.[3127]

3809 *Thirdly,* Mahoney was ultimately not called as a witness. As a result, Koenig's evidence in relation to the Further Bid Calls was not contradicted, and so may be more readily accepted.[3128]

X.54.2 Were the Other Bidders Representations conveyed?

X.54.2.1 Legal principles

3810 In determining whether Mahoney's statements conveyed the Other Bidders Representations, it is necessary to consider those statements in the circumstances in which they were made.[3129] It is trite that any meaning conveyed by particular words and phrases depends not only on their literal meaning, but also the context in which those words or phrases are used, including to whom they are conveyed.[3130] The meaning or meanings conveyed by words in a particular context and to a particular person may therefore differ, even differ substantially, from the literal meaning of those words.[3131] Further, the literal truth of a statement is no barrier to finding that the meaning conveyed by that statement was misleading or deceptive.[3132]

3811 Accordingly, Mahoney's statements must be considered:

(1) In combination with each other.

(2) As part of a dialogue, and in relation to statements and queries to which

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3126 Ibid, 319.1. See also *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237, [159] (Warren CJ, Osborn JA and Macaulay AJA), citing *Watson v Foxman* (1995) 49 NSWLR 315, 318-319; *Lord Buddha Pty Ltd (in liq) v Harpur* (2013) 41 VR 159, 172 [63] (Vickery AJA, with whom Weinberg and Tate JJA agreed).

3127 *Watson v Foxman* (1995) 49 NSWLR 315, 319.4.

3128 *Jones v Dunkel* (1959) 101 CLR 298, 312.7 (Menzies J).

3129 See, for example, *Global One Mobile Entertainment Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 134, [108] (Greenwood, Logan, and Yates JJ).

3130 *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274, 280.5 (Gummow J).

3131 See, for example, *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452, 483E (Black CJ, von Doussa and Cooper JJ); *B&W Cabs Ltd v Brisbane Cabs Pty Ltd* (1991) 30 FCR 177, 181.6-182.1 (Pincus J). See also issues 15, 22 above.

3132 See, for example, *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647, 690 [217] (Edelman J); *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, 88.4 (Bowen CJ, Lockhart and Fitzgerald JJ); *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181, 201.2 (Brennan J).

they responded.

(3) Against the backdrop of the competitive sale process.

(4) In light of the relative knowledge of the participants, including that Cargill was unaware of the details of the competitive bids.

(5) As informed by the subject matter and apparent purpose of the communications.

X.54.2.2 Submissions

3812 The Cargill Parties submitted that the constituent statements necessarily conveyed the Other Bidders Representations. The Viterra Parties submitted that the constituent statements were incapable of conveying the Other Bidders Representations, largely because the Other Bidders Representations were never stated or represented.

X.54.2.3 Analysis

3813 As to the First Further Bid Call, either the Equal to or Better Bids Representation, or the Competitiveness Representation was conveyed by the statement that Mahoney had other bidders "there" or "at that number" or "that level". Each statement if made individually, or if more than 1 was made, either individually or in combination:

(1) Was made in the context of a competitive and continuing "blind auction" for the Joe White Business in which there was a deliberate and stark asymmetry of knowledge between the bidders and the Viterra Parties. Cargill, an active bidder, was not aware of the number or details, including the amount, of any other Phase 2 bids, and Cargill's lack of knowledge was a fact known to Mahoney.

(2) Was made at a time when it was expected the competitive bidding process would soon be coming to a close, and Glencore and Viterra would be choosing the preferred bidder.

(3) Was made in the course of an unsolicited call from Mahoney, the apparent purpose of which was to convey to Cargill relevant

information that it did not have and could not independently obtain or verify, and that would, if acted upon, allow Cargill to conclude a deal to secure the Acquisition.

(4) Accompanied another statement made by Mahoney in the same call that Mahoney wanted Cargill to increase its Phase 2 bid by a specific increment, $15 million, to a specific level, $420 million.

(5) Responded to Koenig's query as to why Cargill needed to increase its Phase 2 bid by that specific increment, to that specific level.

(6) Accompanied the further statement that Mahoney was in contact, or would shortly be in contact, with other bidders.

3814 In those circumstances, Mahoney's statement that he had other bidders "there" or "at that number" or "at that level", or in any combination, objectively conveyed a representation in substance that:

(1) There were other Phase 2 bids at the desired bid amount of $420 million or in the range between the First Final Bid of $405 million and the desired bid amount of $420 million (that is, the Equal to or Better Bids Representation).

(2) Alternatively, there were other Phase 2 bids equal to or close to the First Final Bid of $405 million and so there was a risk the First Final Bid would not ultimately be the bid that would be accepted (that is, the Competitiveness Representation).

3815 Not only were these representations encompassed in the words used but, unless 1 of these meanings was conveyed, Mahoney's statements: would not have meaningfully explained or rationalised his stated desire that Cargill increase its bid in order to secure the deal; would not have sensibly responded to Koenig's query as to why Cargill needed to increase its bid from the First Final Bid amount to the desired bid amount; and nor would it have offered Cargill, as an active participant in an otherwise

"blind" bidding process, any rational commercial incentive to increase its bid.

3816 In my opinion, it is the Equal to or Better Bids Representation, rather than the Competitiveness Representation, that was made. All other things being equal,[3133] unless the other bids were at least at the same level as Cargill's, then Cargill would have had little incentive to increase its bid. Cargill's offer was already fully compliant, with "surety and speed of closure". Further, the subsequent discussions between the Cargill executives demonstrated that Koenig had understood Mahoney's statements in this way. If this conclusion is not correct, then, at the very least, the Competitiveness Representation was made. The statements made by Mahoney could not be sensibly understood as meaning anything other than there were other active and meaningfully competitive bidders with whom Glencore was still actively engaged. In any event, it was not necessary for Cargill Australia's claim to establish both these representations were made. Either representation was demonstrably false.[3134]

3817 For completeness, other possible alternative meanings of Mahoney's statements would be nonsensical in the circumstances, namely that: (1) Glencore or Viterra had other bids greater than $420 million (with "the same surety and speed of closure"); or (2) Glencore had other bids substantially less than and nowhere close to $405 million. Neither of these meanings, in the context, would be consistent with either a need or some sensible commercial rationale for Cargill to increase its bid to $420 million.[3135]

3818 Further, the Necessity Representation, that Cargill needed to pay an additional $15 million to secure the Acquisition, was made by several of Mahoney's statements in the First Further Bid Call both individually and in combination.[3136] Specifically, it

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3133 See the second paragraph of Koenig's email at par 3781 above.

3134 See pars 3836-3837, 3847 below.

3135 Interestingly, when the Viterra Parties' senior counsel was cross-examining 1 of Cargill's loss experts, he sought to explain what occurred in Cargill Australia increasing its bid from $405 million to $420 million in terms of "Glencore came back to [Cargill] and said, '405 isn't enough, we want 15 million more'". Of course, in the circumstances $405 million was more than enough to win the bidding process. Later, the position was paraphrased as, "Glencore … said, 'You'll *have to* pay another 15 [million] if you want it'" (emphasis added).

3136 The representations made by Mahoney in the Second Further Bid Call and their context are addressed below: see pars 3882-3890.

was conveyed by:

(1) Mahoney's statements to the effect that by increasing its First Final Bid by $15 million, Cargill would or, at the very least, would be highly likely to, secure the acquisition of the Joe White Business.[3137] Within the blind auction process, Mahoney stating in substance that he wanted to complete the transaction and that, by increasing its First Final Bid by a significant and specific increment, Cargill would secure the acquisition of the Joe White Business (subject to having certain details sorted out), conveyed to Cargill that increasing its First Final Bid by that increment was *necessary* for it to secure the acquisition. (On their face, these statements alone might be said to merely convey that Cargill increasing its First Final Bid by $15 million would be a means of securing the Joe White Business;[3138] in context, however,[3139] they conveyed that Cargill increasing its First Final Bid by $15 million was also *necessary*.)[3140]

(2) Mahoney's statement that he was actively engaged with the other bidders in the context of a blind auction coming to an end.

(3) Mahoney's response to Koenig's querying why Cargill needed to increase its bid by $15 million,[3141] which response accepted and reinforced the premise of the question that it was *necessary* for Cargill to increase its bid to secure the acquisition of Joe White.

3819 Suffice to say for present purposes, these latter 2 statements reinforced and confirmed that the Equal to or Better Bids Representation or the Competitiveness Representation, had also been made in the First Further Bid Call. Further, the first paragraph of Koenig's email sent immediately after the First Further Bid Call demonstrated that he had understood from what had been said that Mahoney's position was that the further

3137 See, for example, pars 3780-3781 above.
3138 Statements to that effect may not be false or misleading even when directed at the highest bidder.
3139 Including the context by reason of the matters referred to in subparagraphs (2) and (3) below.
3140 See also fn 3135 above.
3141 See par 3780 above.

$15 million was necessary.[3142] For completeness, the statements made by Mahoney in the Second Further Bid Call were entirely consistent with the relevant statements made in the First Further Bid Call,[3143] and were made in substantially the same context of seeking to close out a blind auction. To the extent the context of the Second Further Bid Call differed, it only reinforced this conclusion as to what was represented in the First Further Bid Call; the key relevant contextual difference being that the Second Further Bid Call followed very shortly after the First Further Bid Call, and so occurred in a context in which the Other Bidders Representations had already been conveyed previously.

X.54.3 Was the relevant conduct attributable to Glencore or Viterra, or both?

3820 It was common ground between the Cargill Parties and the Viterra Parties that Mahoney's conduct was attributable to Glencore. At the time of the Further Bid Calls, Mahoney was director of the agricultural products division of Glencore, and as King attested was the "ultimate decision-maker short of the [chief executive officer] in relation to any issue that might arise regarding" the sale of the Joe White Business. Further, in closing submissions, Viterra Parties' senior counsel stated that Mahoney was the individual who ultimately held the decision-making role.[3144] However, whether Mahoney's conduct was also relevantly attributable to Viterra was disputed.

X.54.3.1 The Cargill Parties' submissions

3821 The Cargill Parties submitted that Mahoney's conduct was attributable to Viterra in any or all of the following 3 ways.

3822 *First,* Mahoney was said to have actual authority to bind and to speak for the Viterra entities as the most senior officer within Glencore's agricultural business.

3823 *Secondly,* Mahoney was said to have apparent authority to negotiate price on behalf of Viterra. Mahoney's authority was said to have been apparent to Cargill in the Further Bid Calls as, amongst other reasons: (1) Cargill was aware that Viterra had been

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3142 See par 3781 above.

3143 This was regardless of whether Koenig's account in his evidence in chief or his account under cross-examination was accepted: see pars 3802 and 3804 above.

3144 See further par 3830 below.

acquired by Glencore's agricultural business under Mahoney's leadership; (2) Mahoney and Koenig had previously communicated on several occasions, in 2012 and 2013, in relation to Glencore's plans to sell Joe White; (3) it was Mahoney who invited Cargill to bid for the Joe White Business;[3145] and (4) in the First Further Bid Call, Mahoney referred to the First Final Bid for the Joe White Business, and asserted an ability to verbally conclude the deal.

3824 *Thirdly*, and in any event, it was contended Mahoney's conduct may be attributed to Viterra by operation of section 139B(2)(b)(ii) of the *Competition and Consumer Act* because Mahoney was acting with authority and relevantly had the consent or agreement of a director of the Viterra entities; namely, Mattiske. The Cargill Parties submitted that consent and agreement could be inferred by, for example, Mattiske's conduct in finalising the sale to Cargill at the price negotiated by Mahoney.

X.54.3.2 The Viterra Parties' submissions

3825 The Viterra Parties submitted that Mahoney's conduct was not attributable to Viterra, essentially for 2 reasons. *First,* it was contended that Mahoney lacked actual or implied authority because there was no evidence that Mahoney, at the relevant time, held any position of authority in respect of any of the Viterra entities. *Secondly,* it was submitted that Mahoney lacked apparent authority because the First Further Bid Call was unexpected, and not preceded or accompanied by a communication from another person known to have authority to act for Viterra. Accordingly, it was submitted that there was no basis for Cargill to infer that "Mahoney had any authority to act for Viterra".

X.54.3.3 Analysis

3826 In my view, Mahoney's conduct was plainly attributable to Viterra.[3146] At a minimum, it was attributable to Viterra because Mahoney had apparent authority to negotiate on behalf of Viterra. This was demonstrated in 3 ways.

3827 *First,* there was every reason for Cargill to presume that he had the authority he

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3145 See pars 431, 456 above.

3146 For a discussion on the general principles concerning attribution of conduct and agency, see issues 11, 18, 19 above.

represented he had. Mahoney was not unknown to Koenig, or to Cargill more generally. Cargill knew of Mahoney's senior position in the Glencore agricultural business, and his role in Glencore's acquisition of the Viterra entities. This was not Mahoney's first conversation with Koenig in relation to the sale of Joe White.[3147] In those circumstances, it was of no moment that the First Further Bid Call was unexpected,[3148] nor that it was not preceded or accompanied by a separate communication with someone known to have authority to act on behalf of Viterra. In the circumstances, Mahoney did not need to be introduced, or expressly authorised by someone else known to have authority to act for Viterra, for it to have been apparent to both Glencore and Viterra that it would appear to Cargill that Mahoney had such authority to engage in negotiations on behalf of Viterra as part of the sale process.

3828 *Secondly*, it may be noted that Mahoney having apparent authority to negotiate on behalf of the Viterra entities by virtue of his senior position in Glencore was consistent with the language of the Information Memorandum and the Management Presentation Memorandum, including the references to "Glencore".[3149] In short, from May 2013 onwards, although Glencore was exercising control over the situation, each of the separate legal entities comprising Viterra had expressly consented and agreed for Glencore to conduct the sale process and present relevant information on behalf of the Sellers.

3829 *Thirdly*, in the context of the first 2 matters referred to above, Mahoney explicitly represented that he had authority to negotiate price and conclude a deal on behalf of the Sellers in the Further Bid Calls. Mahoney's representation of his own authority alone could never be sufficient to establish Mahoney had apparent authority.[3150]

3147 See pars 343-347, 431 above.

3148 To the extent that it may have been: see pars 950, 964 above.

3149 See pars 475-483, 711 above. See also the definition of "Discloser" in the disclaimer in the Information Memorandum and the Management Presentation Memorandum.

3150 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 466 [36] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ), citing *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 503 (Diplock LJ); *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 187.2 (Brennan J); *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Company Pty Ltd* (1975) 133 CLR

However, the statements Mahoney made in the Further Bid Calls were entirely consistent with the impression otherwise created that Mahoney had authority to negotiate on behalf of Viterra (and Glencore).[3151] Amongst other things, he referred to the First Final Bid, represented that he was authorised to conclude a deal verbally by which Cargill could have acquired Joe White, and made representations as to the status of the bidding process and the bid amount necessary for Cargill to secure the Acquisition from the Sellers. This was done in the context where the Further Bid Calls were preceded by the exchanges that took place in 2012 and early 2013.[3152]

3830 For completeness, there can be little doubt that Mahoney had actual authority in any event. From a Glencore perspective, it was Mahoney who was the executive in charge of the sale process in relation to the Joe White Business.[3153] As King stated in his evidence, Mahoney was "head of agri", ultimately the person in charge of the relevant business division, and the ultimate decision-maker short of the chief executive officer with respect to any issue that might have arisen in relation to the sale of Joe White.[3154] Given that role and responsibility and Glencore's position in selling the Joe White Business with the knowledge, involvement and consent of senior executives of Viterra, including Mattiske, Fitzgerald and Rees, it must follow that Mahoney had actual authority to act on behalf of the Sellers.[3155] The possibility that Mahoney may not have had actual authority from Viterra to make precisely each of the specific statements he did was not to the point.[3156]

72, 78.5 (Gibbs, Mason and Jacobs JJ).

3151 See, for example, *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Company Pty Ltd* (1975) 133 CLR 72, 78.6 (Gibbs, Mason and Jacobs JJ). See also *Pacific Carriers v BNP Paribas* (2004) 218 CLR 451, 466-467 [36] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

3152 See pars 342-347, 431 above.

3153 See also par 1007 above; Walt being a key supervisor in the sale process.

3154 To adopt the language of the Viterra Parties' senior counsel in closing submissions: "You will recall that the instructions were all coming from Glencore, from Baar in Switzerland, Mr Mahoney [was] the 1 who ultimately held the decision-making".

3155 See also pars 3820, 3828 above. It must also be noted that Mostert was a director of each of the Sellers as well as chief financial officer of Glencore Agricultural, and was fully aware of Glencore's involvement in the sale process: see, for example, par 366 above.

3156 See *Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Co-Operative Assurance Company of Australia Ltd* (1931) 46 CLR 41, 46.6 (Gavan Duffy CJ and Starke J), 50.5 (Dixon J, with whom Rich J agreed). See also *Scheuer v Bell* [2004] VSC 71, [131] (Kaye J) and the cases there cited; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 467 [38], 469 [44] (Gleeson CJ, Gummow, Hayne, Callinan and

3831 Furthermore, Mahoney's conduct can also be attributed to Viterra by operation of section 139B(2) of the *Competition and Consumer Act*.[3157]

3832 There could be no issue that Mahoney's conduct was done on behalf of Viterra. Mahoney's conduct was engaged in so Viterra could receive payment of an additional $15 million for the purchase price. Further, Mattiske was a director of each of the companies comprising the Sellers with authority to act in relation to the sale of the Joe White Business on behalf of those companies.[3158] The effect of Mattiske's evidence was that he had consented or agreed to, at least implicitly, the sale process being conducted by "the Glencore team" based in Switzerland.[3159] Furthermore, Mattiske, as a director of each of the companies, finalised the transaction and executed the Acquisition Agreement, which evidenced Viterra consenting and agreeing to the purchase price achieved by Mahoney of $420 million (including taking the benefit of the additional $15 million).[3160] Accordingly, Mahoney's conduct was attributable to Viterra.

X.55 Were the Other Bidders Representations false, and did Glencore and/or Viterra thereby engage in misleading or deceptive conduct within the meaning of section 18 of the Australian Consumer Law?

X.55.1 Legal principles

3833 Whether a representation or representations constitute misleading or deceptive conduct is an objective question of fact. It is to be determined by reference to the conduct giving rise to the representation or representations, in light of all the surrounding facts and circumstances, including the representor's course of conduct

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Heydon JJ); *Mullens v Miller* (1882) 22 Ch D 194, 199.5-200.1 (Bacon VC); *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259, 265.8-266.5 (Willes J, delivering the judgment of the court).

3157 For a discussion of the relevant principles concerning s 139B(2), see issue 18 above.

3158 For evidence of such authority in the sale process, see, for example, pars 366-367, 370, 392 above.

3159 See par 392 above. See also par 4525 below as to Glencore's role from the time the Confidentiality Deed was executed by Cargill, Inc and delivered to Glencore.

3160 See fn 644 above.

viewed as a whole.[3161]

3834 Further, as a general rule, where a representation consists of a demonstrably false statement of fact, such a representation will amount to misleading or deceptive conduct.[3162]

X.55.2 Analysis

3835 For the reasons that follow, the Other Bidders Representations were demonstrably false,[3163] and as a result Glencore and Viterra engaged in misleading or deceptive conduct within the meaning of section 18 of the Australian Consumer Law.

3836 Either the Equal to or Better Bids Representation or the Competitiveness Representation was false because, as the Viterra Parties accepted, only 2 other Phase 2 bids had been submitted, which were for amounts significantly less than the First Final Bid. The closest bid to the First Final Bid was the Phase 2 bid of Co-Operative Bulk in the amount of $335 million, obviously $70 million less. The only other Phase 2 bid was $85 million below the First Final Bid, being Malteurop's bid of $320 million.[3164]

3837 The Necessity Representation, that Cargill needed to pay an additional $15 million to secure the Acquisition, was also demonstrably false. As stated above, the First Final Bid was the highest Phase 2 bid by a very significant margin both in dollar and percentage terms. The conditions attached to the First Final Bid were not obviously more onerous, and were less numerous than those attaching to the other Phase 2 bids submitted.[3165] Glencore did not have an amount below which it was not willing to let

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3161 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 605 [39]-[40] (Gleeson CJ, Hayne and Heydon JJ), 625 [109] (McHugh J). For a more extensive discussion of this case, see pars 2937-2950 above.

3162 See, for example, *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647, 690 [217] (Edelman J); *Conagra Inc v McCain Foods (Aust) Pty Ltd* (1992) 33 FCR 302, 380.8 (French J).

3163 That is either the Equal to or Better Bids Representation and the Necessity Representation, or the Competitiveness Representation and the Necessity Representation: see par 3816 above.

3164 See par 983 above.

3165 Ibid.

the sale proceed.[3166] Accordingly, it could not have been necessary, in those circumstances, for Cargill to further increase the amount of the First Final Bid (and so further increase the already substantial margin by which the First Final Bid exceeded the other Phase 2 bids) in order to secure the Acquisition.

X.55.3 Rejection of the Viterra Parties' submissions

3838 Nonetheless, the Viterra Parties contended that the Necessity Representation was not false because it was not incorrect to say that if Cargill increased its bid by $15 million, Cargill *would* secure the Acquisition that day and so would avoid the risk of further competitive negotiations against other bidders.

3839 This submission cannot be accepted. It appeared to be directed at disputing the falsity or otherwise of certain of Mahoney's statements, rather than the falsity of the Necessity Representation. There were 2 indicators that this is so.

3840 The *first* was the use, in this submission, of a temporal qualification; namely, that by increasing its bid by $15 million, Cargill would secure the Acquisition "that day". This was consistent with some of Mahoney's statements, but did not specifically address the Necessity Representation, which was not merely temporally bound.

3841 The *second* indicator was the use of the word "would", namely, that by Cargill increasing its bid by $15 million, Cargill "would secure the transaction". That is consistent with the use, in Mahoney's statements, of securing the outcome, but again did not address the Necessity Representation.

3842 This was an important distinction. It was obviously true that, by the highest bidder further increasing the superiority of its bid, it would result in the highest bidder being the successful bidder; but it is not true that doing so was *necessary*. Thus, whilst it was not false to represent that Cargill increasing its bid by $15 million would definitely secure to it the Acquisition, it was entirely misleading and false to represent that it

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[3166] Of course, if all bids were well below a price Glencore was willing to approve for the sale, then there was no obligation for Glencore or Viterra to proceed. It may be assumed that if all bids were very low, Glencore might have reconsidered its position. However, in respect of the First Final Bid of $405 million, no such consideration arose: see, for example, par 766 above.

was necessary that it do so.

3843 This illustrated and reinforced the fundamental point that constituent statements and conveyed representations are, and may mean, different things. The Viterra Parties' submission directed at contesting the falsity or otherwise of specific statements made by Mahoney did not fully engage with the allegation. It is the falsity of the Necessity Representation which was at issue.

3844 In addition, the Viterra Parties put forward a rationale for Cargill increasing its bid by $15 million to secure the Acquisition, namely that Cargill could avert the risk of further competitive negotiations involving other bidders. Notably, this rationale was said not to depend on there being Phase 2 bids that were close, equal or superior to the First Final Bid. "[C]ompetitive negotiations", it was submitted, posed a risk for Cargill not because, as at 2 August 2013, there were presently competitive Phase 2 bids, but because there was the prospect that presently uncompetitive bids may later become competitive. This was said to be because "it was open for Glencore to engage in dialogues with the [other Phase 2 bidders] to seek to encourage them to increase their bids if a deal was not reached … that day".

3845 This submission did not withstand scrutiny.

3846 *First,* as a matter of logic, that the representee had, or may have believed it might have, perceived commercial reasons to do what the representor represents was necessary was not determinative of the issue.

3847 *Secondly,* and in any event, the posited rationale was not at all compelling. If there was evidence that could possibly support the rationale, none was identified.[3167] What evidence there was did not suggest any risk, real or even remote, that the bidding process would continue such that there would have been any real prospect of a

[3167] In oral closing submissions, the Viterra Parties submitted that if Cargill had not agreed to pay an extra $15 million the deal might have been done with someone else. While anything may have been possible, the evidence at trial, coupled with the complete absence of any evidence being led by the Viterra Parties as to the prospect of such an event occurring, suggested any such possibility was extremely remote so as to be bordering on the fanciful. Further, it may be safely presumed that, given the pressure exerted from those in charge in Switzerland (see par 766 above), if there had been any chance of another bidder matching or exceeding the First Final Bid that possibility would have been explored.

competitive bid that would have come close to matching or exceeding the First Final Bid of $405 million. To repeat, as at 2 August 2013, the First Final Bid was $70 million higher than the Phase 2 bid of Cargill's nearest competitor, Co-Operative Bulk, and $85 million higher than the Phase 2 bid of its only other remaining competitor, Malteurop. To be competitive against Cargill, Co-Operative Bulk would have had to increase its bid by over 20 percent just to match the First Final Bid, in circumstances where there was no evidence to suggest Co-Operative Bulk was interested in increasing its Phase 2 bid at all.

3848 In those circumstances, it is difficult to comprehend: (1) why a technically possible, but not realistic, risk of further bidding from uncompetitive other bidders should compel Cargill to immediately secure the deal; and (2) why, even if immediately securing the deal was considered desirable by Cargill, Cargill should need to materially increase the already significant amount by which its First Final Bid exceeded the Phase 2 bids of its competitors to do so.

3849 In conclusion, the Necessity Representation was patently false.

X.56 Were the Other Bidders Representations made in trade or commerce within Australia, or between Australia and places outside Australia, such that section 18 of the Australian Consumer Law applies?

3850 Section 18 of the Australian Consumer Law applies to conduct in trade or commerce "within Australia" or "between Australia and places outside of Australia".[3168] Further, section 5(1) of the *Competition and Consumer Act* gives section 18 of the Australian Consumer Law extraterritorial operation. That subsection relevantly provides that section 18 of the Australian Consumer Law applies to conduct engaged in outside of Australia by "bodies corporate incorporated or *carrying on business* within Australia" (emphasis added).[3169]

3851 As the exchanges between Mahoney and Koenig took place entirely overseas,[3170] a

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3168 Australian Consumer Law, definition of "trade or commerce": s 2(1).
3169 *Competition and Consumer Act*, s 5(1).
3170 Koenig was in the United States of America and Mahoney was in Europe.

question arose as to whether the Other Bidders Representations were made in trade or commerce such that section 18 of the Australian Consumer Law applied. In light of the relevant facts, this must be resolved by determining whether the Other Bidders Representations were made by a body "incorporated or carrying on business within Australia".[3171]

3852 Perhaps because of the way the issue was formulated, it appeared the Viterra Parties adopted the position that, because the Other Bidders Representations were not made within Australia or between Australia and places outside Australia, this disposed of the issue entirely. That was the only submission they made on this issue. If that was their position, it cannot be accepted. Section 5(1) of the *Competition and Consumer Act* must be considered.

3853 As set out above, Mahoney's conduct in making the Other Bidders Representations was attributable to *both* Glencore and Viterra.[3172] However, in answering this particular question, it is convenient to address Glencore and Viterra separately.

3854 Turning *first* to Viterra, if I am correct that Mahoney's conduct in making the Other Bidders Representations was attributable to Viterra, then this question must be answered in the affirmative. This is because each of the Viterra entities was incorporated within Australia. For completeness, each of them was also carrying on business within Australia.

3855 Turning *secondly* to Glencore, the answer to the question is the same. This is because Glencore was relevantly "carrying on business within Australia".[3173]

3856 The term "carrying on business" is to be construed according to its ordinary or usual meaning.[3174] Whether or not a company satisfies the definition of "carrying on

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3171 See, for example, *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647, 681-682 [164]-[166], 685 [182], 686 [189], 687-688 [198]-[205] (Edelman J).

3172 See issue 54.3 above.

3173 Glencore is not incorporated within Australia.

3174 *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 17-18 [59]-[60] (Merkel J). For completeness, Merkel J referred to a submission of the applicant and the Australian Competition and Consumer Commission (the latter not being a party: 8 [14]) that "carrying on business in Australia" should be interpreted

business" is a question of fact and degree.[3175] Ordinarily, although not always, "carrying on business" will involve:[3176]

> … a series or repetition of acts. Those acts will commonly involve "activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis".
>
> (Citations omitted.)

3857 Relevantly, a company incorporated overseas may be "carrying on business" in Australia even where the bulk of its activities are conducted elsewhere.[3177] Further, a company incorporated elsewhere may be found to be "carrying on business" in Australia where, as here, its Australian activities are conducted in connection with, or by reason of its control over, an Australian company.[3178] Furthermore, involvement in the acquisition and sale of an Australian company or companies may, in appropriate cases, constitute "carrying on business" in Australia.[3179]

3858 In my view, Glencore was relevantly "carrying on business within Australia" for at least the following reasons:[3180]

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broadly so as to give effect to the object of the *Trade Practices Act*: 17-18 [59]. However, his Honour did not rule on the point in finding he was not satisfied the foreign respondents carried on business in Australia: 23 [81]. In *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647, Edelman J suggested Merkel J had referred to "the parties' acceptance" that the expression should be broadly interpreted: 687 [196]. In fact, only the applicant and a non-party had contended for that position. To compound matters, in *Vautin v BY Winddown, Inc* (*No 4*) (2018) 362 ALR 702, 753-754 [235] Derrington J referred to Edelman J as describing Merkel J's position to the effect that "carrying on business" should be broadly interpreted. In fact, Merkel J did not express this view.

3175 *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164, 186.9 (Stephen J).

3176 *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647, 687 [197]. See also *Vautin v BY Winddown, Inc* (*No 4*) (2018) 362 ALR 702, 754 [235]-[236] (Derrington J); *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, 233-235 [144]-[149] (Dowsett, McKerracher and Moshinsky JJ); *Norcast S.ár.L v Bradken Ltd (No 2)* (2013) 219 FCR 14, 77 [255] (Gordon J).

3177 *Re Application of Campbell; Gebo Investments (Labuan) Ltd v Signatory Investments Pty Ltd* (2005) 54 ACSR 111, 124-125 [38]-[41] (Barrett J), citing, for example, *Smith (on behalf of National Parks and Wildlife Service) v Capewell* (1979) 142 CLR 509, 519.2 (Gibbs J) and *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164, 179.03 (Gibbs J, with whom Stephen, Mason and Jacobs JJ relevantly agreed).

3178 *Norcast S.ár.L v Bradken Ltd (No 2)* (2013) 219 FCR 14, 77 [255] (Gordon J), citing *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 18-19 [60]-[63] (Merkel J).

3179 *Norcast S.ár.L v Bradken Ltd (No 2)* (2013) 219 FCR 14, 77 [256].

3180 It is not suggested that these reasons individually would all lead to the conclusion that Glencore was carrying on business with Australia. Further, it was unlikely all of them were necessary to be established to demonstrate Glencore carried on business in Australia at the relevant times.

(1) Glencore was the ultimate holding company for Joe White, an Australian company, which it owned through Joe White's holding companies, Viterra Ltd and its subsidiaries.[3181]

(2) Glencore acquired Joe White, through its acquisition of Viterra in late 2012, and shortly afterwards, Glencore commenced preparations to on-sell Joe White.

(3) From the time Glencore acquired Viterra, Glencore was involved in decisions concerning how Joe White conducted some aspects of the Joe White Business.[3182]

(4) Throughout 2013, Glencore was actively involved in, and primarily responsible for, the sale of Joe White and the "running of the transaction".[3183] Day-to-day project management of that process fell to a Glencore employee, King, with the decision-making responsibility resting with, and the actual sale process driven by, "the Glencore team".[3184] Glencore's advisers were continually involved in that process in key respects.[3185]

(5) Glencore's purpose in selling Joe White was the generation of profit, or at least the realisation of the maximum value possible for what was, for Glencore, a "non-core" asset.

(6) The sale process was long, multi-tiered and involved, on Glencore's part, continuous and repetitive activity of a conventionally commercial kind, including attendance in Australia by Glencore executives and representatives, the making of presentations, and facilitating and overseeing site visits occurring in Australia as part of that process.[3186]

3181 See par 9 above.
3182 See par 357 above.
3183 This reflects the Viterra Parties' own submissions.
3184 See par 392 above.
3185 See, for example, pars 363, 369, 376, 386, 404, 440 above.
3186 See, for example, pars 362, 699 above.

(7) The sale process required the involvement of Australia-based executives and employees of Viterra, working in Australia in this capacity over a number of months, whose conduct was overseen by Glencore and Viterra.

(8) Glencore (and Viterra) retained Australian lawyers, Mallesons, to advise and assist with the sale process.[3187]

(9) The sale process also involved the ongoing participation of Mattiske, who had some responsibility to ensure it ran smoothly and who was based in Melbourne at all material times.

3859 As a result, section 18 of the Australian Consumer Law applies.

X.57 Did Cargill, Inc rely on the Other Bidders Representations in raising its bid by $15 million to $420 million?

X.58 Did Cargill Australia rely on the Other Bidders Representations in entering into the Acquisition Agreement?

X.58.1 Preliminary matters

3860 It is convenient to deal with issues 57 and 58 together. Necessarily, they largely overlap. However, separate issues in relation to causation arise with respect to each of the Further Bid Calls. Therefore, it is necessary to deal with each call separately.

3861 There is no controversy that Cargill raised its bid to $420 million and as a result acquired the Joe White Business at that amount.

3862 The relevant legal principles are set out in issue 20.2 above. As explained above, the issue of whether or not Cargill Australia relied on the Other Bidders Representations as alleged is to be determined as a matter of fact.

X.58.2 The First Further Bid Call

3187 See par 367 above.

X.58.2.1 The Cargill Parties' submissions

3863 The Cargill Parties submitted that there were 3 main indicators that Cargill relied on the Other Bidders Representations conveyed in the First Further Bid Call in raising its bid to $420 million and entering into the Acquisition Agreement:

(1) Cargill immediately treated the Other Bidders Representations as warranting serious consideration and an urgent response. Significantly, very shortly after the First Further Bid Call, a telephone call involving a large number of senior Cargill executives (including executives with the power to decide whether or not to increase the First Final Bid) was convened to consider how to respond.[3188]

(2) The evidence of senior Cargill executives who participated in that telephone call was that, notwithstanding some reservations, Mahoney was ultimately taken "at his word" and the Other Bidders Representations were taken at face value.[3189]

(3) Despite canvassing alternative options (including maintaining the First Final Bid, or raising the First Final Bid by $5 million or $10 million), Cargill decided shortly after to increase its bid by $15 million as a result of the Other Bidders Representations. In short, Cargill agreed to do precisely what Mahoney had represented was necessary to secure the Acquisition.

X.58.2.2 The Viterra Parties' submissions

3864 The Viterra Parties submitted that if, contrary to their primary submission that the Other Bidders Representations were not made, the court held they were made then there were key indicators that Cargill had not relied on the Other Bidders Representations. They referred to the evidence indicating that senior Cargill executives, at the time at which they were considering the Other Bidders Representations, openly and repeatedly doubted whether they could rely on the Other Bidders Representations. Further, they submitted there was a lack of direct evidence

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3188 See pars 3783-3789 above.

3189 See pars 3793, 3795, 3799 above.

as to what matters, if any, were actually relied upon by the person they contended was the ultimate decision-maker, Page. Page was not called to give evidence, and it was submitted he was likely to have been influenced by views expressed by Conway, and Conway did not recall being involved in the relevant calls. Furthermore, they submitted that notwithstanding the absence of any direct evidence in relation to Page's decision-making, there was "strong circumstantial evidence" that Page did not rely on the Other Bidders Representations. They contended that Page instead saw the making of the Other Bidders Representations as offering leverage to resolve the outstanding key matters in Cargill, Inc's favour in return for an increase in the purchase price. In this regard, 2 key pieces of circumstantial evidence were identified: (1) Page, during a telephone call following the First Further Bid Call, asked other Cargill executives about the present state of negotiations with Glencore and the matters in negotiation that had not yet been resolved; and (2) Page ultimately decided that Cargill would increase its bid on condition that a number of remaining items be resolved in Cargill's favour.

X.58.2.3 Analysis

3865 For the reasons below, it has been established that Cargill did rely on the Other Bidders Representations[3190] in raising its bid to $420 million and entering into the Acquisition Agreement at that price.

3866 To explain why this is so, it is convenient to first address several matters raised by the Viterra Parties.

3867 There was no direct evidence that Page singularly made the decision to raise the First Final Bid by $15 million. On the contrary, the evidence shows the decision was made collectively by a number of senior Cargill executives,[3191] of whom Page was the most senior. The mere fact that Page was the senior officer did not mean that it was only his state of mind that was relevant in determining whether the causation requirement

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3190 In making this observation, it is necessarily contingent on which of the 3 representations comprising the Other Bidders Representations were made. Essentially, therefore, this represents a finding of reliance on either the Equal to or Better Bids Representation, or the Competitive Bids Representation, and, in addition, the Necessity Representation.

3191 In addition, Koenig gave evidence that he sent his email concerning the first of the Further Bid Calls (see par 3781) "to the people who were making the decision".

had been satisfied. This was particularly so in such a large organisation as Cargill, where a number of other senior executives had worked far more closely on the proposed transaction. Further, because of Cargill's decision-making structure and process,[3192] these other senior executives were also capable of making the decision as to whether or not Cargill should proceed with the purchase.

3868 In short, the collective consideration of Mahoney's statements, including the open exchange of opinions and assessments, the views expressed and the manner in which the ultimate decision was made, demonstrated the Other Bidders Representations were relied upon by Cargill.[3193]

3869 Alternatively, even accepting for the sake of argument that Page was the relevant decision-maker in relation to whether to increase the First Final Bid to $420 million,[3194] the absence of direct evidence in relation to Page's state of mind was not an obstacle to a finding of reliance on the facts of this case. Reliance may be established by inference.[3195]

3870 In the circumstances, contrary to what has been found, even if Page was the sole decision-maker, an inference of reliance would readily be drawn.[3196] Page participated in, and went along with, the views of others to the effect that Mahoney's statements could not be dismissed and ought to be acted upon.[3197] Even putting this fact aside, the mere fact that Page and the other executives acted with the urgency that they did and agreed to increase the First Final Bid in such a short and stipulated timeframe by precisely the specified amount of $15 million was highly probative evidence of reliance on the statements made.

3871 Further, there was not "strong circumstantial evidence" that Page viewed the Other Bidders Representations merely opportunistically; that is, only as leverage for Cargill

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3192 See pars 298-299 above.
3193 See pars 3783-3801 above.
3194 Noting that the Cargill Board had pre-approved making a bid for Joe White of up to US$400 million (approximately $440 million) on 9 July 2013, on condition of a minimum 10 percent internal rate of return.
3195 See pars 3154-3157, 3159 above.
3196 See further pars 3878-3879 below.
3197 See pars 3786, 3789-3790, 3792-3793, 3795 above.

to extract additional contractual protections from Glencore.

3872 The circumstantial evidence relied upon by the Viterra Parties comprised 2 entirely unremarkable matters: (1) Page enquired as to the state of negotiations and the status of all unresolved matters when considering whether Cargill should agree to the purchase price specified; and (2) Cargill responded to that request for a significant increase in its bid with a condition that certain unresolved matters that had not been discussed by Mahoney and Koenig be resolved in Cargill's favour. Put simply, that Cargill's response to the Other Bidders Representations had regard to the overall state of negotiations and sought to finalise them in its favour did not indicate that the Other Bidders Representations were not viewed seriously, nor that they were not relied upon.

3873 Furthermore, even if Cargill's decision to increase its bid and enter into the Acquisition Agreement was motivated in part, even in large part, by its interest in securing the additional contractual protections it extracted, that would still be entirely consistent with Cargill having relied on the Other Bidders Representations in deciding to offer to (and contracting to) acquire the Joe White Business for $420 million. It was not necessary that Cargill relied only on the Other Bidders Representations in deciding to increase its bid and enter into the Acquisition Agreement; it was only necessary that the Other Bidders Representations materially contributed to those decisions.[3198] It was readily apparent that they did.

3874 Two further observations may be made about the doubts openly expressed by senior Cargill executives in relation to the Other Bidders Representations.

3875 *First*, whether it was, as found, a group decision or if Page alone made the decision and he had shared, endorsed or had been influenced by the doubts expressed by the other executives, it would still be no bar to establishing reliance. Scepticism, doubt or distrust as to the truth of a representation is not knowledge of its falsity, and so is not necessarily inconsistent with reliance.[3199] There was no evidence to suggest that Page

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3198 See pars 3153-3154 above.

3199 See par 3158 above.

or any other Cargill executive knew, or held a definite belief, that Mahoney was merely bluffing and that there was no real substance to what he had told Koenig. On the contrary, the possibility was squarely raised (such consideration included Mahoney's previous conduct while a Cargill employee),[3200] considered and then resolved on the basis that Cargill ought not to proceed other than by taking what Mahoney had said at face value. In other words, it was decided to rely and act upon the Other Bidders Representations despite a level of doubt as to their veracity.

3876 To the extent the Viterra Parties submitted that an adverse inference ought to be drawn because of the Cargill Parties' failure to call Page, or at least that no inference ought to be drawn in Cargill Australia's favour because of this failure,[3201] it was correct that Page's absence was not explained. It was also correct that, assuming he remembered the circumstances, he would have been able to give direct evidence of the relevant discussions, as well as any thoughts or decision-making process he may have engaged in at the time.

3877 However, the fact that Page was not called as a witness did not, and should not, prevent the court from finding reliance given the circumstances of the case. There were a number of other witnesses who were able to give evidence about what occurred.[3202] Further, the case of reliance was a very strong case, supported by contemporaneous documents and facts not in issue. Furthermore, it should not be necessarily assumed that Page would have remembered the relevant events. It was quite plausible that he like Conway, in a very senior executive role, would have no or little substantive recollection.[3203]

3878 *Secondly*, and in any event, the absence of direct evidence of Page's reliance was not evidence of an absence of reliance. In short, the lack of evidence from Page did not

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3200 See par 3792 above.

3201 It was not entirely clear whether such a submission was made. Comment was made in the factual part of their submissions about Page not being called. However, in the Viterra Parties' submissions dealing with *Jones v Dunkel* inferences, Page was not referred to.

3202 See pars 3785-3798 above.

3203 Whilst acknowledging the facts in this case were very different, compare the observations in *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, 413-414 [168]-[170] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

rebut or undermine the large body of evidence which demonstrated Cargill did, in fact, rely on the Other Bidders Representations.

3879 Having disposed of these main matters raised by the Viterra Parties, it may be seen more readily that a fair inference was available that Cargill relied on the Other Bidders Representations in deciding to increase its First Final Bid for Joe White to $420 million and enter into the Acquisition Agreement. Indeed, in my view, it was the only sensible inference to draw. The following matters were significant:

(1) The Other Bidders Representations were calculated to induce Cargill to adopt a very specific course of action in order to benefit Glencore and Viterra. The Necessity Representation, reinforced by the Equal to or Better Bids Representation or the Competitiveness Representation, was an acute and direct means of inducement.

(2) The Other Bidders Representations were accompanied by other statements that aligned with the atmosphere of exaggerated urgency and competitiveness created by the Other Bidders Representations, in particular a 2 hour window of opportunity, and references to active correspondence with competitor bidders.[3204]

(3) The Other Bidders Representations were made in the context of a high-stakes and competitive bidding process, involving a stark asymmetry of information between representor and representee, coupled with the inability for the representee to lawfully test or verify the relevant representations.[3205] In those circumstances, a level of doubt on the part of Cargill was almost unavoidable, but acting (or more accurately failing to act by not increasing the First Final Bid) on the basis of mere doubt was considered untenable given the stakes.

3204 See pars 3779-3780 above.

3205 Cargill was contractually bound not to communicate with any of the other bidders: see par 643 above.

(4) The evidence demonstrated that Cargill took the Other Bidders Representations seriously. Cargill convened high-level meetings to consider them on short-notice; and formulated a response quickly and in compliance with the demands accompanying the Other Bidders Representations.[3206]

(5) In a very short timeframe, Cargill ultimately decided to do precisely what was represented to be necessary to acquire the Joe White Business, by increasing its First Final Bid by $15 million.

3880 In those circumstances, there can be little doubt that the Other Bidders Representations "materially contributed" to Cargill's decision to increase the First Final Bid for Joe White to $420 million and enter into the Acquisition Agreement for that amount. Indeed, given the terms of the bidding process,[3207] and that there was no competitive bid even remotely close to the First Final Bid,[3208] in the absence of the Other Bidders Representations in the First Further Bid Call, there would have been no rational basis for Cargill to increase its bid as it did.

3881 To reiterate, although relevant to determining whether the required causal link existed, the mere fact that Cargill was able to secure some additional conditions in its favour in return for offering the additional $15 million did not break the chain of causation.

X.58.3 The Second Further Bid Call

3882 There was no suggestion that what occurred in the Second Further Bid Call altered the effect of what had occurred in the First Further Bid Call. Accordingly, it was not strictly necessary for Cargill to make out its case based on the Second Further Bid Call. However, given I have formed the view that Cargill did not rely on any representations conveyed in the Second Further Bid Call in raising its bid to

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3206 Even after the discussions about increasing the First Final Bid were completed, there was evidence demonstrating reliance. In an email on 3 August 2013, Eden made reference to buying the Joe White Business in circumstances where there was "intense competition": see par 1009 above.

3207 See pars 639-643 above.

3208 See pars 3836-3837 above.

$420 million and entering into the Acquisition Agreement at that price, it is important to set out the basis of that conclusion. Essentially, Cargill's decision to raise its First Final Bid had already been made by the time of the Second Further Bid Call. Further, Koenig considered he was duty-bound to respond in accordance with that decision, and demand the specified conditions,[3209] whether or not Mahoney confirmed what he had previously stated.

3883 To elaborate, Cargill's decision to raise the First Final Bid for Joe White was communicated to Koenig in the email sent by Hawthorne before the Second Further Bid Call. By that email, Koenig was authorised and directed to convey to Mahoney an offer of $420 million. He did so in the Second Further Bid Call. As Koenig accepted, he was not relevantly a decision-maker and had no authority to further negotiate the price. Though Koenig, in the Second Further Bid Call, again asked Mahoney why it was necessary that Cargill increase its bid, that query did not indicate the absence of a concluded decision by Cargill to so increase its bid; the question was put despite that decision having already been made.

3884 The Cargill Parties submitted that the Other Bidders Representations were conveyed in the Second Further Bid Call and were relevantly relied upon by Cargill despite the fact that, as the Cargill Parties accepted, Cargill had decided to agree to pay $420 million before the Second Further Bid Call. The Cargill Parties advanced this submission in 2 ways.

3885 *First,* the Cargill Parties characterised the later representations as an extension of the earlier representations. Cargill's reliance on the Other Bidders Representations conveyed in the Second Further Bid Call was said to be a continuation of reliance on the Other Bidders Representations conveyed in the First Further Bid Call (which preceded the decision to raise the bid). As the Cargill Parties put it, "Cargill's reliance on [the Necessity Representation] continued in the second call after [Koenig] tested the representation again by asking why Cargill had to pay $15 million more and

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3209 Whichever email it was: see pars 3800-3801 above.

Mahoney confirmed and repeated the earlier representation".

3886 *Secondly,* the Cargill Parties appeared to posit a second component of the decision to offer the increased bid, which followed the later representations. Specifically, it was submitted that Koenig had, in the Second Further Bid Call, a degree of decision-making capacity. This was contended to be in relation to the bid amount, or at least the capacity to decide to not offer the increased bid, in the event that his initial questioning of Mahoney cast further doubt on, or revealed the falsity of, the Necessity Representation. As the Cargill Parties put it, "[h]aving tested the [Necessity Representation], after questions were raised internally as to whether [Mahoney] was bluffing, *[Koenig] then agreed* to pay $420 million on behalf of Cargill" (emphasis added).

3887 If supported by some evidence, or even in the absence of any contrary evidence, both of these submissions might have had some attraction. In those circumstances, it might have been assumed that, if Mahoney had said something to indicate that what he had said in the First Further Bid Call was incorrect, then Koenig would have at least sought further direction from the other Cargill executives before concluding a verbal agreement to pay $420 million for the Joe White Business.[3210] However, the Cargill Parties' submissions were directly contrary to the evidence.

3888 Significantly, there was no evidence that Koenig had any authority to do anything other than put the offer which he had been directed to convey. Equally, the evidence did not suggest Koenig had any authority to withhold the offer, or to further negotiate the price. Further, it was incorrect to submit that Koenig agreed to pay $420 million, or that he so agreed because he was satisfied with Mahoney's responses to his queries. To so submit implied a decision-making capacity where there was none. It was the Cargill executives who had earlier decided that Cargill would pay that amount; Koenig was authorised and directed to convey, and in substance merely conveyed, that decision.

[3210] For the avoidance of doubt, it was clear from the context that such an agreement was not intended to be legally enforceable unless and until the terms of the Acquisition Agreement had been agreed upon.

3889 Moreover, and more significantly, Koenig's evidence on this issue was clear and unequivocal. Under cross-examination, Koenig said that, before telling Mahoney that Cargill was willing to pay $420 million, he asked Mahoney to say a further time why Cargill needed to pay that amount "knowing full well ultimately we were going to pay it". He agreed that it did not matter what Mahoney said (other than if he had said that the deal was no longer available), because Koenig did not have authority to say Cargill was not going ahead and he had no intention of arguing with Mahoney.

3890 It followed that come what may, Koenig was intent to act as directed; namely, to tell Mahoney that Cargill was willing to offer $420 million, and would have done so regardless of what Mahoney might have said. In these circumstances, neither Koenig, much less the decision-makers who instructed him, could have relied on anything Mahoney said in the Second Further Bid Call.

X.58.4 Conclusion

3891 The evidence demonstrated that Cargill did in fact rely on the Other Bidders Representations in raising its bid to $420 million and then entering into the Acquisition Agreement for that purchase price.

X.59 Did Glencore and/or Viterra know that the Other Bidders Representations were false and/or did they not genuinely believe the Other Bidders Representations were true and/or were they reckless as to whether the Other Bidders Representations were true or false?

X.59.1 Legal principles

3892 The elements of deceit are set out above.[3211] To make out their claim for deceit, the Cargill Parties needed to establish that Glencore or Viterra, or both, knew that the Other Bidders Representations were false, or did not genuinely believe that they were true or were reckless as to whether they were true or false.

3211 See issue 22.1 above.

X.59.2 Submissions

3893 The Cargill Parties submitted that it could be inferred from the relevant facts that Mahoney, and therefore Glencore and Viterra,[3212] knew the Other Bidders Representations were false, or did not genuinely believe that they were true or were reckless as to whether they were true or false. The Cargill Parties referred to the fact that Mahoney was the head of Glencore Agriculture and in charge of the sale of Joe White, while reporting to the chief executive officer of the Glencore group. Further, they referred to Merrill Lynch's summary of the Phase 2 bids.[3213] In the Defence, Glencore admitted knowledge of the amounts of the Phase 2 bids. In any event, the Cargill Parties submitted in his conversation with Koenig, Mahoney made it clear he was aware of other final bids that had been made.[3214]

3894 The Viterra Parties relied on their submissions that the Other Bidders Representations were not made, or alternatively, that even if they were made, it was not established that the representations were false. Both of these submissions have been rejected.[3215]

X.59.3 Analysis

3895 Glencore and Viterra both knew that the Other Bidders Representations were false, or did not genuinely believe that they were true or were reckless as to whether they were true or false. As already explained above,[3216] Mahoney's conduct and his knowledge that the Other Bidders Representations were false, were plainly attributable to Glencore and Viterra as a matter of law (in addition to attribution resulting from the operation of section 139B(2) of the *Competition and Consumer Act*).

3212 Initially, the Cargill Parties only made submissions on this issue in relation to Glencore's position. After this fact was raised with them, on 19 November 2019 the Cargill Parties filed supplementary submissions contending that Viterra also knew the falsity of the Other Bidders Representations because Mahoney was acting as Viterra's agent or on Viterra's behalf within the meaning of s 139B(2)(b)(ii). At the hearing on 22 November 2019, the Viterra Parties' senior counsel informed the court that he did not wish to say anything in response.

3213 See par 983 above.

3214 See, for example, par 3780 above. The fact that Mahoney misrepresented the level of the other bids made could not, in the circumstances, suggest he was labouring under any misunderstanding as to the amounts involved. No submission to this effect was made by the Viterra Parties.

3215 See issues 54, 55 above.

3216 See pars 3820, 3826-3832 above.

3896 Further to Glencore's admission that it knew of the amounts bid in Phase 2, there could be no real issue that Mahoney was a person at Glencore who had this knowledge on 2 August 2013. Therefore, Mahoney, acting for Glencore and Viterra during the sale process, was clearly in a position to have known that the Other Bidders Representations were false, and materially so. Naturally, if I had not formed this view, I would have concluded that Mahoney did not genuinely believe the Other Bidders Representations to be true or, at the very least, was reckless as to whether they were true or false. These alternate findings would necessarily have flowed from Mahoney's knowledge of the sale process and the position he held.

X.60 Did Glencore and/or Viterra make the Other Bidders Representations with the intent that Cargill, Inc should rely on them by raising its bid by $15 million, and that Cargill Australia should rely on them by entering into the Acquisition Agreement? If so, and Cargill relied upon the Other Bidders Representations (see issues 57 and 58 above), did Cargill Australia suffer any loss?[3217]

3897 To make out its claim for deceit, Cargill Australia needed to establish that Glencore or Viterra, or both, made the Other Bidders Representations with the intention that they be relied upon by Cargill.[3218]

X.60.1 The submissions

3898 The Cargill Parties submitted it should be inferred that Glencore made the Other Bidders Representations with the intent that Cargill rely on them to raise its bid by $15 million and rely on them by entering into the Acquisition Agreement. The Cargill Parties claimed that the Other Bidders Representations were made in the context of the sale process and the only purpose for which they could have been made was to persuade Cargill to increase the First Final Bid.

3899 The Viterra Parties submitted that, if the Other Bidders Representations were

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3217 The parties addressed the question of loss arising from the Other Bidders Representations in issue 73, but it is convenient to deal with it here.

3218 See par 3233 above.

conveyed (which they denied), as a result of the context there was no intention for Cargill Australia to rely on them because such an intention would be wholly inconsistent with the Sale Process Disclaimers.

X.60.2 Conclusion

3900 The Other Bidders Representations were undoubtedly made with the intention for Cargill to rely on them in the way that it did by increasing its bid by $15 million.

3901 In circumstances where the First Final Bid was $405 million and Mahoney called Koenig and made representations to Koenig that other bidders were "there", "at that number" or "at that level",[3219] and that there was a necessity for Cargill to pay an additional $15 million to secure the acquisition of Joe White,[3220] objectively there was no other realistic intention that Mahoney could have had in making the Other Bidders Representations.

3902 Further, the existence of any disclaimers that formed part of the sale process did not have the effect of preventing Mahoney from intending for Cargill to rely on the Other Bidders Representations, nor could they have had the effect of altering the factual matter of his actual intention apparent from what he said when he made the Other Bidders Representations. Mahoney made no reference to any disclaimers in the Further Bid Calls. Furthermore, Mahoney's intention was a matter of fact, and in the surrounding context, the Sale Process Disclaimers did not prevent, detract, diminish or obscure Mahoney's particular and obvious intention. Given the content of the Other Bidders Representations, it would be entirely artificial to find that Mahoney's intentions, at the closing stages of the sale process when all final bids were in, were somehow altered or materially affected by previous disclaimers. This was particularly so in circumstances where the Further Bid Calls were not foreshadowed to be part of the sale process and were clearly outside what the parties had agreed would have been the means of the Viterra Parties procuring a sale.[3221]

3219 See par 3780 above.
3220 See pars 3781-3782, 3818 above.
3221 See, for example, par 3790 above.

3903 In summary, Glencore and Viterra both engaged in deceit by making the Other Bidders Representations. In the circumstances, Mahoney knew that the Other Bidders Representations were false because he knew there was no other bid that was even remotely comparable to the First Final Bid. In short, Mahoney was successful in creating a completely false impression that Cargill needed to increase the First Final Bid to $420 million to secure the purchase of Joe White, when in fact the existing offer was already more than enough to achieve that outcome. In doing so, Mahoney evidenced his intention that, in the limited time he allowed, Cargill would rely on the Other Bidders Representations, which it did. Except for the reference to the Sale Process Disclaimers in their closing submissions, no alternate intention was suggested by the Viterra Parties and none was apparent.

X.60.3 Loss

3904 Regardless of the outcome of the other claims in this proceeding, Cargill Australia is entitled to recover by way of damages the additional $15 million it agreed to pay in reliance upon the Other Bidders Representations.

3905 The Viterra Parties submitted that even if the court was satisfied that Cargill, Inc and Cargill Australia relied upon the Other Bidders Representations in offering an additional $15 million, it could not be satisfied that that amount was the equivalent of the loss suffered. This was put on the basis that there was no counterfactual evidence of what would have occurred had Cargill not offered a further $15 million. They contended that the evidence from Cargill's own witnesses gave rise to an inference that the parties almost certainly would not have entered into the Acquisition Agreement on the same terms as they did on 4 August 2013 because: (1) at the time of the Other Bidders Representations, the parties were still apart on some key contractual terms; (2) Cargill had decided that the increased purchase price could be used as leverage to resolve the outstanding key matters in Cargill's favour; (3) Cargill's offer of an additional $15 million was in fact expressly conditional upon Glencore agreeing to certain key terms; and (4) Glencore agreed to most of those terms, which were duly

incorporated into the Acquisition Agreement.[3222]

3906 Despite the negotiations concerning the terms of the Acquisition Agreement being long and hard,[3223] and that it cannot be determined with any certainty what the precise final terms would have been if Cargill had not offered to pay an additional $15 million, these circumstances did not alter the amount of (additional) loss suffered by Cargill when it agreed to pay $420 million because of the Other Bidders Representations. Put simply, if Mahoney had not made the approach to Koenig by way of the First Further Bid Call, in all probability Cargill would have been the successful bidder at $405 million and would not have paid any further sum as part of the process of arriving at agreed terms (noting that most terms already had been agreed upon by 2 August 2013). There was no evidence to suggest that any of the negotiations outside the Further Bid Calls raised any issue concerning Cargill Australia paying a higher price to complete the deal. Further, the Viterra Parties did not put to any witness that, absent the Other Bidders Representations, such a scenario was a real possibility.

X.61 Did Glencore and/or Viterra convey the representations pleaded in paragraph 67 of the Statement of Claim ("the Co-Operative Bulk Representations")?

X.62 Were the Co-Operative Bulk Representations false by reason of the matters pleaded in paragraphs 63 and 64 of the Statement of Claim, including in light of the Sale Process Disclaimers, the Acquisition Agreement Liability Terms and the terms of the Co-Operative Bulk Agreement as pleaded in paragraph 91 of the Defence ("the Co-Operative Bulk Agreement Terms"), and in consideration of Co-Operative Bulk's termination claim, and did Glencore and/or Viterra thereby engage in misleading or deceptive conduct within the meaning of section 18 of the Australian Consumer Law?

X.63 Did Cargill Australia enter into the Acquisition Agreement for $420 million

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3222 See par 3805 above.

3223 This was how the Viterra Parties fairly summarised the evidence of Eden. Eden gave evidence that the negotiations were very complex, that there were a lot of trade-offs in coming to the final terms and conditions and that the negotiations were long and difficult.

in reliance on the Co-Operative Bulk Representations?

X.64 Were the Co-Operative Bulk Representations made in trade or commerce in Australia or between Australia and places outside of Australia?

X.65 Did Glencore and/or Viterra owe Cargill Australia a duty to take reasonable care in making the Financial and Operational Performance Representations and/or the Warranty Representations and/or the Pre-Completion Representations ("the Due Diligence Information Duty")?

X.66 Did Glencore and/or Viterra breach the Due Diligence Information Duty by reason of:

(1) any falsity of the Financial and Operational Performance Representations, the Warranty Representations and/or the Pre-Completion Representations; and
(2) any knowledge by Viterra of the Undisclosed Matters (individually or in combination) from around early 2010, or from around mid-October 2013?

X.67 Did Glencore and/or Viterra owe Cargill Australia a duty to take reasonable care in providing the Financial and Operational Information ("the Co-Operative Bulk Information Duty")?

X.68 Did Glencore and/or Viterra know or ought to have known of the termination notice pleaded in paragraph 63 of the Statement of Claim, and did they breach the Co-Operative Bulk Information Duty by disclosing the Co-Operative Bulk Agreement in the Data Room documents, but not disclosing the termination notice or the fact that Co-Operative Bulk had terminated or purported to terminate the Co-Operative Bulk Agreement, including in light of the Sale Process Disclaimers, the Acquisition Agreement Liability Terms and the Co-Operative Bulk Agreement Terms, and in consideration of Co-Operative Bulk's termination claim?

3907 None of the matters raised in issues 61 to 68 were ultimately pressed by the Cargill

Parties.[3224]

X.69 Was the Independent Expert appointed to determine certain disputed issues pursuant to clauses 7.2(f)(iii) and 8 of the Acquisition Agreement competent to determine the Disputed Issues?

X.70 By instituting this proceeding, has Cargill Australia waived any right and/or made an election which precludes it from having an Independent Expert determine the Disputed Issues?

X.71 Are the Viterra Parties therefore bound by the outcome of the Independent Expert's determination to the extent it purported to determine any of the Disputed Issues and are they liable to pay the amount as claimed by Cargill Australia (see issue 75 below)?

X.72 If the Viterra Parties are bound by the outcome of the Independent Expert's determination, are the claims brought by Cargill Australia in this proceeding in relation to the Disputed Issues claims brought in breach of clause 7.2(f)(iii) of the Acquisition Agreement, which ought to be dismissed?

3908 Due to the interrelated nature of issues 69 to 72, these issues will be dealt with together. In brief, the issues as defined in paragraph 102(a) of the Amended Defence ("the Disputed Issues")[3225] arose out of the draft completion accounts prepared by Joe White. The Disputed Issues were referred to an independent expert, McGrath Nicol ("the Independent Expert"), pursuant to a dispute process set out in clause 8 of the Acquisition Agreement. The Independent Expert determined 1 of the Disputed Issues relating to Joe White's malt inventory in Cargill's favour ("the Independent Expert's Determination"). Subsequently to the Independent Expert's Determination, Viterra

3224 These issues were the subject of written closing submissions, but were withdrawn during the course of oral closing submissions.

3225 The Disputed Issues were defined in par 102(a) as a termination claim with respect to Co-Operative Bulk (which was not pressed by the Cargill Parties), and certain barley and malt inventory of Joe White which Cargill Australia alleged could not be used for supply to customers because it comprised Hindmarsh barley, malt made from Hindmarsh barley and malt made from off-specification barley.

Malt paid the sum of $9,445,882.36 to Cargill for the adjustment amount and accrued interest.[3226] Viterra claimed that this was the whole amount owing, whilst Cargill claimed that a further $774,887 was owing.

3909 It was common ground that Cargill Australia's loss in relation to the Independent Expert's Determination was subsumed by the loss claimed in this proceeding. This was made clear not only by Cargill's concession on this point, but also the calculation of Cargill's loss in Cargill's key expert report on loss in relation to the problems with Joe White's malt inventory.

3910 Therefore, as the loss claimed in relation to the Independent Expert's Determination falls within the loss for which Cargill is entitled to recover in this proceeding, there is no need to consider and resolve issues 69 to 72. Furthermore, the amount alleged to be owing by Viterra in relation to the Independent Expert's Determination will be satisfied by payment of the award of damages in this proceeding. Accordingly, there is no need to consider these 4 issues any further.

X.73 Has Cargill Australia suffered loss by reason of:[3227]

(1) Any contravention by Glencore and/or Viterra of section 18 of the Australian Consumer Law?
(2) Any deceit by Glencore and/or Viterra?
(3) Any breach by Viterra of the Warranties and clause 13.1 and/or clause 13.8 of the Acquisition Agreement?
(4) Any breach by Glencore and/or Viterra of the Due Diligence Information Duty?
(5) Any breach by Glencore and/or Viterra of the Co-Operative Bulk Information Duty?

X.73.1 The relevant legal principles for the assessment of loss suffered for misleading or deceptive conduct

X.73.1.1 Section 236 of the Australian Consumer Law

3911 Cargill Australia sought compensation for misleading or deceptive conduct in

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3226 The Independent Expert determined that a negative adjustment to the draft completion accounts was required in the order of $814,881. Cargill ultimately claimed from Viterra an adjustment amount of $9,692,197 with interest in the amount of $528,572 pursuant to clause 3.2(b) of the Acquisition Agreement.

3227 It is unnecessary to consider questions (3), (4) or (5): see par 4324 below.

contravention of section 18 of the Australian Consumer Law. The relevant section to determine compensation for such conduct is section 236,[3228] which relevantly states:

> (1) If:
>
> (a) a person (the ***claimant***) suffers loss or damage because of the conduct of another person; and
>
> (b) the conduct contravened a provision of Chapter 2 or 3;[3229]
>
> the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

3912 The starting point is consideration of the words of section 236 itself.[3230] The question is simply has the plaintiff established it has suffered loss or damage because of the contravening conduct?[3231] In assessing the loss, the court's approach must be flexible and best adapted to give the plaintiff an amount that will most fairly compensate for the wrong suffered.[3232]

3913 The court is not constrained to principles of common law relevant to assessing damages in contract or tort.[3233] However, in many cases the measure for damages in

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3228 Section 236 of the Australian Consumer Law is the successor to s 82 of the *Trade Practices Act*. Case law regarding the construction of the previous section remains relevant: see, for example, *Robinson v 470 St Kilda Road Pty Ltd* [2018] FCAFC 84, [102]-[103] (Rangiah J). See also *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 526-527 [95] (Gummow J) for an articulation of the relevant elements under s 82 of the *Trade Practices Act*; as to the fourth element articulated, read "because of" instead of "by" for the purposes of s 236.

3229 Section 18 is located in Chapter 2.

3230 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 407 [44] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 526.4 (Mason CJ, Dawson, Gaudron and McHugh JJ).

3231 *Henville v Walker* (2001) 206 CLR 459, 501-502 [130]-[132] (McHugh J, with whom Gummow J agreed); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 512-513 [42] (McHugh, Hayne and Callinan JJ). See also par 3916 below.

3232 *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 186 [963] (Jacobson, Gilmour and Gordon JJ), citing *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653, 684 [171] (Ipp JA), *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 667 [65] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ) and *Henville v Walker* (2001) 206 CLR 459, 502 [131] (McHugh J).

3233 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 403 [31] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 503-504 [17] (Gaudron J), 510 [38], 512 [40]-[41] (McHugh, Hayne and Callinan JJ), 529 [102]-[103] (Gummow J); *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 526.2 (Mason CJ, Dawson, Gaudron and McHugh JJ); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 14.8 (Mason, Wilson and Dawson JJ).

tort has been considered appropriate.[3234] In tort, damages are awarded with the object of placing the plaintiff in the position they would have been had the tort not been committed.[3235] In particular, where appropriate and helpful, the court can look to actions for deceit as analogous to claims for compensation pursuant section 236,[3236] but only as a guide.

3914 In the current proceeding, the measure of damages for the tort of deceit provides helpful guidance for the court to ascertain the measure of damages under section 236 that will most fairly compensate Cargill Australia for its loss. Such an approach would essentially put Cargill Australia in the position it would have been in if not for the relevant conduct; namely not paying the purchase price of $420 million and not acquiring Joe White (but accounting for the benefit received by actually taking ownership of Joe White represented by ascertaining its real value).[3237]

X.73.1.2 The common approach

3915 In *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd,* the High Court recognised that, when the acquisition of an asset is induced by misleading or deceptive conduct, the common approach to the measure of damages is the difference between the real value of the asset at the date of acquisition and the price paid for it.[3238] In effect, a plaintiff is entitled to recover the loss or expenditure incurred because of the conduct in question, but must account for any corresponding advantage gained. This approach has been described as "the rule in *Potts v Miller*".[3239] The High Court

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3234 See, for example, *Henville v Walker* (2001) 206 CLR 459, 470 [18] (Gleeson CJ); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 6.8-7.1, 14.8 (Mason, Wilson and Dawson JJ). See also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 348.6 (Mason CJ, Dawson, Toohey and Gaudron JJ).

3235 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 12.2 (Mason, Wilson and Dawson JJ). See also *Gould v Vaggelas* (1984) 157 CLR 215, 265.5 (Dawson J); *Toteff v Antonas* (1952) 87 CLR 647, 650.5 (Dixon J).

3236 *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281, 290.9-291.2 (Brennan, Deane, Dawson, Gaudron and McHugh JJ); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 14.7 (Mason, Wilson and Dawson JJ).

3237 For convenience, unless indicated to the contrary, no distinction is made between Joe White and the Joe White Business in this part of the reasons.

3238 (2004) 217 CLR 640, 656-657 [35] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), referring to *Potts v Miller* (1940) 64 CLR 282. See also *Morellini v Adams* [2011] WASCA 84, [42] (McLure P, with whom Pullin and Newnes JJA agreed); *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281, 291.2 (Brennan, Deane, Dawson, Gaudron and McHugh JJ); *Toteff v Antonas* (1952) 87 CLR 647, 650.5 (Dixon J), 654.1 (Williams J).

3239 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 656-657 [35] (Gleeson CJ,

explained that true or real value is distinct from market value:[3240]

> [T]he test [of the rule] depends not on the difference between price and "market value", but price and "real value" or "fair value" or "fair or real value" or "intrinsic" value or "true value" or "actual value" or what the asset was "truly worth" or "really worth" or "what would have been a fair price to be paid . . . in the circumstances . . . at the time of the purchase".
>
> (Citations omitted.)

3916 However, "the 'rule' is not universal or inflexible or rigid", and is only a "rule of practice".[3241] It is not the default position. The fundamental questions are: "what are the facts, do those facts establish a compensable loss and if so, what was its true measure?"[3242]

X.73.1.2.1 Determining true or real value

3917 The distinction between true, or real, value and market value is "sometimes difficult to draw, but it is old and fundamental".[3243] The market value of the asset is the price which would be struck between "willing but not anxious buyers" and "willing but not anxious sellers".[3244] The assessment must be undertaken "at the relevant time" and "in the position of the bargaining parties as on the critical date".[3245] In relation to market value, reference was made in the Cargill Parties' submissions to what was described as the "*Falconer* principle", that "evidence of future events is admissible not to prove a hindsight but to confirm a foresight".[3246] The Viterra Parties pointed to the criticism that this formulation was an oversimplification of the principle and argued that its relevance to the current case was limited.[3247] While it has been recognised that

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McHugh, Gummow, Kirby and Heydon JJ). See also *Potts v Miller* (1940) 64 CLR 282.

3240 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 657 [36] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

3241 Ibid, 657 [35]. See more generally *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 459 [123] (Kirby and Callinan JJ, with whom Gummow J agreed at 449 [93]), for a case regarding negligence.

3242 *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 188 [969] (Jacobson, Gilmour and Gordon JJ). See further par 3927 below.

3243 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 657 [36] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

3244 Ibid, 661 [46]; *Spencer v Commonwealth* (1907) 5 CLR 418, 432.2 (Griffith CJ), 441.8 (Isaacs J).

3245 *Spencer v Commonwealth* (1907) 5 CLR 418, 432.4 (Griffith CJ), 441.8 (Isaacs J).

3246 See *Challenger Property Asset Management Pty Ltd v Stonnington City Council* (2011) 34 VR 445, 461-463 [35]-[38] (Croft J), quoting *Housing Commission of New South Wales v Falconer* [1981] 1 NSWLR 547, 558B-559C (Hope JA), 563F (Glass JA), 576B (Mahoney JA).

3247 *Challenger Property Asset Management Pty Ltd v Stonnington City Council* (2011) 34 VR 445, 464 [40], citing *Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council* (2009) 168 LGERA

there is a risk in adopting this single phrase independent of context, the principles from *Housing Commission of New South Wales v Falconer* are relevant to the possibility of using subsequent events in determining market value.[3248] While these principles relate to an assessment of market value, rather than true value, market value is a "starting point" to determine real value.[3249]

3918 Market value will differ from true value if the market value is "delusive or fictitious". Such a market value may be the result of market manipulation or some other improper practice on the part of the vendor,[3250] or where the market operates under some material mistake.[3251]

3919 Whatever the precise position with respect to market value, true or real value can be determined with reference to subsequent events insofar as they shed light on the true value of the asset at the relevant date.[3252] In *Kizbeau Pty Ltd v W G & B Pty Ltd*, the High Court stated that "although the value is assessed as at the date of the acquisition, subsequent events may be looked at insofar as they illuminate the value of the thing as at that date".[3253]

3920 Importantly, a distinction is drawn between subsequent events where the cause of loss is intrinsic and those where the cause of loss is extrinsic. The court must distinguish between causes of decline in value that are "intrinsic", or "inherent", in the thing itself, which should be taken into account, and causes that are "independent" or "extrinsic", which should not be taken into account to determine the true value.[3254]

71, 88–91 [70]-[85] (Basten JA).

3248 *Challenger Property Asset Management Pty Ltd v Stonnington City Council* (2011) 34 VR 445, 464 [41] (Croft J).

3249 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 659 [41] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

3250 Ibid, 657-658 [37].

3251 Ibid, 658 [37], 661 [45].

3252 Ibid, 657-659 [37]-[39]; *Potts v Miller* (1940) 64 CLR 282, 299.6 (Dixon J).

3253 (1995) 184 CLR 281, 291.2 (Brennan, Deane, Dawson, Gaudron and McHugh JJ), cited in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 658 [39] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ). See also *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426, 431.7 (Lord Macnaughten), cited in *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281, 294.7-295.2.

3254 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 659 [40] (Gleeson CJ, McHugh,

3921 In *Kizbeau Pty Ltd v W G & B Pty Ltd*,[3255] the nature of this distinction was traversed. The High Court stated that subsequent events arising from the nature or use of the thing itself should be taken into account. For example, the takings of a business subsequent to purchase were generally relevant not only to prove a representation made before the acquisition, but also to prove the true value of the business as at the date of purchase.[3256] This is true even when some difference exists between the conditions under which the business was conducted before and after purchase, subject to allowance being made for differences in conditions.[3257] However, supervening events, such as a decline in takings caused by ineptitude or unexpected competition post-acquisition, should not be taken into account.[3258]

X.73.1.2.2 Effect of resale

3922 If, subsequent to acquisition, the plaintiff resells the asset, this will not, in itself,[3259] prevent the plaintiff recovering.[3260] If the *Potts v Miller* approach is adopted, the date at which loss is ascertained is the date of the original acquisition. Therefore, the comparison is made between the true value at the date of acquisition and the purchase price, and not the value at the time of subsequent sale. However, a resale, like a later valuation, may be relevant to the extent it illuminates the true value at the time of the original acquisition.[3261] In some instances, where resale occurs shortly after the original purchase, and is not affected by extrinsic factors, the amount of the resale may closely reflect the true value at the time of purchase.

3923 The Queensland Court of Appeal held, in *Manwelland Pty Ltd v Dames & Moore Pty*

Gummow, Kirby and Heydon JJ), citing *Potts v Miller* (1940) 64 CLR 282, 298 (Dixon J). See also *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 188-189 [971] (Jacobson, Gilmour and Gordon JJ); *Morellini v Adams* [2011] WASCA 84, [44] (McLure P, with whom Pullin and Newnes JJA agreed).

3255 (1995) 184 CLR 281 (Brennan, Deane, Dawson, Gaudron and McHugh JJ).

3256 Ibid, 291.3.

3257 Ibid.

3258 Ibid.

3259 However, see pars 3923-3927 below.

3260 See, for example, *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 188 [969], 188-189 [971] (Jacobson, Gilmour and Gordon JJ).

3261 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 658-659 [38]-[40] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

Ltd,[3262] that a resale could be taken into account to determine the plaintiff's loss, as damages were to be determined by ascertaining the net loss sustained.[3263] In that case, the plaintiff was a developer who purchased property in reliance on representations made by the defendant. The defendant had been employed by the plaintiff to provide expert advice on the costs associated with decontaminating the relevant property.[3264] The advice provided was found to be misleading or deceptive because it materially underestimated the costs of remediating the land.[3265] The plaintiff went on to develop and sell the land for significantly more than the original purchase price. After project costs were taken into account a small net loss resulted.[3266]

3924 The plaintiff sued the defendant for the difference between the price paid, $810,000, and the true value of the property at the date of acquisition in March or April 1995,[3267] being $300,000.[3268] However, both at first instance and on appeal it was held that the proceeds of resale of part of the property in July 1996 (after a subdivision) were required to be taken into account in assessing the plaintiff's loss. Accordingly, the expenses incurred by the plaintiff, including the original purchase price, were deducted from the resale price to establish the "overall loss sustained", and the plaintiff was only entitled to approximately $10,000.[3269] In the leading judgment, McPherson JA emphasised that it had been found by the trial judge that the plaintiff always intended to develop and sell the property it acquired and that was precisely what it did, albeit with respect to only a third of the property purchased because of the contamination. On this basis, it was found that the plaintiff achieved the original purpose of its purchase, but on a scale reduced by two-thirds. Accordingly, the

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3262 (2001) ATPR ¶41-845.

3263 Ibid, 43,463-43,464 [17], 43,464-43,645 [19] (McPherson JA, with whom Thomas JA and Douglas J agreed).

3264 Ibid, 43,459-43,460 [2]-[5].

3265 Ibid.

3266 Ibid, 43,461 [9].

3267 There are slightly different dates referred to. The option was exercised on 31 March 1995, but the valuation was conducted on the basis that it occurred on 20 April 1995, which valuation was accepted by the trial judge.

3268 *Manwelland Pty Ltd v Dames & Moore Pty Ltd* (2001) ATPR ¶41-845, 43,460, [7], 43,462 [12] (McPherson JA, with whom Thomas JA and Douglas J agreed).

3269 Ibid, 43,461, [9], 43,463 [15].

plaintiff was only entitled to the amount it was out-of-pocket in relation to "the project it carried out" and no more.[3270]

3925 On the approach in *Manwelland Pty Ltd v Dames & Moore Pty Ltd*, if the asset in question is subsequently sold for more than the original purchase price, the loss that the plaintiff may be entitled to recover is the total of any expenses incurred, including the original purchase price, less any gross profit obtained from holding or reselling the asset. On this approach, if the gross profit exceeded the total expenses incurred, then the plaintiff would have no loss to recover. Further, the approach does not involve considering the true value at the time of the acquisition, at least not directly.[3271] Special leave to appeal from the Court of Appeal's decision was refused on the basis it was an "application of established general principles to the particular facts and circumstances".[3272]

3926 There has been some criticism of the approach adopted in *Manwelland Pty Ltd v Dames & Moore Pty Ltd*. This was made on the basis that it was considered that if the plaintiff was not locked into the property but chose to keep it and had incurred further losses as a result of the development they would not be recoverable; therefore, it was difficult to see why any profits from a successful development ought to be brought to account.[3273]

3927 In circumstances where the approach in *Potts v Miller* is appropriate, resale is relevant only to the extent it sheds light on the true value at the time of the original purchase. This was acknowledged in *Manwelland Pty Ltd v Dames & Moore Pty Ltd*, where it was stated that if *Potts v Miller* were to be applied, the development and resale of the asset

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3270 Ibid, 43,465 [21].

3271 Ibid, 43,464-43,465 [19]-[20]. See further par 3927 below.

3272 *Manwelland Pty Ltd v Dames and Moore Pty Ltd*, B89/2001 (26 June 2002) (Gleeson CJ and Hayne J).

3273 *Brown v Dream Homes SA Pty Ltd* (2008) 102 SASR 93, 143 [206] (Kourakis J); cf 98 [17] (Doyle CJ), 118 [108], 121 [125] (Layton J). The Viterra Parties noted that in *Brown v Dream Homes SA Pty Ltd* the amount received on resale of the property was to be taken into account in assessing damages. This is of no relevance to the question at hand; *Brown v Dream Homes SA Pty Ltd*, 143 related to a claim for transaction costs in buying and selling the property. Damages, applying the approach in *Potts v Miller*, were not sought and there was no claim based on the difference between the purchase price and true value of the asset at the date of acquisition.

would be relevant to demonstrate its true value at the time damages fall to be determined.[3274]

X.73.1.3 Instances when Potts v Miller *is not appropriate*

3928 It is fundamental that a plaintiff be compensated for loss suffered. The approach in *Potts v Miller* is not universal and is only 1 means of giving effect to this.[3275] Alternative approaches may be appropriate in a range of circumstances.[3276]

3929 In determining which approach to adopt, the court must consider the facts of the case and what the true measure of compensable loss is.[3277] An alternative approach to assessing loss will be appropriate if required to properly compensate the plaintiff for their loss.[3278] When considering tort cases, courts have stated that in certain circumstances an alternative approach will be appropriate if the plaintiff "incurs losses which are not represented by the difference between the price and value of the business",[3279] or if required "in order to give adequate compensation for the wrong done to the plaintiff after the transaction is complete",[3280] or "when the overriding compensatory rule requires it".[3281]

3930 Circumstances when an alternative approach may be appropriate include:

(1) Where the loss is a contingent loss, the appropriate date for ascertaining loss may be the date upon which the contingency materialised.[3282]

3274 (2001) ATPR ¶41-845, 43,464-43,465 [19]-[20].

3275 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 666-667 [63] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 265 (Lord Browne-Wilkinson with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

3276 Ibid, 666-668 [63]-[66] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

3277 *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 188 [969] (Jacobson, Gilmour and Gordon JJ).

3278 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 666-667 [63] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 265, 267.

3279 *Gould v Vaggelas* (1984) 175 CLR 215, 221.8-222.2 (Gibbs CJ).

3280 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 266F (Lord Browne-Wilkinson, with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

3281 *Gould v Vaggelas* (1984) 175 CLR 215, 221.8-222.2 (Gibbs CJ); *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 266F (Lord Browne-Wilkinson), 284C (Lord Steyn, with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

3282 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 410 [55] (Gleeson CJ, McHugh, Gummow,

(2) Where the misrepresentation continues to operate after the date of acquisition of the asset so as to induce the plaintiff to retain the asset.[3283]

(3) Where the misrepresentation continues to operate and subsequent losses are directly attributable to the impugned conduct itself and not extraneous factors.[3284]

(4) Where the circumstances of the case are such that the plaintiff is, by reason of the impugned conduct, locked into the property.[3285]

3931 It is uncontroversial that determining the appropriate approach requires "consideration of factual questions going to the circumstances of the acquisition" and the relevant principles identified by the High Court in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*.[3286]

X.73.1.4 The "left in hands" approach

3932 An alternative approach, in which the benefits of any subsequent resale may be taken into account is, for example, the "left in hands" approach. In an appropriate case, this may be utilised as the preferred approach to calculate the actual amount of loss or damage, or may be a means by which the soundness of another approach utilised to calculate the amount might be checked.

3933 Under the "left in hands" approach, damages are calculated as whatever is left in the

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Kirby, Hayne, Callinan and Heydon JJ); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 532 [107] (Gummow J). See also *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 532, cited in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 655 [29] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

3283 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 668 [66] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 267C (Lord Browne-Wilkinson, with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

3284 *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 188-189 [971], 191 [983] (Jacobson, Gilmour and Gordon JJ).

3285 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 668 [66] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 267C (Lord Browne-Wilkinson with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

3286 *North East Equity Pty Ltd v Proud Nominees Pty Ltd* (2010) 269 ALR 262, 295 [178], and see also 295 [176] (Sundberg, Siopis and Greenwood JJ).

purchaser's hands at the time of the trial.[3287] The plaintiff is entitled to all their loss, subject to giving credit for any benefit that has been received, including proceeds from a subsequent sale of the asset.[3288]

3934 A primary reason for adopting the *Potts v Miller* approach is the desirability of separating out losses resulting from extraneous factors subsequent to the purchase.[3289] However, it may be less appropriate to look primarily at the point in time of the acquisition if there are no losses resulting from extraneous factors to separate out, and thus the "left in hands" approach may be more readily adopted.[3290]

X.73.1.5 The key parties' positions

3935 The Cargill Parties submitted that the approach in *Potts v Miller* should be adopted, so that the amount of compensation for the loss suffered be calculated as the difference between the purchase price of $420 million and the true value of Joe White on the date of purchase. The Cargill Parties submitted that the "left in hands" approach was inapposite and that the factors that might have made it appropriate were not present in this case. It was submitted that there was no ongoing operation of the misrepresentations on Cargill Australia as it became aware of the misleading or deceptive conduct soon after Completion. Further, Cargill Australia was not locked in and had the option of selling Joe White immediately, but opted to retain the asset for around 5 years, which necessarily resulted in the undesirability of having to identify and quantify extraneous factors. Furthermore, it was submitted that a current valuation of Joe White (in essence there was no such valuation before the court)[3291] would not reveal anything about Cargill Australia's loss in 2013. Moreover, the Cargill Parties submitted that the sale price of the entirety of Cargill Malt did not demonstrate the standalone value of Joe White at that time of resale and was therefore irrelevant.

3287 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 666-667 [63]-[64] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

3288 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 266G-267C (Lord Browne-Wilkinson, with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

3289 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 667-668 [65] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

3290 Ibid.

3291 See issue 73.15 below.

3936 Broadly, the Viterra Parties submitted that the court had 3 options to assessing any loss Cargill Australia may have suffered: (1) the *Potts v Miller* approach with synergies included in assessing true value; (2) the *Potts v Miller* approach without including synergies; and (3) the "left in hands" approach. The Viterra Parties submitted that the "left in hands" approach should be preferred as it was the best measure to ensure that Cargill Australia was not over compensated. It was submitted that Cargill Australia was required to prove loss and had ignored the significance of resale of Joe White in the context of the sale of its global business, Cargill Malt.

3937 Further, the Viterra Parties referred to a number of authorities in contending that the value of Joe White at the time of trial was the appropriate basis upon which to assess any loss.

3938 Furthermore, the Viterra Parties correctly observed that Cargill Australia had chosen to adopt only 1 measure of damages, based on a single body of expert evidence. They submitted that if the approach Cargill Australia adopted was not the appropriate means of calculating the amount of loss, then it necessarily followed that, whatever causes of action were relied upon, Cargill Australia's claims for compensation must fail.[3292]

X.73.1.6 Application of principles in this case

3939 In the circumstances of this case, *Potts v Miller* is the appropriate approach to provide fair compensation for the loss suffered at the date of the Acquisition of Joe White. There are a number of reasons for this.

3940 *First*, a justification for not adopting the common approach is to ensure the plaintiff is fully compensated.[3293] In circumstances where Cargill Australia has not claimed any

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3292 *Winky Pop Pty Ltd v Mobil Refining Australia Pty Ltd* [2016] VSCA 187, [294] (Warren CJ, Ashley and Osborn JJA), affirming the approach at first instance: [2015] VSC 348, [752] (Digby J). See also *Radferry Pty Ltd v Starborne Holdings Pty Ltd* [1998] FCA 1689, 15 (Cooper, Marshall and Dowsett JJ), in which it was observed that if a party seeks to prove loss by only a single basis of calculation and that basis fails, there is no fall-back position. It was further noted that it is not for the court to seek to find another basis to establish loss and it is the fault of the party for failing to adduce the relevant evidence that is the cause of the failure to succeed.

3293 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 284C (Lord Steyn, with whom Lords Keith and Slynn agreed).

losses incurred subsequent to the Acquisition, an alternative approach is not required to give adequate compensation for the loss suffered as a result of the contravening conduct.

3941 *Secondly*, a reason for adopting the *Potts v Miller* approach is the desirability of separating out losses resulting from extraneous factors in the later history of the asset.[3294] In circumstances where Cargill Australia has operated the Joe White Business for a number years following the Acquisition, and during this period the value of the asset has been influenced by both intrinsic and extraneous factors, which in themselves may have varied in significance over the extended period of time, a later date is inappropriate for the assessment of loss.

3942 *Thirdly*, the features of this transaction do not align with any of the examples of instances when an alternative approach has been found to be appropriate. Cargill was a strategic bidder that did not acquire Joe White with the intention of improving and selling it in the short or intermediate term;[3295] it bought it for the purpose of conducting the Joe White Business on an ongoing basis. Further, Cargill Australia's position (which has been accepted) was that if it had known of the Undisclosed Matters, it would not have proceeded with the transaction.[3296] Thus, any loss suffered by Cargill Australia was incurred upon Acquisition and was not contingent on some later event. Furthermore, the misrepresentation did not continue to operate beyond the date of Acquisition;[3297] and (leaving aside any considerations confined to contractual remedies)[3298] Cargill Australia was not "locked into" retaining Joe White.[3299]

3943 Consequently, events subsequent to the Acquisition are not properly attributable to

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3294 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 667-668 [65] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

3295 Cf *Manwelland Pty Ltd v Dames & Moore Pty Ltd* (2001) ATPR ¶41-845, 43,465 [21] (McPherson JA, with whom Thomas JA and Douglas J agreed).

3296 See issue 33 above.

3297 See pars 1557-1558 above.

3298 See pars 5294-5325 above.

3299 See par 3930(4) above.

the contravening conduct.[3300] In these circumstances, the fact that Cargill has resold Joe White as part of a larger sale of Cargill Malt did not alter this position, regardless of whether or not it has made a profit, or a loss less than that suffered at the date of Acquisition. In circumstances where such a significant period of time elapsed between the Acquisition and the subsequent sale, and there were significant changes in management and other factors which influenced the performance and value of Joe White, there could be little if any connection between the amount received on the resale and the loss suffered back in 2013 upon Completion. To be clear, and contrary to the Viterra Parties' submission, the approach in *Potts v Miller* does not involve the court "ignoring" the resale. But in my view, in the circumstances of this case, the resale is not material to an assessment of the amount of the loss suffered.

3944 Having concluded that it is appropriate to adopt the approach in *Potts v Miller*, it is then necessary to consider the evidence relevant to ascertaining the true value of Joe White at Completion.

X.73.2 The 3 experts called in relation to calculating loss

3945 There was no suggestion that the experts called were not suitably qualified to give expert evidence on the issue of the true value of Joe White. Accordingly, details of their respective qualifications and experience may be briefly summarised.

3946 Cargill Australia called 2 experts, Gordon Klein ("Klein")[3301] and Greg Meredith ("Meredith").[3302] The Viterra Parties called Michael Potter ("Potter").[3303]

3300 Noting that subsequent events may still be relevant to the extent they shed light on the true value at the time of the acquisition: *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 657-659 [37]-[39].

3301 Klein is a faculty member of Anderson's School of Management at the University of California, Los Angeles, where he lectures in courses as part of undergraduate and masters of business administration programs. He was admitted to the Californian bar in 1979 and is a certified public accountant registered in Illinois. He has substantial experience as a professional consultant in relation to business and financial matters.

3302 Meredith is a partner of Ferrier Hodgson, and gives expert evidence in commercial cases as part of his professional activities. He has a bachelor of economics degree from the University of Sydney and is a fellow of Chartered Accountants Australia and New Zealand. He is also an accredited business valuation specialist.

3303 Potter is a chartered accountant and a principal of Axiom Forensics Pty Ltd. He holds a business

3947 Klein prepared 2 reports.[3304] Using a discounted cash flow method, Klein ultimately concluded that the true value of Joe White at the date of Completion was $158.2 million (thus resulting in a loss to Cargill Australia of $261.8 million), or on a less preferred assumption that the true value was between $178.2 million and $250.6 million.

3948 Meredith also prepared 2 reports. In his first report, based on 3 separate scenarios, Meredith estimated the true value of Joe White at the date of Completion was between $36.3 million and $90.5 million. In the later report, Meredith concluded the true value of Joe White was between $102.6 million and $120.1 million. Little more need be said about Meredith's evidence in relation to his valuations.[3305] In closing submissions, the Cargill Parties ultimately chose not to rely on it. This was done so advisedly. Although not in any way seeking to challenge Meredith's considerable expertise or his general veracity as an independent witness, there were a number of difficulties with his evidence.

3949 Without being exhaustive, he made the assumption that something was attributable to the Viterra Practices and was not extrinsic for the purposes of assessing value unless it was demonstrated otherwise. Although such an approach possibly might have been appropriate for any claim for equitable compensation (I express no view), in circumstances where the onus was entirely on Cargill Australia to prove its loss without any presumptions in its favour, this basis of assessment was self-evidently problematic. What made this approach even more troubling was that Meredith failed to disclose his reasoning in determining whether a factor was extrinsic or otherwise. Further, although purporting to adopt the approach in *Potts v Miller* as explained in subsequent authorities, Meredith's valuation relied on hindsight in a manner that was impermissible and, in my view, went beyond what was contemplated by these

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valuation specialist designation from Chartered Accountants Australia and New Zealand. He has a bachelor of commerce degree from the University of Western Australia.

3304 He did so with the assistance of an economic consultant, Cornerstone Research. This consultant performed research and provided other assistance.

3305 That said, his evidence with respect to various components of the valuations of the other experts remained relevant.

authorities.

3950 In circumstances where his evidence was not relied upon, it is unnecessary to elaborate further. Put simply, if Cargill Australia had decided to rely on Meredith's evidence, it would not have advanced its claim for loss.

3951 Potter prepared 3 reports.[3306] In his first report, which is the report Potter stated the court should prefer in ascertaining Joe White's true value,[3307] Potter made a range of assumptions based on each possible scenario concerning the existence or otherwise of the Viterra Practices. Based on the average of the results of using the discounted cash flow method and the capitalised maintainable earnings method, Potter concluded the true value of Joe White was between $384.8 million and $447.2 million.[3308] Potter described his second report as an illustrative valuation. He used a forecast which had been prepared by Cargill approximately 12 months after the Acquisition.[3309] Based on this, he concluded the true value was between $372.8 million and $396 million.[3310] This second report was not put forth by the Viterra Parties as providing a basis for establishing the true value. The third report was prepared as a result of the sale of Joe White.[3311] It contained the same figure as the first report for the upper end of the range, but increased the lower end from $384.8 million (or $360.3 million)[3312] to $398.9 million.

3952 In addition to the individual reports, the experts prepared 2 joint reports. The first of

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3306 He did so with the assistance of Axiom Forensic employees and officers, being a fellow principal, a manager, a senior analyst and an analyst. During cross-examination, Potter explained that the fellow principal drafted the first draft of the third report.

3307 The Viterra Parties submitted that Potter gave no such indication, and suggested his evidence was confined to comparing his approach in his first report with the approach he took in the second report. The issue was raised twice during his evidence and on the second occasion, it was clear the question was not confined to Potter's first 2 reports. In any event, not much turns on this as it is ultimately a matter for the court.

3308 In so concluding, Potter adopted Klein's conclusions in relation to sales prices and volumes without deciding whether or not those assumptions were correct. Further, in a subsequent joint report Potter amended the lower end of this range to $360.3 million.

3309 See pars 1784-1785 above.

3310 In the second report Potter assumed $30 million of capital expenditure.

3311 See par 1846 above.

3312 This alternate figure was arrived at by Potter in a later joint report using Klein's assumptions regarding projection of loss of sales.

these was prepared shortly after the trial commenced, and the second was prepared over 5 months later.

X.73.3 What methodology or methodologies did each of the experts adopt; and what are the relative strengths and weaknesses of each methodology?

3953 Relevantly,[3313] the methodologies adopted by each expert were selected respectively by them in order to determine the true value of Joe White. The experts agreed that true value was a legal rather than accounting term and that market value could be used as a starting point to assess true value. The experts agreed that market value can be defined as:[3314]

> …the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.

3954 The experts agreed that the true value of Joe White at the date of Completion was the market value of Joe White adjusted to take into consideration the effect of the Viterra Practices. In this case the only circumstance that would allegedly cause the participants in the market to be mistaken in any material manner concerning true value was the existence of the Viterra Practices and not being given notice of their ongoing implementation.

3955 The 2 possible dates for assessing true value were 4 August 2013, being the date of the Acquisition Agreement, and 31 October 2013 being the date of Completion. The experts to varying degrees made reference to both dates in some of their analysis, but ultimately settled on 31 October 2013.

3956 There are obvious reasons why 4 August 2013 might be considered an appropriate date, as it was the date upon which Cargill Australia legally bound itself to purchase

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3313 Not including Potter's "illustrative" second report.

3314 Citing the International Valuation Standards Council's International Valuation Standards (2013 (being the year of the Acquisition)), [29]. The definitions cited and agreed upon by all the independent experts were contained in the *International Valuation Standards* issued by the International Valuation Standards Council (per the 2013 Frameworks and Requirements). See also pars 3917-3918 above.

Joe White. However, no rigidity is applicable in this regard.[3315] The date at which Completion occurred, and Cargill Australia paid the moneys it claimed represented its loss (less any benefit received) may also be viewed as an appropriate date. The experts have proceeded on the basis that the date of Completion was the valuation date to use. In circumstances where new information came to light in October 2013 and Cargill considered withdrawing from the transaction in late October 2013 but then decided to proceed only shortly before Completion, after further misleading conduct of the Viterra Parties, 31 October 2013 represented an appropriate date at which to assess true value.

X.73.3.1 Klein's approach

3957 Klein used a discounted cash flow method. It is useful to provide an overview of this method here, as these concepts will be referred to throughout this analysis of the experts' valuations. Broadly, the discounted cash flow method uses 2 inputs to determine value: the estimated future cash flow on a forward-looking basis and a discount rate. The estimated future cash flows are an estimate of the cash flows the business will generate over the forecast period, and are reflected in the numerator. The discount rate relates to the level of risk and is used to determine the net present value of the cash flows, and is reflected in the denominator. Generally, there is an inverse relationship between the discount rate and the assessed value; if the discount rate is reduced the value goes up, and vice versa.

3958 Klein conducted his valuation assuming that the Viterra Practices were disclosed and that Cargill would not have acquired Joe White. Klein drew a distinction between hypothetical purchasers who were financial bidders and those who were strategic bidders. In his preferred scenario, Klein assumed that only risk-tolerant financial bidders would choose to participate in the market once the Viterra Practices became known.[3316] In his alternative scenario, Klein assumed that strategic bidders would also participate in the market.[3317] In both scenarios, Klein made adjustments to the

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3315 For example, *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 284A (Lord Steyn).

3316 See pars 4036-4037 below.

3317 See par 4038 below.

discount rate to reflect the increased debt and equity costs of capital that would result upon lenders and equity investors becoming aware of the Viterra Practices.

3959 Klein stated that he valued Joe White on a forward-looking basis, having regard to information existing at the time of the Acquisition. Klein's position was that he used information arising post-Acquisition generally not by means of hindsight, but as a cross-check on the reasonableness of his assumptions as at the valuation date. Accordingly, he readily acknowledged he did not use hindsight to exclude factors that might be considered extrinsic. He also conceded that in circumstances where he had limited data as at the valuation date, he did the best he could and sometimes used subsequent facts as a means of adjusting his foresight estimates, but only to be more conservative.

X.73.3.1.1 The Cargill Parties' submissions

3960 The Cargill Parties submitted that Klein's general approach was forward-looking and used information that existed at the time of Acquisition. It was submitted that to the extent subsequent events were used, generally it was to confirm a foresight. The Cargill Parties acknowledged that Klein used post-Acquisition data when no other data was available, but submitted that this approach was orthodox and appropriate.

3961 The Cargill Parties also pointed out that Potter accepted that there were significant areas of agreement between Potter and Klein. In his evidence, Potter identified only 4 primary areas of disagreement,[3318] if he were to accept Klein's assessment of sales.[3319]

X.73.3.1.2 The Viterra Parties' submissions

3962 The Viterra Parties criticised Klein's approach of assessing the impact of the Viterra Practices in aggregate, rather than in various scenarios as Potter did. The Viterra Parties also argued that Klein's valuation required the court to find that all aspects of those practices would have contributed to the hypothetical purchaser paying less for

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3318 Being the attributes and identity of the hypothetical purchaser (see pars 4034-4064 below), the treatment of synergies (see pars 4163-4202 below), the discount rate (see pars 4203-4251 below), and transaction costs: see pars 4252-4265 below.

3319 In Potter's first report, and then the first joint report and his second report, Potter had not accepted Klein's assessment of the impact of the Viterra Practices on sales. However, they were largely adopted by Potter in Potter's calculations in the second joint report.

Joe White. A further criticism was that Klein relied on a mix of assumptions made by Goldman Sachs, Deloitte and Cargill in determining the inputs into his valuation model without analysing their baselines to determine their reliability, which he then adjusted to reflect assumptions the hypothetical purchasers would have made if aware of the Viterra Practices and Policies.

3963 The Viterra Parties criticised Klein's methodology on the basis that his references to post-Acquisition information were selective, ignoring consideration of post-Acquisition information that would been more directly relevant to his forecasts than other valuation modelling.

X.73.3.1.3 Other experts' response to Klein

3964 Potter characterised Klein's methodology as calculating the expected future cash flows arising from an assessment of the effect of the Viterra Practices and then applying an uplift factor to the discount rate applied in assessing the present value of the forecast cash flows. Potter contended that the approach Klein should have adopted was to start with the market price of Joe White with no effect on the value from the Viterra Practices and reduce this by the amount the potential purchasers would require to remedy the Viterra Practices, to the extent the Viterra Practices were inappropriate or not sustainable. Further, Potter contended that Klein should not have adjusted both projected cash flows and the discount rate on the basis that he believed this double-counted the allowance for risk, or at least gave rise to a material overstatement, which resulted in a material understatement of the true value of Joe White. Potter argued that as the Viterra Practices was a series of specific alleged matters that was better accommodated by making specific adjustments to the forecast cash flow. Accordingly, he contended there should be no uplift in the discount rate.[3320]

3965 Meredith criticised Klein's cash flow forecasts on the basis that Klein did not consider hindsight in estimating the effect of the Viterra Practices, which in Meredith's view was inconsistent with the legal principles. Further, Meredith disagreed with Klein's

[3320] Potter's position was that the figure for the denominator for the appropriate level of risk should consist of 3 components only: a base; a market risk and specific risk. Potter stated that the specific risk did not need to be adjusted for the Viterra Practices if an appropriate adjustment had been made to the cash flows.

reliance on the Goldman Sachs forecasts as a starting point to estimate cash flows and Klein's assumption that sales volumes would reach similar levels to those set out in the Information Memorandum. These criticisms were directed towards stating why Klein had *overstated* Joe White's true value.

3966 In response to Potter's observations, Klein argued that the value determined through the discounted cash flow method reflected an assessment of both future cash flows and an assessment of the risk-adjusted discount rate applied to these cash flows. Klein contended that if new material information had become available, such as an awareness of the Viterra Practices, the hypothetical purchaser would have performed a new discounted cash flow analysis and estimated anew the expected future cash flow and risk-adjusted discount rate of the asset taking into account the new information. He submitted that it was entirely appropriate to change all valuation inputs when material new information rendered a previous analysis outdated.

X.73.3.1.4 Analysis of Klein's approach

3967 Ultimately, there could be no issue with Klein's approach of assessing the effect of the Viterra Practices in aggregate in circumstances where the court has determined that all the Viterra Practices occurred as alleged and were not disclosed.[3321]

3968 Further, Potter's position that "[i]n this case" it was impermissible to adjust both cash flows and discount rate, as it would necessarily be double counting or give rise to an overstatement of results, should not be accepted. Notably, when giving evidence Potter accepted that adjusting both the numerator (being the estimated cash flows) and the denominator (being the discount rate for risk) could be done without double counting.

3969 As explained by Klein, the valuation was a fresh assessment of value, taking into account the new information, being the Viterra Practices. It was proper for the valuer to assess the appropriate future cash flows *and* the appropriate discount rate in light of the relevant information. Whether or not the adjustments have the effect of double counting, or materially overstating the effects of the Viterra Practices, depends on the

3321 See issue 10 above.

appropriateness of the inputs used to determine the future cash flow and the discount rate selected.[3322] Furthermore, it is highly likely, if not axiomatic, that the risk attaching to a business that sold only 1 type of product (that is, malt), and that was historically involved in the routine misreporting of test results in relation to that product in purported satisfaction of customers' requirements, would be greater than that applicable for a business that conducted its operations in an appropriate and contractually compliant manner. Such risk should also have been addressed in choosing the appropriate discount rate.

3970 The assumptions made by Goldman Sachs, Deloitte and Cargill prior to the Acquisition were not a problem at the methodological level, as these assumptions were made prior on the basis of information that would be available to the hypothetical purchaser absent the Viterra Practices. The reasonableness of the assumptions used by Klein, both drawn from the Goldman Sachs, Deloitte and Cargill models and his adjustments, are discussed below. Further, it was not impermissible (and in fact it was required), if beginning with assumptions made without knowledge of the Viterra Practices, to make any adjustments necessary to reflect the assumptions that would have been made by a hypothetical purchaser who had been aware of the Viterra Practices and Policies.

X.73.3.2 Potter's approach

3971 In his primary valuation, contained in his first report, Potter's methodology was to first value Joe White absent the Viterra Practices then estimate the cost of rectifying the effect of the Viterra Practices and deduct this amount to arrive at an estimate of the true value. In the first stage of his analysis, Potter estimated the market value absent the Viterra Practices by undertaking both a discounted cash flow method of valuation and a capitalisation of maintainable earnings method of valuation and averaging them both to reach an estimate of $447.2 million.[3323] Critically, in doing so

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3322 See pars 3989-4033 below in relation to assumptions and pars 4203-4251 below in relation to discount rate.

3323 The capitalisation of maintainable earnings valuation was $414.7 million and the discounted cash flow valuation was $479.7 million.

Potter relied on the forecasts contained in Cargill's deal model "as a proxy for the assumptions that would have been made by a hypothetical market participant".[3324] He did so on the basis that he considered it to have been professionally prepared after a period of "extensive due diligence", that it represented an informed assessment of the prospects of Joe White and that it was reasonable to assume that a hypothetical acquirer of Joe White would have undertaken a similar analysis. Accordingly, he considered the Cargill deal model an appropriate starting point in assessing market value.

3972 Thus, in the discounted cash flow method Potter adopted Cargill's deal model as a proxy for the cash flow. Potter commented that the strength of the discounted cash flow method was its transparency, incorporating market estimates of risk and return and enabling alternative views of key input to be readily identified. In contrast, Potter described the capitalisation of future maintainable earnings method as a relatively simple, shorthand version of the discounted cash flow method. Potter explained that this method involved assessing the future expected Unadjusted Earnings,[3325] and then multiplying that figure by a multiple derived from comparable "stockmarket listed companies" (to ascertain a trading multiple) and transactions for the sale of comparable companies (to ascertain a transaction multiple). The experts agreed that the capitalisation of maintainable earnings approach was a method commonly used where there was a profitable operating history and sufficient consistency in earnings to form a view as to sustainable earnings. They also agreed this method was commonly used for small to medium enterprise valuations where prospective financial information, that would support a discounted cash flow valuation, was not available.

3973 Essentially, Potter also adopted Cargill's base case discount rate.[3326] He stated that

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3324 Based on the Cargill deal model, Potter calculated a cash flow forecast for a period of 20 years, followed by the calculation of a terminal value. Potter's terminal multiple was calculated by reference to his discount rate. But as the Cargill deal model did not include a terminal growth rate, Potter chose to adopt a terminal growth rate of zero percent.

3325 That is, earnings before interest, tax, depreciation and amortisation.

3326 The Cargill base case discount rate was 10 percent. The Cargill deal model was expressed in United States dollars. Potter explained that 10.97 percent was an implied rate to arrive at the United States

Cargill Australia's claim was based on what it paid and therefore he considered it was necessary to have regard to any assumptions in Cargill's deal model that were more optimistic than those in the Information Memorandum or Goldman Sachs' valuation. Notwithstanding reservations he expressed about Cargill's discount rate being excessive,[3327] he concluded that it was reasonable to assume that a hypothetical purchaser would have used the same discount rate as Cargill's base case, and would have made a similar allowance for risk as Cargill did.[3328] Potter explained that he arrived at a higher valuation than Cargill's deal model because he adopted a mid-year discount period assumption, rather than year-end, and adjusted for Australian corporate tax rates and excluded transaction costs, which were included in Cargill's deal model.[3329] For the capitalisation of maintainable earnings method Potter assessed the future expected Unadjusted Earnings,[3330] then applied a multiple of 11.3. The Unadjusted Earnings were calculated by reference to the average earnings for the 2010 to 2012 financial years and the expected earnings for the 2014 financial year.[3331] Potter decided to take the average of the 2010 to 2012 financial years, being $36.7 million, as his figure for future maintainable earnings.

3974 In the second stage of his analysis, Potter assessed the effect of the Viterra Practices on the value of Joe White in 8 scenarios.[3332] In order to calculate the net present value of

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dollar valuation that Cargill applied, but he chose to use 10 percent to the Australian dollar cash flows in any event. The issue was a little confusing as Potter stated in his report that he used the discount rate of 10.97 percent, which was the percentage figure referred to in each of the appendices that made up appendix 5 to his report. However, both in his evidence in chief and under cross-examination he gave evidence that the rate of 10 percent had been used for the Australian dollar cash flows. He stated that his reference to 10.97 percent in his first report was inaccurate.

3327 Potter expressed the view that each of the discount rates of 8, 10 and 12 percent in the Cargill deal model for best case, base case and downside case respectively appeared to be excessive. Potter calculated a weighted average cost of capital (which he described as a "[m]arket based discount rate based on United States integers") as at 31 October 2013 at 6.31 percent, prior to an allowance for specific risk.

3328 This conclusion was expressed despite the fact that the precise amount Cargill had allowed for specific risk was not apparent.

3329 Potter stated that the mid-year assumption was standard valuation practice, on the assumption that cash flows were received on average evenly across the year and "to reflect this the discount period [was] assumed to be 0.5 less than the forecast period"; with the consequence that the discount period for the first year was 0.5, and 1.5 for the second year, 2.5 for the third year, and so on.

3330 Being earnings before interest, tax, depreciation and amortisation.

3331 No use was made of the 2013 financial year for which Unadjusted Earnings were expected to decline to $25.1 million for earnings before interest, tax, depreciation and amortisation.

3332 See pars 4006-4008 below.

the effect of the Viterra Practices on Joe White, Potter undertook the following calculation:

(1) Determined the value of Joe White without making any allowance for the Viterra Practices by applying a market based discount rate (said by Potter to be 8.75 percent) to the expected cash flows based on Cargill's deal model.[3333]

(2) Determined the value of Joe White by making adjustments for the effect of the Viterra Practices to the expected cash flows and applying a market based discount rate to the expected cash flows.[3334]

(3) Calculated the effect of the Viterra Practice(s) as the difference between the 2 amounts.[3335]

3975 Potter used a discount rate of 8.75 percent in both the first and second step of this calculation. He repeated the calculation in relation to each of the scenarios, as the adjustments to the cash flows for the effect of the Viterra Practices differed in each.

3976 To arrive at his final estimate of the true value, Potter deducted the effect of the Viterra Practices from his estimate of the market value. This "market value" was calculated by using the average of the discounted cash flow and the capitalisation of

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3333 The result was an unadjusted value of $621.9 million, though this figure was not referred to anywhere in the body of Potter's first report and obviously bore no resemblance to the figure at which Joe White was sold after a market sale. When the Viterra Parties' senior counsel was asked for a term to describe this figure other than unadjusted value, he described it as a notional value using a different discount rate. In short, there was no attempt to describe it as representing market value or true value, nor could there have been.

3334 The results were different in each scenario and varied from a value of $621.9 million to a value of initially $559.5 million, the latter figure subsequently being adjusted down to $534.7 million.

3335 The results were different in each scenario and varied from an amount of nil to an amount of initially $62.4 million which was later adjusted up to $87.2 million as at 4 August 2013 and $86.9 as at 31 October 2013. This was explained by Potter by reference to the difference between Klein's position and his position with respect to assumptions about the effect of the Viterra Practices on sales volumes and prices. Potter's evidence was that he became aware of some additional evidence which might have meant that he underestimated the level of risk or uncertainty that a hypothetical purchaser would place on sales. In order that the effect of the differences in these assumptions was apparent, he did recalculations using Klein's assumptions regarding the effect on sales volumes and prices. (Potter's evidence by way of his opening statement to the court seemed to suggest an increase from $62.4 million to $87.2 million, but his calculations attached to the final joint report indicated that the figure for 31 October 2013 was $86.9 million.)

maintainable earnings valuations as described above.[3336] In his final scenario, assuming the existence of all the Viterra Practices, Potter ultimately estimated the true value as $360 million.[3337]

X.73.3.2.1 The Viterra Parties' submissions on Potter's approach in his first report

3977 In relation to Potter's first valuation, the Viterra Parties submitted that Cargill's deal model was the best available proxy for the cash flow that a hypothetical purchaser could be expected to develop and so was appropriate for Potter's discounted cash flow valuation.

3978 Further, in relation to the capitalisation of maintainable earnings estimate, the Viterra Parties submitted that to determine the multiple Potter undertook a global study of the grain industry transactions for comparable companies where synergies were reported to be a significant driver of value and the process for publicly traded shares of comparable companies. Furthermore, the Viterra Parties submitted that the multiple was reliable because it was subsequently confirmed by the multiple achieved when Cargill resold its global malt business, as was cited in the buyer's letter of offer.[3338]

3979 The Viterra Parties submitted that it was appropriate to apply a different discount rate to the calculation of the value absent the Viterra Practices and for the effect of the Viterra Practices to avoid a mismatch of cash flows and the discount rate applied to those cash flows.[3339]

3980 The Viterra Parties submitted that Potter's methodology should be preferred because he was the only expert who properly engaged with the question of whether and when it was appropriate to use hindsight and the only expert to conduct proper analysis of

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3336 See par 3971 above.

3337 This was lower than the estimate in his first report due to his adjustment of the amount of the effect of the Viterra Practices: see fn 3335 above.

3338 The multiple used in the resale was 11.1. In my view, the sale of a global business using such a multiple in 2019 was of little relevance to determining the appropriate multiple for Joe White in 2013 impacted by the Viterra Practices and the necessary uncertainty that attached to the maintainability of the earnings.

3339 See pars 4226-4228 below.

customer data post-Acquisition. The Viterra Parties further submitted that Potter's valuation was corroborated by subsequent evidence including Cargill's commitment review from 2014,[3340] and the subsequent sale of Cargill's global malt business.[3341]

X.73.3.2.2 The Cargill Parties' submissions on Potter's approach

3981 In relation to Potter's discounted cash flow valuation, the Cargill Parties submitted that it was improper to use Cargill as a proxy for the hypothetical purchaser because Cargill's bid price reflected Cargill's unique synergies and the next highest bidder, with far fewer synergies, bid significantly less. Further, the Cargill Parties submitted that Potter accepted that he did not have an understanding of the other bidders' businesses, did not assess their synergies and that if other market participants did not have grain and oilseeds businesses then that synergy would need to be excluded.[3342] The Cargill Parties submitted that it was untenable for Potter to decline to reduce his valuation to reflect Cargill's unique synergies, which the Cargill Parties contended were worth $107 million. Finally, the Cargill Parties submitted that it was inappropriate that Potter adjusted Cargill's deal model to arrive at a higher valuation than that reached by Cargill at the time; $479 million compared to $427 million.

3982 In relation to the capitalisation of maintainable earnings valuation, the Cargill Parties submitted that Potter used an inflated multiple and thus arrived at an inflated value.

3983 The Cargill Parties were critical of the fact that Potter did not provide any information about the adjustments he made to the value of Joe White to account for knowledge of the Viterra Practices, submitting that it was unsatisfactory that this could not be understood from his report on its face. The Cargill Parties rejected Potter's method for assessing the effect of the Viterra Practices by determining a sum for rectification on a number of bases. *First*, his valuation was not a valuation of Joe White and did not consider the wider impact of the Viterra Practices on business value, including on reputation and relationships with customers. *Secondly*, the Financial and Operational Information that formed the basis of Cargill's valuation was underpinned by the

3340 See pars 4268-4277 below in relation to this assessment in Potter's second report.
3341 See pars 1845-1846 above in relation to the sale of Cargill's global malting business.
3342 See par 4186(6) below.

Viterra Practices and a buyer could not utilise the commercial advantage and efficiencies provided by the Viterra Practices or change the fact that historically the Viterra Practices occurred. Thus the Cargill Parties submitted that rectification costs was an inappropriate methodology to value the impact of the Viterra Practices. *Thirdly*, the Cargill Parties argued that Potter's application of this methodology was flawed because he failed to reflect risks that he accepted were created by cessation of the Viterra Practices.

X.73.3.2.3 Other experts' responses to Potter's approach

3984 Klein considered Potter's methodology to be improper for 4 principal reasons:

(1) Inclusion of buyer-specific synergies.

(2) Reliance on Cargill's deal model resulting in an assumption that other market participants would have had identical expectations to Cargill.

(3) Use of cash flows relied on by Cargill in setting its bid prior to having awareness of the Viterra Practices.

(4) Use of the discount rate relied on by Cargill, not a market participant.[3343]

3985 Meredith criticised Potter's methodology on the basis that it in effect relied on 3 valuations of Joe White and that this was an unconventional and uncommon method of assessing the true value of a business. Meredith's view was that 1 valuation should have been performed using the expected cash flows a hypothetical purchaser would attribute and with a discount rate calculated from first principles rather than being "back-solved". Potter responded to this criticism; he agreed that the discount rate was "back-solved" but asserted that it was in effect the rate Cargill applied and represented the level of risk a market participant, being Cargill, applied to the cash flow assumptions. Meredith also criticised Potter's use of the cash flow projections in Cargill's deal model because they were prepared on the basis that the Viterra Practices continued and represented cash flows available to Cargill. Meredith's view was that valuation principles did not support assessing market value incorporating practices

[3343] These criticisms are addressed at pars 4226-4230, 4247-4249 below.

breaching customer contracts.

X.73.3.2.4 Analysis of Potter's approach

3986 Potter's first report used both the discounted cash flow and capitalised maintainable earnings approaches, both of which are conventional means by which to value a business. In principle, it was appropriate to use a combination of these methods in seeking to ascertain the true value of Joe White. However, on the facts of this case, the capitalised maintainable earnings approach was inapposite and not a proper basis upon which to value Joe White. In addition to serious reservations about the multiple chosen by Potter,[3344] in circumstances where the financial performance of the 2010 to 2013 financial years was substantially underpinned by the Viterra Practices, it was totally inappropriate to use the financial results for those years as a means of assessing the true value of Joe White as at 31 October 2013. Further, Joe White did not have consistency of earnings upon which to form a proper view as to Joe White's sustainable earnings.[3345] Furthermore, serious questions must be raised about the ability to ascertain an appropriate multiple (whether based on a trading multiple or a transaction multiple) when any comparable company would presumably involve a company involved in practices that could be compared to the Viterra Practices. There was no evidence to suggest any such comparable existed.

3987 The second report did not, in truth, purport to be a valuation of the true value of Joe White. It impermissibly used hindsight as its basis. No criticism of Potter is made in this regard as he was simply acting in accordance with his instructions. However, as he himself acknowledged, the "valuation" in the second report was flawed in its approach.

3988 As to his third report, in light of the view that I have formed about its lack of relevance or probative value,[3346] it is unnecessary to go through each of the components of this analysis.

X.73.4 Have the assumptions that were provided to, made by or otherwise relied upon

3344 See fn 3580 below.
3345 See par 3972 above.
3346 See pars 4306-4313 below.

by the experts been proven?

X.73.4.1 The determination of "true value"

3989 Klein was instructed to determine the "true or market value" of Joe White, assuming the Viterra Practices and Policies were fully disclosed and that Cargill would not have acquired Joe White. The Viterra Parties noted that Klein was not instructed to assess loss suffered by Cargill or the value of benefits received by Cargill as the owner of Joe White.

3990 The instruction to assess the value assuming the Viterra Practices and Policies were disclosed accorded with the legal principles. The reference to "true or market value" was appropriate because it was clear Klein understood these instructions to be directing him to ascertain the true value.[3347] Further, the assumption that Cargill would not have bid for Joe White (or having bid, would not have acquired Joe White) has been proven.[3348] Furthermore, there was no need for expert opinion regarding loss suffered by Cargill as the owner of Joe White because, applying the principles referred to above, in appropriate circumstances (which is a matter for the court) the loss may be calculated by the purchase price minus the true value.

3991 Similarly, Potter was instructed that 1 approach to assessing damages was to subtract the "true value" or "real value" of the business acquired from the price paid. This instruction itself was appropriate, as it required Potter to determine the "true value".

X.73.4.2 The extent and impact of the Viterra Practices and Policies

X.73.4.2.1 Klein's instructions

3992 The Viterra Parties submitted that Klein was not given instructions as to the malting industry, nor precisely what the Viterra Practices and Policies entailed. It was submitted this lack of instructions included not being provided with specifics of the Reporting Practice, the Varieties Practice or the Gibberellic Acid Practice, other than information regarding the alleged extent and impact of the Viterra Practices. Further, the Viterra Parties submitted that Klein's instructions and analyses were inadequate, not based on actual evidence and supplemented by Klein's own assumptions and

3347 See pars 3953-3954 above.

3348 See par 3394 above.

conclusions which were inconsistent with evidence given at trial.

3993 The Viterra Parties submitted that Klein was not given instructions in relation to similar practices alleged to have been engaged in commonly by other participants in the industry (being the Alleged Industry Practices).[3349] Further, the Viterra Parties noted Klein's language when referring to the Viterra Practices:

(1) "longstanding, intentional practice of committing large-scale deception upon its customers and a longstanding practice of failing to perform its contractual obligations".

(2) "company that [authorises] the unethical and widespread practice of falsely 'passing off' goods as conforming to customer specifications".

(3) "in conjunction with a company systematically concealing that products intended for human consumption did not meet specifications".

3994 The Viterra Parties' submissions in relation to Klein's instructions and analysis are dealt with in relation to each of the assumptions below. In relation to the submissions regarding the language used by Klein, although such language does not mirror precisely the actual findings in this case, the evidence in relation to the Viterra Practices was entirely consistent with these characterisations. As the matters set out above (including in issue 10) demonstrate, the Viterra Practices were longstanding, intentional, unethical, involved deception of Joe White's customers and breaches of contract, and were committed to such a significant level as to underpin the operational and financial performance of the Joe White Business.

X.73.4.2.2 Klein's instructions regarding the Reporting Practice and the Varieties Practice

3995 Klein was given the following information with respect to the Reporting Practice and the Varieties Practice in relation to malt produced by Joe White during the period from January 2010 to 31 October 2013:

3349 But see issue 13 above.

(1) Approximately 90 percent of all Certificates of Analysis that Joe White provided to its customers had at least 1 parameter for that malt shipment that was recorded as out of specification in testing results but reported in the Certificate of Analysis sent to the customer as within specifications.

(2) Approximately 90 percent of the total tonnes of malt orders shipped to customers had at least 1 parameter for that malt shipment recorded as out of specification in testing results but reported in the Certificate of Analysis sent to the customer as within specifications.

(3) More than 70 percent of the orders from customers that required specific barley varieties to be used in their malt in contracts or written communications and for which a Certificate of Analysis was issued to the customer were not correct in that the variety actually used in the blend was not that specified by the customer and was not that reported in the Certificate of Analysis issued to the customer.

3996 To inform his analysis, Klein relied on the assumptions above. Klein explained that he expected, on or around the date of Completion, that hypothetical purchasers would have performed similar analyses to those performed by Cargill, consequently revising their perceptions about the reliability of Joe White's historical financial statements.[3350]

3997 The Cargill Parties submitted that the figures Klein used were not materially different to, and were more conservative than, the figures arrived at by Ryan.

3998 The Viterra Parties noted that the particulars on which Klein's instructions were based were subsequently withdrawn.[3351] Further, the Viterra Parties submitted that even if the particulars were proven, the analyses undertaken by Klein identified non-conformance in situations where, on the evidence, there was conformance.

3350 Klein explained under cross-examination that nowhere did he state the historical financial statements were incorrect, but rather was indicating in this part of his report that there was a basis for a hypothetical market participant to conclude that they were unreliable.

3351 This was as a result of Ryan being instructed to use data from a different source: see par 2316 above.

Furthermore, the Viterra Parties submitted that evidence at trial did not establish that other bidders would have had the ability to perform such analyses, nor did it establish that they would have had concerns arising from those types of analyses. The Viterra Parties submitted that whilst Klein considered that hypothetical purchasers would revise their perceptions about the reliability of Joe White's historical financial statements, under cross-examination he could not identify any part of a financial statement that was wrong and he failed to point to any inaccuracies.

3999 To determine whether the assumptions relied upon by Klein were established, it is necessary to consider the evidence given by Ryan.[3352] Ryan's Parameters Analysis established that 98.88 percent of all Certificates of Analysis[3353] that Joe White provided to its customers had at least 1 parameter for that malt shipment that was recorded as out of specification in testing results but reported in the Certificate of Analysis sent to the customer as within specifications, which amounted to 99.16 percent of tonnes of malt sold.[3354] Ryan's conclusions demonstrated higher levels of non-compliance than Klein's assumptions of 90 percent of both Certificates of Analysis and tonnes of malt sold. Therefore, Klein relied on conservative estimates.

4000 Further, Ryan's Barley Analysis established that 77.58 percent of orders,[3355] with at least 1 barley variety used in the blend and at least 1 customer-required variety, were orders where not all the varieties used in the blend were the customer required varieties.[3356] Therefore Klein's assumption that more than 70 percent of orders from customers contained non-conforming malt was justified, albeit conservative, compared to the 77.58 percent established.

4001 It was immaterial that the particulars upon which Klein relied were withdrawn, as Ryan's analyses as ultimately put before the court provided a sound basis for the

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3352 See annexure D to these reasons.

3353 That is, of the 4,359 Certificates of Analysis the subject of the Parameters Analysis.

3354 See annexure D, facts 1-2. Also see par 2411 above regarding the Parameters Analysis. Further, it was appropriate for Klein to not rely on the Deviation Analysis: see pars 2410-2412 above.

3355 That is, the unique orders.

3356 See annexure D to these reasons, fact 11. Also see par 2537 above regarding the Barley Analysis.

assumptions that Klein relied upon.

4002 Further, on the basis that a hypothetical purchaser would not have known of the Viterra Practices prior to any disclosure as part of the sale process,[3357] it was reasonable to assume that, upon learning of the Viterra Practices and before deciding whether to acquire Joe White, a hypothetical purchaser would have reconsidered the reliability of the financial statements and used information available at the time to assess the extent to which non-conformance had occurred, together with the consequential effect that might have had upon the assumptions previously made in valuing Joe White. Furthermore, it was reasonable to assume that, if information had not been available, a hypothetical purchaser would have requested information about the extent of the Viterra Practices as part of its due diligence in order to conduct similar analyses to the analyses undertaken, including because of the additional uncertainty regarding the reliability of the financial statements and any forecasts based upon them. Moreover, it was reasonable to assume that based on the data that would have been made available,[3358] a hypothetical purchaser would have arrived at the same or even less conservative conclusions than Klein given such high levels of non-conformance.[3359] Therefore, Klein's analyses of the particulars were underpinned by assumptions that were established.

4003 As to the remainder of the Viterra Parties' submissions on this point, it was not clear why a hypothetical potential bidder would have had any inability to perform the relevant analyses or some form of analyses or enquiries to understand the nature and extent of the issues. This was a "Wall Street" sale, which could be expected to attract sophisticated prospective purchasers. Further, it was highly likely, and I so find, that such a person would have had concerns arising from those types of analyses or enquiries. Furthermore, it was unnecessary for there to be evidence from Klein identifying parts of the historical financial statements that were wrong. It was sufficient to justify Klein's position that Klein considered, as would be expected, that

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3357 See par 2792 above.

3358 The data was available from Joe White's and Viterra's existing systems.

3359 See Annexure D to these reasons.

hypothetical purchasers would revise their perceptions about the reliability of Joe White's historical financial statements as a means of ascertaining a reliable valuation of Joe White. In any event, the effect of the findings in issue 10 above is that it has been established that the historical financial statements were only accurate to the extent that they were the result of operations being conducted in accordance with the Viterra Practices and not otherwise.

X.73.4.2.3 Klein's instructions regarding the Gibberellic Acid Practice

4004 Klein was given the following instructions (each of which has been established, or relevantly established, for the reasons set out immediately under each assumption) with respect to gibberellic acid and its use by Joe White prior to the Acquisition:

(1) Some of Joe White's customers had terms of their contracts which related to the use of gibberellic acid in the production of malt, which included:

(i) Sapporo (Marubeni Corporation) whose contracts, from time to time, provided that barley used for commodity was to meet Japanese regulations of agricultural chemical residues of barley.

(ii) Sumitomo (on behalf of Asahi) whose contracts, from time to time, requested that either gibberellic acid not be used in the malting process and/or that agrochemicals should be below Japanese maximum residue level.

(iii) SAB Miller whose contracts, from time to time, did not permit the use of gibberellic acid.

(iv) Asia Pacific Breweries and its subsidiaries whose contracts, from time to time, did not permit the use of gibberellic acid.

It has been established that up to 31 October 2013 Sapporo,[3360] Asahi, SAB Miller and Asia Pacific Breweries prohibited the use of gibberellic

[3360] See pars 1224, 1564, 2552 above.

acid.[3361]

(2) Gibberellic acid for malting was not allowed in Japan as it is a food additive.

This broad proposition has not been established,[3362] but relevantly the evidence was that each of Joe White's customers based in Japan prohibited the use of exogenous gibberellic acid.[3363]

(3) Joe White used gibberellic acid to produce malt from time to time including in respect of some customers whose contract did not permit it.

This assumption has been established.[3364]

(4) Joe White did not record all occasions where gibberellic acid was used in the production of malt.

This assumption has been established.[3365]

(5) With the use of gibberellic acid, Joe White was able to produce malt taking only 4 days of germination, compared to 5 days of germination if gibberellic acid was not used, which increased production by about 16,350 tonnes per year.

This has been established.[3366]

(6) Joe White supplied approximately 70 kilotonnes of malt each year that

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3361 See pars 41, 1224, 1564, 2546 above.

3362 The Cargill Parties referred to the translation of Articles 10 and 11 of the Food Sanitation Act (Japan) Act No 233 of 1947. However, these articles did not refer to gibberellic acid specifically and referred to exclusions (which included certain additives) and exceptions, as well as criteria or standards that might be established and used in producing food. Beyond referring to this statutory position, there was no evidence to establish the status of gibberellic acid (which is a naturally occurring substance). In the absence of any evidence on the point, it was not possible to make any finding about Japanese law and its regulatory impact on the use of exogenous gibberellic acid in malt.

3363 See pars 41, 1224, 2546, 2552 above.

3364 See par 2544 above.

3365 See par 2556 above.

3366 See par 1703 above. There was a slight variance in figures given for this issue, but it was insignificant.

was produced using gibberellic acid when it was prohibited.

This has been established.[3367]

(7) Joe White estimated that moving from 4 day to 5 day malting would increase costs by $1.5 per tonne, whereas Cargill estimated it to be $5 per tonne.

This has been established.[3368]

X.73.4.2.4 Potter's instructions

4005 In contrast to the approach taken by the Cargill Parties in relation to Klein's reports,[3369] not a great deal of focus was put on whether Potter's instructions in relation to the Viterra Practices were established. Although not all the assumptions made by Potter were readily apparent, largely they reflected the allegations made by Cargill Australia in the Statement of Claim.

4006 Potter was instructed to assess the effect of the Viterra Practices in 8 scenarios, adopting a different combination of assumptions in each scenario. The assumptions were:

(1) No adjustments were required to be made to any pre-Acquisition forecasts of Joe White's post-Acquisition financial performance and results as a consequence of any of the Viterra Practices.

(2) Cargill Australia's changes to the Viterra Practices relating to the Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice were an independent, extrinsic or supervening cause of any decline in the value of Joe White post-Acquisition and were not to be taken into account in assessing the true value at the assessment date.

4007 In the first scenario Potter was instructed to adopt the above assumptions in relation

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3367 See, for example, par 1467 above, which evidence related only to Asia Pacific Breweries (and accordingly the tonnage was likely to have been considerably more).

3368 See pars 1281, 1419, 1421 above.

3369 The Cargill Parties prepared a table of the relevant assumptions, and referred to the evidence they relied upon in seeking to demonstrate that the assumption had been established.

to all aspects of the Viterra Practices, which Potter stated resulted in an estimated reduction in market value of nil. In the following scenarios he was instructed to adopt the assumptions in relation to combinations of 1 or more aspects of the Viterra Practices so the adjustments incrementally increased as the greater impact was allowed for.[3370] In the final scenario he adopted none of the above assumptions, thereby assuming that the Viterra Practices and each of them had an adverse effect on the market value which was not extrinsic when calculating the true value of Joe White.

4008 Joe White's financial and operational performance for the financial year 2010 to part of the financial year 2013 was substantially underpinned by the Viterra Practices.[3371] Accordingly, a valuation that proceeded on the assumption that no adjustment to any pre-Acquisition forecasts of Joe White's post-Acquisition financial performance and results was required as a result of the Viterra Practices would be inapt to the facts as found. Further, although the logic of Potter being instructed to make assumptions in each of the scenarios he assessed was perfectly sound in the absence of findings by the court, in light of the findings actually made it is only necessary for the final scenario be considered. In relation to the final scenario, he estimated a reduction of market value of either $86.9 million or $87.2 million.[3372]

X.73.4.3 Email from Viers dated 28 October 2013

4009 Klein relied upon estimates contained in an email from Viers to Eden and Jewison dated 28 October 2013,[3373] as a basis for various assumptions.[3374]

4010 The Viterra Parties submitted that, regardless of the issues relating to the general reliability of the estimates contained in the email, Viers' estimates were made, according to Cargill, without knowledge of the full extent of the Viterra Practices. It was submitted that if those estimates were to be considered relevant, then the court should accept that Cargill had all the information required to estimate the impact of

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3370 See par 3974 above.

3371 See issue 10 above.

3372 This assumed capital expenditure of $30 million and was an adjustment to his first report as he subsequently became aware of additional evidence of lost sales resulting in him amending his valuation of the effect of the Viterra Practices, in the final scenario, from $62.4 million to $87.2 million: see fn 3335 above.

3373 See pars 1418-1435 above.

3374 See pars 4071, 4100, 4120, 4141 below.

the Viterra Practices and Policies prior to Acquisition to make an informed decision about whether to complete the transaction.

4011 It was accepted in October 2013 by the relevant Cargill employees that the estimates contained in the 28 October 2013 email were made without knowledge of the full extent of the Viterra Practices. It was for that very reason they were not referred to in communications with the Viterra Parties.[3375] Accordingly, regardless of Klein's instructions or any assumptions he may have made based on this email, there was no proper basis to conclude that Cargill had all the information it required in October 2013 to make any properly informed assessment of the impact of the Viterra Practices.

4012 Therefore it must follow that Viers' calculations at that time were not a reliable proxy for the assumptions that a hypothetical purchaser would have made with full knowledge of the Viterra Practices. Rather, they were relevant information about the views of a purchaser with the information that was available to Cargill at that time. Thus, references to estimates within the email would only be appropriate with the qualification that such estimates were made in the absence of full knowledge of the extent of the Viterra Practices. The significance of this is discussed below.

X.73.4.4 Information available to a hypothetical purchaser

4013 Klein acknowledged that a hypothetical purchaser would have knowledge of the Viterra Policies but not information about the numerical impact of such policies, and that quantification of the impact would require difficult projections.

4014 The Viterra Parties submitted that Klein made numerous assumptions about what hypothetical bidders would have known and how they would have dealt with the situation (and what they could and would have forecasted), despite not having any experience in the malting industry and apparently not seeking any opinions from the industry.

4015 Notwithstanding the fact that Klein was not a malt expert, as an expert in valuing businesses he was tasked with assessing the true value of Joe White in light of the

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3375 See par 1425 above.

existence of the Viterra Practices. The task before Klein and the other experts involved using information available, much of which was provided by highly qualified and experienced people in the malting industry, to come to a valuation. The extent to which any of Klein's assumptions were inconsistent with the "reality" of a hypothetical scenario, or might otherwise have been unreasonable, will be considered in the sub-issues below where relevant.

X.73.4.5 Disclosure of the Viterra Practices and Policies to customers

4016 Klein was instructed to assume full disclosure of the Viterra Practices and Policies to customers and noted that he had made this assumption. Klein stated that a reasonable hypothetical purchaser who became aware of the Viterra Practices and Policies would have told their customers upon acquiring the Joe White Business.

4017 The Viterra Parties submitted that Klein's assumption that a hypothetical purchaser would have disclosed the Viterra Practices and Policies to customers had not been proven and further Cargill had not disclosed them to customers and therefore this was contrary to the actual facts.

4018 There was no doubt that, for a time after Completion and the immediate cessation of the Viterra Practices, Cargill decided at that point in time not to disclose to Joe White's customers what had happened in the past regarding the existence and implementation of the Viterra Practices. However, commencing shortly after Completion and then over time, derogations were sought, together with permissions to use different barley varieties or gibberellic acid where previously prohibited. Accordingly, although there was no specific communication to customers providing all the details of the Viterra Practices, the major overseas customers generally became aware that Cargill was not conducting the Joe White Business in material respects as it had been previously conducted.[3376] However, this fact alone was of little moment. More significantly, the cessation of the Viterra Practices coupled with having to communicate with customers about the need for derogations or, with respect to some customers changes in production methods concerning the use of required barley varieties or the non-use or

3376 See, for example, pars 1666, 1673-1693, 1706-1713, 1718-1720, 1725-1726, 1728-1744 above.

ongoing use (as the case may be) of prohibited gibberellic acid, gave rise to significant disruption in Joe White's operations and performance. For completeness and in any event, the evidence indicated that over time some customers became aware of what had occurred previously.[3377]

X.73.4.6 Cessation of the Viterra Practices and Policies

4019 The Viterra Parties submitted that Klein assumed that upon Acquisition, a hypothetical purchaser would not continue with any aspect of the Viterra Practices and Policies, nor attribute any value to Joe White to the extent that such value was referrable to the Viterra Practices and Policies. It was submitted that Klein had not received instructions to do so and evidence at trial indicated that it was unlikely to be the case, as most commercial maltsters engaged in similar practices.

4020 In circumstances where the Alleged Industry Practices have not been established,[3378] there can be no basis for the submission that most commercial maltsters would have continued to operate the Joe White Business adopting practices similar to the Viterra Practices. Both Klein and Potter agreed, by reference to established valuation principles, that only legally permissible uses were to be taken into account. In light of the fact that each of the Viterra Practices involved conduct concerned with deliberately misleading Joe White's customers, it must follow that the hypothetical purchaser acting in accordance with established valuation principles would have made the assumption that it would have immediately desisted with the Viterra Practices upon taking ownership of Joe White.

X.73.4.7 Risk and reputation

4021 Klein assumed that the Acquisition of Joe White posed an unquantifiable risk of harm to a strategic purchaser's reputation for integrity and reliability. Further, consistent with Cargill's evidence on what various witnesses said they would have done if they had been properly informed of the Viterra Practices before Completion,[3379] Klein concluded that such risks would have resulted in strategic purchasers withdrawing

3377 See pars 1666, 1708-1711 above.
3378 See issue 13 above.
3379 See issue 33 above.

from the bidding process altogether.[3380]

4022 The Viterra Parties submitted that Klein's assessment of an unquantifiable reputational risk was inconsistent with evidence of what practices industry participants engaged in and the lack of any evidence of actual reputational damage to Cargill after the Acquisition. It was submitted that the fact that Cargill had continued to operate under the name Joe White suggested that Cargill had not perceived reputational damage from an association with Joe White. Further, the Viterra Parties submitted that Klein did not even take into account all of the information that was known to Cargill in October 2013, and he did not ask for instructions as to whether Cargill had decided before 31 October 2013 to cease using the name.

4023 The Cargill Parties submitted that Klein was correct not to rely on evidence of actual reputational damage to Cargill after the Acquisition, as his task was to value the business using foresight and it was a matter for him, as a valuer, to decide whether he cross-checked the reasonableness or not on actuality. Nor, it was submitted, was it put to Klein that he did not take into account all of the information known to Cargill. Further, it was submitted that the Viterra Parties failed to put to Klein evidence of what practices industry participants engaged in.

4024 The reasonableness of Klein's assumptions regarding risk and the strategic bidder's involvement in the bidding process is considered below.[3381]

4025 Further, whether or not a hypothetical purchaser would have perceived some sort of reputational damage from association with Joe White was not contingent on whether or not Cargill did or would have changed Joe White's name. Cargill would not have bid on Joe White if it had been aware of the Viterra Practices, and as such, it was immaterial that Klein did not ask for instructions as to whether Cargill would have changed Joe White's name. Under cross-examination, Klein gave evidence a prospective purchaser would have to factor in evidence that reputational harm could arise from being aligned with a firm that had previously deceived customers, with the

3380 See par 4036 below.
3381 See pars 4054-4062 below.

risk that the affected customers might be lost in the future. Furthermore, as could be expected given the ongoing inability to produce malt in compliance with specifications, it was clear that Cargill did suffer reputational damage after the Acquisition.[3382] If this subsequent fact had been taken into account, it would have confirmed the appropriateness of the assumption that a hypothetical purchaser, with knowledge of the Viterra Practices, would have considered additional risks concerning reputational damage.

4026 In short, it was entirely reasonable to assume that, upon learning of the extent of the Viterra Practices, it was likely that a hypothetical purchaser would have perceived additional risks and the possibility of reputational damage.

X.73.4.8 Misstatements in financial statements

4027 The Viterra Parties submitted that Klein proceeded on an incorrect assumption that the financial statements of Joe White contained misstatements. Klein's assumptions regarding misstatements in Joe White's financial statements are considered below.[3383]

X.73.4.9 Additional factual assumptions

4028 In addition to disclosure of the Viterra Practices and Policies, Klein was instructed to make the following factual assumptions:

(1) The term "Total Barley Costs," as recorded in Cargill's financial accounts, included freight and logistics costs, in addition to the direct materials cost of acquiring barley.

Klein was taken to this specific assumption during cross-examination and was not challenged about it. Further, in Potter's first report, he specifically referred to this assumption (made by both Klein and Meredith) and took no exception to it. Finally, the Viterra Parties made specific challenges to both Klein and Meredith's approach to barley costs in their closing written submissions,[3384] but made no criticism of this

3382 See, for example, pars 1708-1713 above.
3383 See pars 4205, 4234, 4242 below.
3384 See pars 4099-4101 below.

particular factual assumption. As no issue was taken on this point, it is inferred that there was no controversy about this assumption. In any event, it would be expected that the total of the costs associated with barley would include freight and logistics.

(2) To produce 1 tonne of malt output, Joe White must utilize 1.2 tonnes of barley.

This was the effect of Jones' evidence, which was not challenged.

(3) When preparing its valuation dated 18 December 2014, Deloitte was not instructed to consider the impact of the Viterra Practices and Policies.

This was established.[3385]

(4) Instructions were provided in relation to the Joe White and Co-Operative Bulk dispute before Completion.

As there was ultimately no substantive issue between the parties on this matter,[3386] it suffices to say that the documents tendered at trial bear out the assumptions Klein was instructed to make about the history of the dispute up to Completion, as well as the subsequent payment by Cargill to settle the dispute.[3387]

(5) Following the Acquisition by Cargill, Joe White's barley costs increased from the prices paid before Acquisition due to, among others, 1 or more of the following factors:

(a) There were insufficient quantities of contractual varieties available in the market and so premiums had to be paid when purchasing the required varieties of barley.

(b) Costs of preserving the barley through the supply chain increased

3385 See fn 674 above.
3386 See issues 61-64 above.
3387 See further pars 4266-4267 below.

(that is, hiring and building additional separate storage to keep different varieties segregated).

(c) Additional transport and logistics costs associated with transporting barley around the country to the plants at which it was required were incurred.

The above factors were established.[3388]

4029 With respect to storage for the Joe White Business following the Acquisition, Klein was instructed:

(1) In order for Joe White to operate at capacity production levels and produce malt in accordance with Cargill's Blending and Certificate of Analysis procedure rather than the Viterra Practices and Policies, as at February 2014 it was calculated that an additional 15,500 to 18,500 tonnes of storage was required. To acquire such additional storage would cost approximately $30 million.

For the reasons discussed below, in substance this was established.[3389]

(2) As at the date of Klein's first report, being 21 February 2018, the Joe White Business had constructed 6,580 tonnes of additional storage at the following plants:

(a) Sydney an additional 3,880 tonnes of storage;

(b) Port Adelaide in stage 1 an additional 1,800 tonnes of storage; and

(c) Port Adelaide in stage 2 an additional 900 tonnes of storage.

(3) As at the date of Klein's instructions for his first report, the costs

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3388 See, for example, pars 1574, 1785 above, regarding the unavailability of contractual barley varieties and the consequential purchasing premiums; par 1670-1671 and fn 1031 above, regarding the increased supply chain costs due to barley requirements; and pars 1574, 1725, 1784-1785 above regarding additional barley transport costs.

3389 See pars 4140-4162 below.

expended to construct the additional 6,580 tonnes storage was $11.4 million, incurred as follows:

(a) Sydney additional storage costs, approximately $5.1 million;

(b) Port Adelaide stage 1 additional storage costs, approximately $2.5 million; and

(c) Port Adelaide stage 2 additional storage costs, approximately $3.8 million.

In relation to (2) and (3), it has been established that additional storage was installed at a cost of the amounts alleged (even if all the storage was not related to malt storage, as opposed to barley storage).[3390] Although the additional tonnage of storage capacity available was not established, little could turn on this in circumstances where the production of Joe White never approached capacity after Completion and plainly the expenditure which occurred would have significantly increased storage capacity.[3391]

(4) Further to the additional storage constructed as set out above, during 2014 to the first half of 2016 Joe White incurred additional costs of $452,000 in renting additional storage capacity from Co-Operative Bulk at the Perth plant. From around mid-2016 Joe White entered into a new agreement with Co-Operative Bulk which provided for various grain and malt handling, cleaning and transport services and also provided for storage, including for Joe White to access additional storage at the Perth plant.

This was established.[3392]

3390 Contrary to the Viterra Parties' submission, it was of no moment that the document proving the overall cost in relation to stage 2 at Port Adelaide did not provide a breakdown of the costs. The business record tendered demonstrated on its face that the entirety of the costs related to additional storage.

3391 See pars 1826, 1844 above.

3392 See fn 1024, 1039 above.

(5) As the Joe White Business was not, at the date of Klein's instructions, operating at full production capacity, it had not yet been necessary to construct all of the additional storage identified as set out in subparagraph (2) above.

This has been established.[3393]

4030 There were also further assumptions relating to events after Completion.[3394] These assumptions appeared in a table provided to the court, which set out the relevant assumptions and the evidence relied upon to demonstrate each assumption was based on evidence adduced at trial.[3395] Given these matters related to events subsequent to Completion (being the date upon which true value was calculated), it suffices to say that I have been through each of those assumptions and find that each of them has been established on the evidence referred to (much of which appears in the findings of fact set out above).

X.73.4.10 Documents not in evidence

4031 The Viterra Parties correctly submitted that Klein's report relied on documents that were not in evidence. The Viterra Parties listed the following 3 particular documents that Klein relied on:

(1) A financial summary of Joe White.

(2) Fitzgerald's handwritten notes dated 29 October 2013.

(3) Rees' handwritten notes, which appear to have been prepared in late October 2013.

4032 Although strictly correct, part of this submission was without substance. The financial summary referred to in paragraph 4031(1) was at court book page 38090 (which the

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3393 See pars 1826, 1844 above.

3394 These were the subject of instructions in a letter dated 4 October 2018 to Meredith from the Cargill Parties' solicitors.

3395 The table of assumptions consisted of 19 pages; the further assumptions and the corresponding evidence relied upon being from pages 8 to 19.

Viterra Parties highlighted was not tendered). It contained information that was in another document at court book 38099 entitled updated financial summary which was tendered and contained the same or substantially the same information for all of the financial years from November 2013 to October 2017.[3396] Further, the Cargill Parties submitted that whilst the documents in paragraphs 4031(2) and 4031(3) were not tendered, other evidence spoke to the same topics. When the issue was raised in closing submissions as to what documents precisely were being referred to (as only examples had been given), the Viterra Parties did not identify any particular document as being of significance in demonstrating an inability to prove an assumption of materiality. In short, the issue may be left on the basis that the real question for the court was whether the underlying facts have been established rather than whether any particular document was or was not tendered.

4033 For completeness it should be noted that, naturally, documents that were not tendered cannot be considered. Some instances where Klein did rely on documents that were not tendered and were material to his consideration are dealt with below.[3397]

X.73.5 What conclusions should be drawn in respect of the nature of the hypothetical purchaser?

4034 The experts agreed that the assessment of true value required a hypothetical transaction and a hypothetical purchaser. Further, they agreed that market value is determined based on hypothetical market participants, not the actual entities that in fact may have bid to acquire Joe White prior to learning of the Viterra Practices. The experts accepted the definition of market participants as: [3398]

> … the whole body of individuals, companies or other entities that are involved in actual transactions or who are contemplating entering into a transaction for a particular type of asset. The willingness to trade and any views attributed to market participants are typical of those of buyers and sellers, or prospective buyers and sellers active in a market on the valuation date, not to those of any

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3396 See pars 1826, 1844 above.

3397 See pars 4067, 4120, 4134 below.

3398 The definitions cited and agreed upon by all the independent experts were contained in the *International Valuation Standards* issued by the International Valuation Standards Council (2013), Frameworks and Requirements, [18]: see fn 3314 above.

particular individual or entity.

4035 There were 2 types of bidders identified as potential market participants for Joe White; financial bidders and strategic bidders. Financial bidders are bidders that generally buy and sell companies and whose portfolios do not necessarily hold assets in the same industry. Further, financial bidders usually dispose of their investments in the intermediate term. Strategic bidders are bidders that hold assets in the same industry as the target company and focus on companies in that industry. Klein referred to relevant potential strategic bidders as agribusiness firms.

X.73.5.1 Klein's approach

4036 Klein concluded that upon learning of the Viterra Practices, the characteristics of hypothetical market participants would differ from the characteristics of the actual bidders in 2 respects:

(1) Strategic bidders, who had reputations to protect and conservative risk profiles, would withdraw from the bidding process altogether. Klein explained that this would be due to the potential risks stemming from an association with a company such as Joe White that engaged in deceptive practices, and had questionable internal controls and unethical management. Such risks could include potential litigation, time-consuming distractions and potential adverse publicity and reputational harm.

(2) Consistent with this position, Klein was instructed that Cargill would not have remained a bidder if it had known the true position. Similarly, Klein was of the view that closely situated strategic bidders would have shared Cargill's perspective and withdrawn from the bidding process.[3399]

4037 Klein therefore expected that the hypothetical market participants would consist of financial bidders, who were more risk-tolerant and had business models that focused

[3399] Klein was given instructions as to Cargill's position, but gave evidence he would have formed that view with respect to strategic bidders independently of his instructions.

on rehabilitating distressed companies. The financial bidders would operate Joe White on a standalone basis and accordingly not be subject to reputational harm in the agribusiness industry due to association with Joe White.

4038 Determining the correct hypothetical market participant had a material effect on Klein's calculation of the true value of Joe White. Klein considered that the true value was what financial bidders would pay, being $158.2 million. Alternatively, Klein considered that strategic bidders would pay between $178.2 million and $250.6 million, and concluded that the lowest value in that range was the proper assessment.[3400]

4039 Meredith did not utilise Klein's approach of distinguishing between strategic and financial bidders. On the contrary, in his approach to synergies, he implicitly accepted that strategic bidders would remain in the bidding process. That said, he did not consider Klein's approach was necessarily incorrect. While stating that he was unable to express a concluded view as to how a hypothetical purchaser would react to knowledge of the Viterra Practices,[3401] he said he did not consider the conclusion that other strategic bidders would have reacted the same way as Cargill and opted out of the bidding process to be unreasonable. However, Meredith also stated that it was highly likely that any hypothetical strategic purchaser would have been identified by Goldman Sachs, and that the hypothetical purchaser "may" have included some additional financial purchasers.

4040 Potter disagreed with Klein's distinction between financial bidders and strategic bidders.[3402]

X.73.5.1.1 The Cargill Parties' submissions

4041 The Cargill Parties submitted that the court should accept Klein's opinion that the appropriate hypothetical bidders were financial bidders, who would invest in Joe

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3400 The lower value is based on a higher discount rate, representing an expectation of greater risk: see pars 4203-4251 below.

3401 He specifically said he could not form a view as to whether Co-Operative Bulk or Malteurop would have remained in the bidding process.

3402 See further pars 4049-4050 below.

White on a discrete basis rather than joining it with existing assets.

4042 In support of this, the Cargill Parties noted the following:

(1) Klein considered that the substantial reputational and financial risks posed by the Viterra Practices meant that the hypothetical market participants would consist solely of financial bidders.[3403]

(2) Throughout cross-examination, Klein consistently maintained his reasoning for his position that no strategic purchasers would bid on Joe White after learning of the Viterra Practices, based upon many years of experience and study, as well as consulting with strategic bidders.

(3) When it was put to Klein that the strategic bidders would be in a better position to extract value from Joe White and so bid more, Klein considered that both strategic bidders and financial bidders were likely to have stood in the same position on the core issue of whether customers would disappear, and both bidders would hire skilled consultants to run the business. Further, given the Joe White Business depended on 10 customers for around 90 percent of its sales (of which 3 of those represented nearly half of the sales), Klein's position was that a strategic bidder would not know any better than a financial bidder whether 1, 2 or 3, or even 10, of those customers might "disappear".

X.73.5.1.2 The Viterra Parties' submissions

4043 The Viterra Parties submitted that the court should find that the market participants included strategic bidders. It was submitted that strategic bidders who were already in the industry were more likely to want to have something that they could tack onto their existing businesses.

4044 The Viterra Parties submitted that in excluding strategic bidders, Klein assumed that no-one already in the malting business was bidding. The Viterra Parties submitted that Klein's conclusions were not credible given the number of businesses involved in

3403 See par 4021 above.

malting who had been interested in Joe White and Klein's lack of specialised knowledge of the malting industry.[3404]

4045 Further, the Viterra Parties submitted that Klein's language was speculative, for example, his reports contained the following phrasing:

(1) "[P]resumably, others similar to Cargill similarly would have withdrawn".

(2) "[I]t is reasonable to believe that Cargill, and other strategic buyers similarly situated to Cargill, would have withdrawn from the bidding process".

(3) "[L]arge companies with substantial business reputations to protect and conservative risk profiles likely would have withdrawn from the bidding process altogether".

4046 Furthermore, it was submitted that Klein's reasons for excluding strategic bidders were based upon the possible consequences for the acquirer's reputation, and it was submitted that there was no evidence of damage to Cargill's reputation post-Acquisition.[3405] Therefore, it was submitted that there was no basis to conclude that hypothetical strategic purchasers would have withdrawn from the bidding process out of concern for reputation.

4047 Moreover, the Viterra Parties submitted that in cross-examination Klein refused to accept the "flaw" in his approach. It was submitted that Klein's reasoning appeared to extend to assumptions that Joe White representatives had deceived bidders and upon discovering flaws, "most buyers" would withdraw from the bidding process. The Viterra Parties submitted that Klein's use of the words "most buyers" did not support his position that not a single strategic buyer would continue to participate in the bidding process.

3404 Although there were 9 bidders at the conclusion of Phase 1, there were only 3 bidders (all strategic) at the end of Phase 2: see pars 626, 945, 983 above.

3405 See par 4022 above.

4048 Finally, the Viterra Parties submitted that Klein accepted that someone in the malting business would be in a better position to form a judgment about the effect of the Viterra Practices than someone who was not. It was submitted that Klein also agreed that a strategic purchaser would be in a better position than a financial purchaser to ameliorate and perhaps eliminate the impact of the Viterra Practices. The Viterra Parties contended that such acknowledgements contradicted Klein's approach.

X.73.5.2 Potter's approach

4049 Potter relied on the assumptions set out in Cargill's deal model, as a proxy for the assumptions that would have been made by a hypothetical purchaser. He then considered the net present value of adjustments to those cash flows to adjust for the effect of the Viterra Practices after "rectifying capital expenditure". Potter noted that he considered these assumptions reasonable given the time that Cargill spent examining Joe White and preparing forecasts. Further, Potter considered that the Goldman Sachs valuation contained forecasts that combined its own analysis and the analysis of an industry participant (in this case, Cargill), stating that it was not clear that there would have been any difference in valuation outcome had Goldman Sachs prepared a valuation for any other hypothetical acquirer.[3406]

4050 As for Klein's views concerning strategic and financial bidders, Potter disagreed with the delineation. Potter suggested the exercise involved was not concerned with "idiosyncrasies" of particular purchasers, but rather the market value as assessed by all potential acquirers.

X.73.5.2.1 The Viterra Parties' submissions

4051 The Viterra Parties submitted that the court should find that Potter's adoption of the assumptions in Cargill's deal model was a reasonable approach in circumstances where Cargill had conducted an "extensive due diligence" and there was no evidence available of the valuation models of other bidders.

4052 Further the Viterra Parties submitted that the forecast cash flows that Potter used from

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3406 Importantly, Potter noted the exception to this proposition was that there could be a difference to the extent that synergies available to Cargill were higher than those available to a hypothetical acquirer. This is addressed further below: see pars 4179-4180 below.

Cargill's deal model closely approximated those in the Goldman Sachs' valuation and, as Potter explained, it was not clear that there would have been any difference in valuation outcome had Goldman Sachs prepared a valuation for a different hypothetical acquirer, rather than for Cargill.

X.73.5.2.2 The Cargill Parties' submissions

4053 In addition to their submissions about the inappropriateness of using a particular participant, the Cargill Parties rejected Potter's approach of using Cargill as a proxy for the hypothetical bidder, in circumstances when it was submitted that Cargill would not have bid had it known about the Viterra Practices.

X.73.5.3 Analysis

X.73.5.3.1 Klein's approach

4054 On balance, Klein's conclusion that the hypothetical purchaser was confined to a set of financial bidders cannot be accepted. Based on both the evidence at trial of what actually occurred in 2013 and the expert evidence, I am not satisfied that the potential bidders would not include any strategic bidders. On the contrary, it appeared more likely that at least some of the potential strategic buyers would have remained part of the bidding process. There are a number of reasons for this.

4055 *First*, although Cargill's position on the point was unequivocal and clear, it did not follow that other strategic bidders would necessarily drop out of the bidding process, especially if the circumstances were that the bidder considered the Viterra Practices could be addressed and the business might be acquired at a reasonable price. The assets of the Joe White Business were undoubtedly valuable, and Joe White occupied a unique position in the market of a global industry.

4056 *Secondly*, the views expressed by Klein were equivocal. This observation is not made by way of criticism. Indeed, if Klein had completely ruled out any possibility of any strategic bidders remaining in the process, such a position would be difficult to accept. However, his evidence read as a whole clearly did leave open the real possibility that a strategic bidder would have remained.

4057 *Thirdly*, other than Cargill's position, there was no other evidence to support this

conclusion. Whilst Klein is undoubtedly suitably qualified to have formed the views that he did, he did not have any special knowledge of the malting industry and his reasoning was necessarily speculative.

4058 *Fourthly*, and further to the third point, neither of the other experts positively agreed with Klein. While it did not follow from this that Klein was wrong, on an uncertain issue such as this it is telling that Meredith, with the full benefit of Klein's opinions and reasoning, was not willing to unreservedly agree with him. While Meredith was able to state that Klein's opinions were reasonable, in substance his approach to identifying the hypothetical purchaser amounted to a rejection of Klein's position.

4059 *Fifthly*, while the reputation of a strategic bidder would be highly likely to be a factor when considering a strategic purchase, it appeared unlikely that all strategic bidders would consider that this aspect of the Viterra Practices could not be managed after any acquisition.

4060 In short, if the Viterra Practices were openly disclosed during the bidding process, it was unlikely that all strategic bidders would conclude the issue could not be dealt with satisfactorily by an adjustment to the amount of any bid and appropriate communications with customers upon acquisition, albeit acknowledging that the risks involved in the proposed transaction would necessarily be heightened.

4061 Accordingly, the better view is that the correct approach was to include hypothetical purchasers who were strategic bidders as it was more likely than not that some strategic bidders would have remained part of the bidding process.

4062 As such, Klein's alternative valuation of strategic bidders will be considered for the purposes of determining the true value of Joe White.

X.73.5.3.2 Potter's approach

4063 On the basis that strategic bidders would still be involved in the bidding process, it was appropriate for Potter to rely on Cargill's deal model as a proxy for assumptions developed by a hypothetical purchaser *as a starting point* for his valuation. Although there was merit in Klein's view that it was inappropriate to conclude that if Cargill

had withdrawn as a bidder, a company identical to Cargill would have emerged as a bidder (as Cargill would have withdrawn from the bidding process had they known of the Viterra Practices),[3407] it was reasonable for Potter to assume that a strategic hypothetical purchaser would have conducted its own due diligence and come to not dissimilar conclusions as those that were arrived at in Cargill's deal model, again *as a starting point* for its analysis. However, this starting point would not include valuation of all potential synergies and would necessarily be prior to consideration of the effects of the Viterra Practices and Policies on the overall approach to any valuation.[3408]

4064 To be clear, having determined that the hypothetical purchaser included strategic bidders, there was no real controversy about the appropriate *starting point*. The Viterra Parties submitted, consistent with Potter's evidence, that there was no material difference in the forecasts in the Goldman Sachs' valuation (that was adopted by Klein), and the Cargill deal model (that was adopted by Potter). Similarly, leaving aside the issue of financial bidders, the Cargill Parties submitted there were only 2 primary areas of difference between Klein and Potter.[3409]

X.73.6 Volumes of malt sold

4065 One input used to estimate future cash flow was the volume of malt sold.[3410]

X.73.6.1 Klein's approach

4066 Klein estimated a decrease in sales volumes on the basis that there would be a reduction in demand by customers. Klein considered that not only would customers increasingly reject non-conforming malt, there would also be a loss of customers, which would have a significant adverse effect on customer demand given that a small

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3407 See issue 33 above.

3408 See sub-issue 10 below.

3409 These being synergies and the discount rate for the discounted cash flow approach. Initially there was another area of dispute, namely the treatment of transaction costs, but Klein accepted Potter's position on this issue and increased his assessment of the true value accordingly. This position reflected Potter's evidence that there were only 4 primary areas of disagreement between himself and Klein, which were the same 4 issues, being the type of hypothetical purchaser, synergies, the discount rate, and transaction and integration costs, see par 3961 above.

3410 The volume of malt sold was measured in metric tonnes and also was referred to in the evidence as kilotonnes. The volume sold could be constrained by limits in production capacity or customer demand.

number of customers accounted for a large proportion of sales.

4067 In assessing the impact of the Viterra Practices on volume, Klein assessed the volume of non-conforming historical sales,[3411] and considered how the hypothetical purchaser would assess the impact of the Viterra Practices on sales volume.[3412] This led Klein to conclude that the hypothetical purchaser would assume that Joe White had not been delivering malt of the high quality represented to customers and, due to issues of non-conformance with and unavailability of barley varieties, Joe White's sales volumes would decline approximately 40 kilotonnes per year for 3 years and then recover at the same rate over the following 3 years.[3413] Further, Klein estimated an ongoing annual reduction of 16.35 kilotonnes due to a 20 percent decrease in production capacity with respect to the relevant malt affected, caused by the cessation of use of gibberellic acid when not permitted. Klein relied upon a spreadsheet setting out the capacity of each Joe White plant, and calculated 16.35 kilotonnes based on 1 day of extra production for the orders of Asia Pacific Breweries, Asahi, Sapporo and SAB Miller.[3414] However, as the effect of this would only be fully suffered if capacity was constrained, the amount of 16.35 was only included in Klein's calculations from when the anticipated loss of sales ceased, namely the 2019 financial year.

3411 Using an analysis of 4 years of historical data which was filed as particulars of Cargill Australia's claim and then withdrawn, but for these purposes the details were not materially different to the agreed facts set out in annexure D to these reasons: see pars 3999-4000 above. Klein estimated that on average, per year since 2010, Joe White had sold approximately 312 kilotonnes of malt which were reported in Certificates of Analysis as complying with customer specifications but that in fact were out of specification and just under 239 kilotonnes of malt which did not conform to barley variety specifications. Further Klein considered, based on 3 documents, 2 of which were not tendered in evidence and 1 which was tendered, that at least 70 kilotonnes of malt was produced using gibberellic acid for customers who required it not to be used: see par 4031-4033 above. Notes from a meeting with Joe White executives on 23 October 2013, tendered in evidence and relied on by Klein, estimated 120 kilotonnes of malt was produced using gibberellic acid for customers: see par 1301 above.

3412 In assessing the impact of the Viterra Practices on volume of malt sold, Klein had regard to Cargill's estimates contained in an email from Viers to Eden and Jewison on 28 October 2013: see par 1419 above. Klein also had regard to his own assessment of the frequency at which Joe White supplied malt that did not conform to barley varieties specified, the impact on customers and expected time lags in the responses by customers.

3413 Klein assumed that reduction of volumes of malt sold due to customer rejections attributable to the use of out-of-specification barley would increase from 39.8 kilotonnes in financial year 2014 to 79.7 kilotonnes in financial year 2015 to 119.5 kilotonnes in financial year 2016 and then diminish in annual quantities of 39.8 kilotonnes for 3 years, and thereafter return to equilibrium.

3414 Compare par 1689 above.

4068 In addition to the adjustment in cash flows, Klein considered that hypothetical purchasers would identify additional risk regarding whether Joe White would achieve that estimated cash flow and therefore increased the discount rate to reflect the additional uncertainty.[3415]

X.73.6.1.1 The Cargill Parties' submissions

4069 The Cargill Parties submitted that Klein's approach in assessing the impact on sales and risk were closely related and should readily be accepted.

X.73.6.1.2 The Viterra Parties' submissions

4070 The Viterra Parties submitted that numerous assumptions Klein relied upon had not been established, including the assumptions (in same order as listed by the Viterra Parties) that:

(1) Hypothetical purchasers would have been able to determine that an average of 239 kilotonnes of malt sold per year had historically not conformed with barley variety specifications.

(2) The 3 year pattern of decline in actual sales was a reflection of customer and contract characteristics inherent in the Joe White Business at Acquisition.

(3) 50 percent of goods produced with non-conforming barley varieties would be rejected upon informing customers that non-conforming barley had been used.

(4) Sales volume losses due to rejections attributable to malt that did not comply with barley specification would increase over 3 years by 40 kilotonnes per year and then decrease at the same rate.

(5) An average of 312 kilotonnes of total malt shipped between financial year 2010 and 2013 did not conform with customer specifications, although reported test results stated that it was within specification.

3415 See par 4205 below.

(6) The transition to not using gibberellic acid in malt when not permitted would require more time and cause a loss of capacity of 16.35 kilotonnes from financial year 2019 onwards.

4071 Further, the Viterra Parties noted that Klein's assumption (4) above, was based on an estimate by Cargill, Inc in Viers' email to Eden and Jewison on 28 October 2013,[3416] and Klein acknowledged that he was not able to test the reliability of that estimate.

4072 Accordingly, the Viterra Parties submitted that Klein's approach to volumes of malt sold should be rejected.

X.73.6.2 Potter's approach

4073 Potter made no adjustments to sales volumes as a result of issues relating to the Reporting Practice or the Varieties Practice. With regard to barley variety issues, Potter considered that he had already accounted for additional expenditure to acquire the correct barley varieties and concluded that once the varieties were rectified there would not be any loss of sales.[3417] Further, in contrast to Klein, Potter considered it unreasonable to assume that where corrective costs were included, the effect on sales volumes would continue in perpetuity.[3418]

4074 Potter adopted Klein's calculations of the yearly impact of the Gibberellic Acid Practice on sales volumes. However, Potter considered that cessation of the Gibberellic Acid Practice would affect the sales volume in financial years 2014 and 2015 only, consisting of a reduction of 12.5 kilotonnes and 16.4 kilotonnes, respectively, due to storage capacity constraints. Potter actually factored these production capacity issues into his initial model for 2014 and 2015 because of his assumption that sales would not decline. Therefore, Potter assumed the extra day of germination required by refraining from the use gibberellic acid when prohibited

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3416 As previously explained, these estimates were made absent knowledge of the full extent of the Viterra Practices. After these figures had been internally circulated, Viers considered that he was unable to specifically quantify an amount based on the limited information available and therefore the figures were not communicated with Viterra: see pars 1419-1424 above.

3417 In his first report, Potter adopted Klein's assumptions in part for increased expenditure to acquire conforming barley varieties: see par 4146 below.

3418 Noting that this was relevant to issues relating to the Gibberellic Acid Practice and production, as Klein had the effect on sales at nil from the end of the 2018 financial year.

would have had an impact on overall production capacity. Potter considered that after 2 years, storage capacity would be made available and sales volumes would return to normal.

4075 Subsequently, Potter was provided with evidence that there had been actual loss of sales volumes by Joe White,[3419] and presented an alternative analysis which adopted Klein's sales volume assumptions for non-compliance with barley varieties and other required specifications recorded in Certificates of Analysis, but made no further adjustments to his gibberellic acid assumptions.[3420] In utilising the alternate position on sales figures, Potter queried whether Cargill's approach to Certificates of Analysis and to dealing with Joe White's customers would be applied by a hypothetical purchaser, but accepted this consideration would only be relevant if a hindsight analysis were adopted.

4076 Under cross-examination, Potter stated that after he reviewed the further instructions of the other experts concerning sales, he accepted that there might have been some risk of losing sales, although he did not think there was a significant risk of losing customers. Further, as all risk in Potter's model was in the cash flows inserted into the numerator (and none was taken into account in the discount rate, used for the denominator), any risk needed to be addressed in the forecast cash flows if the risk was significant and measurable. However, Potter did not accept if a risk were not measurable, and therefore could not be incorporated into any adjustments to the forecast cash flows, that there then ought to be an adjustment to the denominator reflecting the appropriate discount rate. Problematically, this resulted in the relevant risk not being attended to at all in Potter's modelling.

4077 Also during his cross-examination he accepted that by making no adjustment to forecast sales, that approach made no adjustment for the risks associated with the

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3419 Potter received new evidence regarding a decrease in volumes of malt sold. He noted that he could not comment on whether the sales losses were directly caused by the Viterra Practices. After noting in the second joint report he had not had the opportunity to read the relevant documents, he referred to the difficulties of relying on post-Acquisition events.

3420 See par 4067 above.

Viterra Practices which Potter himself identified. In relation to revenue items these included: losing customers, contracts or specific sales; a general decline in sales; not being able to maintain premium prices; and the flow-on consequences for the value of the inventory.[3421] As for risks associated with operational costs, Potter gave evidence that these were: increased cost of barley; increased cost of production for malt that was previously produced using gibberellic acid when prohibited; the cost of rectifying plant; potential staffing costs; and claims in relation to previous sales. Save for rectifying capital expenditure (which was expressly provided for in Potter's calculations), Potter was unable to state whether the adjustments he made to forecast sales to accord with Klein's position wholly incorporated all of the risks he had identified.

X.73.6.2.1 The Viterra Parties' submissions

4078 The Viterra Parties submitted that the court should accept Potter's initial approach, save that the anticipated reduction in capacity, as a result of not using gibberellic acid, should only continue up until August 2014, 1 year less than Potter estimated.[3422]

4079 The Viterra Parties submitted that Potter's assumption that volumes of malt sold would not be impacted as a result of barley variety non-compliance was reasonable given that the Cargill Parties had not adduced evidence of material loss of sales post-Acquisition due to non-conforming barley varieties. Further, it was submitted that any actual difficulties that Joe White did face in sourcing particular barley varieties were likely to have been caused by Cargill taking over the supply of barley.[3423]

3421 On this particular risk, Potter's evidence was that in preparing his first report he considered a hypothetical purchaser, upon learning of the Viterra Practices, would consider not being able to maintain premium prices as a risk, but would value that risk at zero.

3422 The Viterra Parties relied on Asia Pacific Breweries' approval of the use of gibberellic acid in August 2014, which was earlier than the end of financial year 2015, the date at which Potter predicted reduced capacity issues would be restored: see par 1786 above. The Cargill Parties submitted that it was an erroneous methodology to contend that there was an error in what Klein did because, in pointing to facts post-Acquisition, the position was in fact different: see par 4086(6) below.

3423 The Viterra Parties submitted that there were multiple explanations for the difficulties faced by Joe White in obtaining barley varieties post-Acquisition that were unrelated to the manner in which Joe White operated prior to the Acquisition, including changes to sourcing arrangements: see, for example, pars 1791, 1816 above. It was submitted that it could be inferred that until Scaife joined Joe White in November 2014, Cargill's grain and oilseeds supply chain had been focused on activities that generated profits for that business rather than procuring the correct barley for Joe White. In support of this, the

4080 With regard to Potter's assumption about reduced volumes of malt sold as a result of cessation of the Gibberellic Acid Practice, the Viterra Parties submitted that they were reasonable. However, the Viterra Parties argued that based on some of the relevant evidence, Potter's adjustments were likely to be too high. They contended that post-Acquisition "from August 2014 (once Heineken … had approved the use of gibberellic acid)" only a very small volume of malt was potentially affected by the Gibberellic Acid Practice.[3424]

4081 Lastly, the Viterra Parties submitted that Potter's assumption that volumes of malt sold would not be impacted due to Certificate of Analysis issues should be accepted. In relation to Potter's alternative assessment of volumes of malt sold, which adopted Klein's assumptions, it was submitted that this was incorrect as Klein's assumptions were flawed. This was put on the basis that, *first,* the post-Acquisition evidence did not demonstrate that there was a material loss of sales as a result of ceasing the Viterra Practices.[3425] *Secondly,* it was submitted that any loss in sales was likely to be a short-term result of switching to the theoretical blend reporting approach without sufficient capabilities to do so.

X.73.6.2.2 The Cargill Parties' submissions

4082 The Cargill Parties noted that Potter focused on analysing Klein's adjustments, rather than undertaking his own analysis. Further, they noted that during the trial Potter relied on his alternative calculations (incorporating Klein's assumptions with respect to loss of volume) as his primary opinion.

4083 In relation to the use of gibberellic acid from August 2014, the Cargill Parties submitted that it was not put to Klein that based on the evidence at trial his adjustment

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Viterra Parties relied upon the synergies relevantly achieved in the first year after the Acquisition. These submissions must be rejected as they were contrary to the substantive evidence on the point: see, for example, pars 1747,-1754, 1775-1776, 1785, 1837 above.

3424 The Viterra Parties pointed to some of the evidence concerning the position from August 2014 (see par 1786 above and fn 3441 below) and submitted that Heineken had approved the use of gibberellic acid and further, by reference to their submissions as to the meaning of the Customer Review Spreadsheet, that the Sapporo Group was the only customer that was affected by the use of gibberellic acid, which totalled between 4,700 to 6,800 tonnes of malt affected each year.

3425 The Viterra Parties submitted that the impact of ceasing the Viterra Practices was limited, short term and numerous other factors contributed to declines that were unrelated to Joe White operations prior to the Acquisition.

related to the Gibberellic Acid Practice was likely to be too high. They further submitted that Klein's task was to value Joe White using foresight and it was a matter for him as a valuer whether or not he cross-checked reasonableness on actuality.

4084 The Cargill Parties submitted that Potter's first analysis should be rejected for 2 principal reasons:

(1) Potter provided his assessment of lost profits associated with reduced volume of malt sold, instead of the lost value of Joe White, which therefore was not a new valuation of Joe White.

(2) Potter failed to account for how a hypothetical purchaser's assessment of the future prospects and risk of Joe White would change, including having regard to the impact on customers.

X.73.6.3 Analysis

X.73.6.3.1 Klein's approach

4085 At a general level, it was not realistic for Potter to assume that a hypothetical purchaser preparing a valuation on a discounted cash flow method would proceed on the basis that the cessation of the Viterra Practices would result in no loss of sales. On the contrary, upon the assumption that customers would necessarily learn their specifications could not be met, there was every reason to anticipate that sales may be adversely affected. Further, the justification given by Klein for his approach in anticipating significant disruption to the Joe White Business was perfectly reasonable in the circumstances. Generally, the assumptions he made were appropriate.

4086 In response to the issues raised (again, in the same order as listed by the Viterra Parties):[3426]

(1) If hypothetical purchasers were to proceed with bidding many millions of dollars for Joe White they would have insisted on taking the time to perform an analysis of the volume of malt sales that contained non-

[3426] See par 4070 above.

conforming barley to gain a proper appreciation of how projections for future performance would be affected.[3427] Of course, based on the information available at trial of pale malt export sales, they would have been able to determine that at least 239 kilotonnes per year did not conform with barley variety specifications.[3428] Even if such a level of information were not available, a proper due diligence with a vendor responding fully and frankly to enquiries about the nature and extent of the Viterra Practices (which could readily have been done as the Sellers had complete and unfettered access to the Viterra Ltd employees engaged in Joe White's management and the relevant data) would have enabled hypothetical purchasers to analyse the likely prevalence and effect on the Joe White Business.

(2) Based on the nature of the Joe White Business, including the unavailability of some particular required barley varieties in the short to medium term and the long term nature of the malt supply contracts,[3429] it was reasonable to assume that hypothetical purchasers would have expected a 3 year pattern of decline in actual sales before recovering over the following 3 years.

(3) Hypothetical purchasers would have conducted the same or a similar analyses to the analysis undertaken by Klein,[3430] to predict the rate of rejection for non-conforming malt. Given the proportion of orders affected by the Viterra Practices, it was reasonable to assume that hypothetical purchasers would have predicted that 50 percent of malt

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3427 This conclusion is consistent with Klein's evidence.

3428 See fn 3411 above. Also see pars 3998-4001 above.

3429 Noting that this latter consideration only affected some of Joe White's customers for a limited period of time as a number of contracts expired in the first year after the Acquisition and that this was to occur would have been information available to a hypothetical purchaser. That said, Potter obviously thought the long term contracts were significant in expressing the view that any decline in sales would have occurred over a 3 year period because of Joe White's practice of entering into long term supply contracts (though he subsequently questioned the relevance of the term of customer contracts).

3430 See fn 3412 above. Also see pars 3998-4001 above.

that did not conform with barley variety specifications would be rejected such that it would have to be sold at a discount.[3431]

(4) It was reasonable to assume that a hypothetical purchaser would estimate a decrease in volume of malt sold by around an additional 40 kilotonnes every year for 3 years, and then an increase at the same rate over the following 3 years.[3432] Again, Klein relied on estimates contained in Viers' email dated 28 October 2013 and acknowledged that he could not verify the estimates made.[3433] However, Klein adopted a more conservative estimate of 39.8 kilotonnes instead of 50 kilotonnes per year.[3434] Further, it was reasonable to assume that hypothetical purchasers would have requested information to conduct some sort of analysis to estimate the amount of malt that would be rejected due to the Varieties Practice and its cessation. An estimate of 40 kilotonnes per year fell within the range of what could be expected to have been estimated by a hypothetical purchaser, based on the information that would have been available at the valuation date. Even if Klein was mistaken as to the exact meaning of Viers' email on this point, using hindsight to test

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3431 Naturally, this assumption carried with it that 50 percent of non-compliant malt would not have to be sold at a discount. Further, in making this assumption, Klein referred to Viers' email sent on 28 October 2013: see par 1419 above. In part, the contents of the email were ambiguous and Potter challenged Klein's reliance on it, stating this assumption lacked analysis. No attempt was made to clarify precisely what Viers meant in referring to malt "directly not usable" and the related matters when Viers was taken to this email in cross-examination. Klein's first report stated his understanding that the email indicated Cargill's position was that half the non-conforming malt would be accepted and the other half would be rejected and then sold discounted by $50 per tonne. Klein referred to subsequent facts in observing that substantially higher discounts were actually incurred with respect to non-conforming barley, including malt being sold for feed. Klein assumed that potential purchasers would have obtained the same results as Cargill, with similar estimates of 156,000 tonnes per year at an estimated discount of $50 per tonne. During cross-examination, Klein accepted that the adoption of these figures was not ideal but that he was doing the best he could with the limited data available. He further noted that the figures used in his model were biased in favour of being more conservative and cautious. The evidence available did suggest malt sold as feed was sold at a substantial discount well in excess of $50 per tonne. When cross-examined about these matters, Klein was not challenged as to his understanding of the contents of Viers' email and acknowledged that he had not sought to exclude extrinsic matters when considering the subsequent facts that he did. During Meredith's cross-examination, he was asked about the contents of the email, but was simply asked to confirm his assumption of a $50 per tonne discount was derived from Viers' email.

3432 See pars 4009-4011, 4067, 4086(2) above.

3433 See pars 1419, 4009-4011, 4071 above.

3434 This was in both Viers' original estimate and his revised estimate: see par 1421 above.

the reasonableness of this assumption, it was confirmed by the fact that the actual reduction of malt sold post-Acquisition was a cumulative total of approximately 171 kilotonnes over 3 years.[3435] Furthermore, Potter himself gave evidence that he reviewed Klein's assumptions concerning volume risk and considered, notwithstanding he had some issues with Klein's calculations, given the information that was available (including using hindsight as a check), Klein held a reasonably rational view concerning a decline in sales and then a recovery. On the same issue, Potter stated that Klein's analysis did not look too unreasonable.[3436]

(5) For the reasons stated in subparagraph (1) above, it was reasonable to assume that a hypothetical purchaser would arrive at the conclusion that an average of 312 kilotonnes of total malt shipped between financial year 2010 to 2013 contained issues relating to the Reporting Practice or some similar approximation.

(6) The assumption that ceasing use of gibberellic acid would increase germination from 4 days to 5 days has been established.[3437] Further, the information that would have been available to a hypothetical purchaser provided a proper basis for the assumption that ceasing to use gibberellic acid would reduce production capacity by 16.35 kilotonnes

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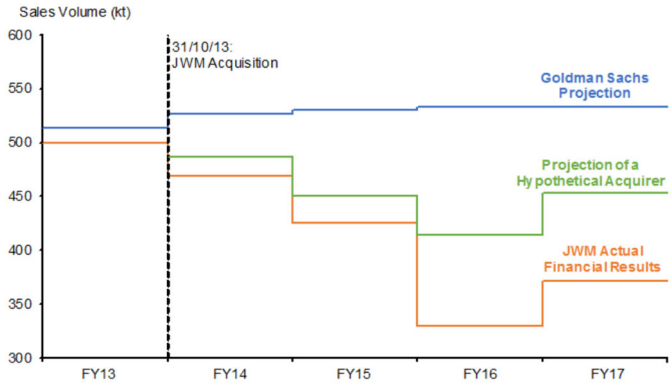
3435 This amount was well in excess of Klein's adjustments, which also allowed a considerable buffer for the effect of any extrinsic factors. The comparison between the original projections by Goldman Sachs, Klein's adjusted projections and the actual results was illustrated by Klein diagrammatically as follows (JWM being a reference to Joe White):



3436 See also fn 3589 below.

3437 See par 4004(5) above.

per year. The customers Klein relied upon were all known to be customers that prohibited gibberellic acid being used as an additive. The fact, also known before Completion, that Joe White supplied at least 70 kilotonnes of malt each year that was produced using gibberellic acid when it was prohibited, was consistent with the assumption made.[3438] Moreover, the Viterra Parties' submissions on the point were misplaced. The contention that only 1 customer was affected by the issue from August 2014, made by relying on the Customer Review Spreadsheet and an agreement in August 2014,[3439] was based on a conclusion with respect to gibberellic acid that was not put to any of the lay witnesses and does not reflect the facts as found.[3440] Further, this contention appeared to ignore the fact that in late February 2014 there were still 4 customers who insisted on exogenous gibberellic acid not being used.[3441] Furthermore, no reference was made to evidence of Scaife about the limited nature of the agreement with Heineken in August 2014.[3442] In short, neither the facts available to a hypothetical purchaser before the valuation date, nor the subsequent facts, provided a basis for the suggestion that production capacity would only be affected for a short period of time because of this issue. On the contrary, as Klein's model assumed a complete return to sales levels at the pre-Completion level by the end of 2018, the introduction of this assumption with respect to production capacity from 2019 onwards made perfect sense.

4087 Before leaving this important aspect of the valuation evidence put forward by Cargill Australia, some further more general observations should be made.

4088 It is a basic principle that the mere circumstance that facts subsequent to the

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3438 See pars 1447, 1462 above.

3439 See par 4080 above.

3440 See pars 1224-1225 above.

3441 See par 1689 above. The document evidencing this fact was referred to in the Viterra Parties' written submissions, but was not referred to when the other subsequent matters were relied upon in seeking to establish that only Sapporo remained an issue.

3442 See par 1786 above.

Acquisition turned out to be different to what a hypothetical purchaser would have assumed in valuing Joe White as part of the bidding process does not demonstrate that the assumptions made in estimating the true value of Joe White were incorrect (but rather such subsequent facts *may* have been used by a valuer as a means of illuminating the true value).[3443] Leaving this principle aside, many of the matters referred to by the Viterra Parties as being the relevant subsequent events were not put to Klein to obtain his expert opinion on whether, and if so how, they would have affected his approach to the assumptions he made and the exercise he undertook.

4089 In any event, much of the underlying basis upon which the Viterra Parties sought to attack Klein's assumptions were contrary to the findings in these reasons, and in some instances plainly contrary to the evidence. Thus, in substance, the attempt by the Viterra Parties to attribute Cargill Australia's loss to Joe White's performance after Completion and various extrinsic or independent factors, rather than it being as a result of the Viterra Practices, was unsuccessful. That is not to say that there were no extrinsic or independent factors at play, but the primary reason for the difficulties experienced in the initial years after Completion was the fallout of having to deal with the Viterra Practices. A key rationale of the adoption of the *Potts v Miller* approach is that it is largely unnecessary to become too immersed in the exact possible cause of every factor of a business' performance after acquisition; that is, provided that it has been established that the forecasting assumptions used to establish the true value were appropriate and soundly based and are not shown to be otherwise, including because of subsequent events. In this case, subject to the specific matters referred to below, I am so satisfied.

X.73.6.3.2 Potter's approach

4090 It follows that Potter's initial approach to volumes of malt must be rejected. Even if the cost of the capital expenses for which both Klein and Potter made provision were to be incurred to rectify issues related to the Reporting Practice and the Varieties Practice, it was unreasonable for Potter to assume that hypothetical purchasers would have anticipated zero losses in volume of malt sold. Self-evidently the measures that

[3443] See par 3919 above.

needed to be taken by way of rectifying capital expenditure (whatever the appropriate level of expenditure might have been) could not be undertaken instantaneously upon Completion. The proposed capital works were to provide for additional storage and would take time.[3444] But further such expenditure could not properly be viewed as some sort of panacea. This was for various reasons. For example, any hypothetical purchaser would have to make provision for the fact that some of the required barley varieties simply were not available and that that fact had been concealed from Joe White's customers. Another matter required to be accounted for was that Joe White would have to produce malt with existing capacities for a period of time and, because of an inability to produce malt that complied with customer specifications, would be required to seek derogations, which would be highly likely to give rise to customer dissatisfaction and disruption. Further, desisting with the prohibited use of gibberellic acid would have had a direct impact on production cycles and capacity.

4091 Again speaking generally, by routinely implementing the Viterra Practices, Joe White had deceived customers into accepting non-conforming goods and in so doing Joe White had maintained customer retention, price, lower costs and margin. Therefore, had a hypothetical purchaser been made aware of the Viterra Practices, it would have assumed either that there was a real and substantial risk that Joe White would lose a number of customers, or that it would be at a risk of losing or not retaining the same level of business with existing customers, or at the very least, that Joe White would have not been able to attract new customers to replace any customers lost (new customers being unusual in the Joe White Business) or attract new business from existing customers at the same rate and for the same returns as it previously would have expected to be able to. As such, it would be unreasonable, and incorrect, to assume that capital expenditure to rectify non-conformance alone would have prevented any significant risk of reduction in volumes of malt sold, as well as the price paid for malt (this issue is dealt with immediately below) and related issues. It would also be incorrect not to adjust for such matters, or the significant risk of such matters

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3444 Potter allowed for 2 years, with $15 million in each year; Klein allowed for a longer period of 5 years on the basis that all capital expenditure would not need to be incurred any sooner because of an anticipated decline in volumes of malt sold.

eventuating, at least either at a cash flow level or in the discount rate, if not both.

4092 Further, Potter's assumption that a hypothetical purchaser would have assumed that storage capacity constraints would be rectified after 2 years and consequently prevent ongoing losses in sales volumes due to issues with gibberellic acid cannot be accepted. Where volume losses were attributable to capacity constraints (as opposed to demand), and where corrective costs were to be incurred to remedy those storage issues, it could reasonably be assumed that the losses would continue into perpetuity in the absence of further capital expenditure with respect to manufacturing capacity.[3445] Further, in adopting Klein's capital expenditure assumptions, Potter did not include an assumption for corrective costs for manufacturing capacity, he only included corrective costs for storage capacity which enabled the storage of more varieties of barley in inventory. The additional storage capacity would not enable increased production of malt not using gibberellic acid and therefore it was unreasonable to assume that losses would be mitigated after 2 years.

4093 Overall, Klein's assumptions were all established and reasonable. Therefore to the extent these experts disagreed on the impact of the Viterra Practices on volume of malt sold, the court accepts Klein's approach in favour of Potter's approach.

X.73.7 Price of malt

4094 An input used to estimate future cash flow was the price of malt sold.

X.73.7.1 Klein's approach

4095 Klein proceeded on the basis that the Viterra Practices undermined the representations made as to how Joe White was able to achieve its historical premium malt price. Klein concluded that, in contrast to the representations made, Joe White's malt was not high quality malt, did not satisfy customer needs, was subject to supply risk, and only achieved fast turnaround through supply of non-conforming barley.

[3445] For completeness, even if the manufacturing capacity was increased by the necessary capital expenditure, it would be the position in perpetuity that malt that previously took 4 days to produce with the use of prohibited gibberellic acid would necessarily take 5 days, with concomitant increases in production and related costs.

4096 Therefore, Klein considered that a hypothetical purchaser would make the following adjustments to price in their forecast:

(1) Discount prices by $50 per tonne in respect of Klein's assessment that half of the 312 kilotonnes of out-of-specification malt previously subject to adjusted Certificates of Analysis would be rejected by customers, which would continue for 2 years post-Acquisition.[3446]

(2) Loss of half of the historical price premium of $25 per tonne, being $12.5 per tonne, for 2 years and then gradually improving until financial year 2019, when it would be restored in full.

4097 Further, Klein recognised, but did not quantify the possibility of, reduced cash receipts due to unpaid deliveries of out-of-specification malt.

X.73.7.1.1 The Cargill Parties' submissions

4098 The Cargill Parties submitted that the court should readily accept Klein's assessment of the forecast price of malt, noting that Klein recognised the possibility of reduced cash receipts due to unpaid deliveries of out-of-specification malt but did not reduce the price because of this possible impact.

X.73.7.1.2 The Viterra Parties' submissions

4099 The Viterra Parties objected to Klein's approach, submitting that numerous assumptions he relied upon in determining how a hypothetical purchaser would forecast sale prices had not been established. These were submitted to include that:

(1) Hypothetical purchasers would have obtained the same results from conducting similar tests to the tests done by Cargill in preparation for trial,[3447] and that they would have estimated a discount of $50 per tonne.

(2) The discount of $50 per tonne would have been sustained for 2 years.

3446 See fn 3411 above. Klein used an analysis performed by Cargill in preparation for trial, which considered 4 years of historical data, forming part of the Cargill Parties' particulars that were withdrawn: see pars 3998-4004 above.

3447 See issue 10 above.

(3) Hypothetical purchasers would have forecasted $12.5 per tonne loss of pricing premium.

4100 The Viterra Parties submitted that the assumptions in subparagraphs (1) and (2) were inconsistent with evidence of what actually happened post-Acquisition.[3448] The Viterra Parties again submitted that Klein relied on Cargill's estimated impact prior to Acquisition,[3449] which he did not test for reliability. Further, it was submitted that Klein used post-Acquisition information to conclude that the actual discount was larger than Cargill had anticipated;[3450] however, he did not analyse such information to exclude extrinsic factors. Accordingly, it was submitted that Klein relied on Cargill's estimate as the best data available, though it did not accord with post-Acquisition evidence.

4101 With regard to the assumption in subparagraph (3), the Viterra Parties submitted that Klein based this on a comment in the due diligence material that indicated that Joe White's margins were generally $25 per tonne higher than its competitors. It was submitted that Klein did not test the reliability of the figure relied upon, including whether a hypothetical purchaser would expect to achieve the same margin. Further, it was submitted that the same document contained references to opportunities to increase the margin, including procurement opportunities, which Joe White previously did not achieve because of the Viterra procurement policy.[3451] Furthermore, the Viterra Parties submitted that Klein assumed that the $25 premium would be lost for 2 years and then bolstered back to equilibrium, based on speculative reasoning as he did not rely on post-Acquisition information and apparently did not seek instructions in that regard. Moreover, it was submitted that the post-Acquisition information demonstrated that there was no loss of margin caused by ceasing the Viterra Practices.

3448 Again, the Cargill Parties submitted that it was an erroneous methodology to contend that there was an error in what Klein did merely because, in pointing to matters post-Acquisition, the position was in fact different.

3449 See pars 4009-4011 above.

3450 In his report, Klein commented that actual discounts were much higher than $50 per tonne.

3451 The Cargill Parties correctly submitted that these matters were not put to Klein.

X.73.7.2 Potter's approach

4102 Potter did not make any adjustments for price on the basis that he had already accounted for additional expenditure to acquire the correct barley varieties and for increased storage capacity; therefore he was of the view that it was unlikely that there would be any losses due to discounts or adjustments to any price premium.[3452]

4103 However, Potter provided an alternative analysis, which adopted Klein's price assumptions relating to issues concerning the Reporting Practice and the Varieties Practice.

X.73.7.2.1 The Viterra Parties' submissions

4104 The Viterra Parties submitted the Potter's initial approach was logical and supported by post-Acquisition evidence. It was submitted that the post-Acquisition evidence supported the assumption that no losses would be incurred because it was contended no material discounts were provided to customers as a result of ceasing the Viterra Practices. Further, it was submitted any discounts provided were likely to be short-term as a result of Cargill having switched to a theoretical blend approach.

4105 Furthermore, the Viterra Parties considered that Potter's alternative assessment of the price of malt, which adopted Klein's assumptions, was incorrect as Klein's assumptions were flawed for the reasons stated above.

X.73.7.2.2 The Cargill Parties' submissions

4106 The Cargill Parties correctly noted that Potter did not, during his evidence, identify the price of malt as an area of substantial disagreement with Klein.

4107 The Cargill Parties submitted that Potter's initial analysis should be rejected because Potter:

(1) Ignored evidence that prior to Acquisition some of Joe White's executives expected sales and customers to be impacted.[3453]

3452 Potter adopted a $50 per tonne discount for out-of-specification malt in scenarios that did not factor in increased costs to purchase the right barley varieties.

3453 The Cargill Parties noted Stewart's assessment, adopted by the other operational Joe White executives, that Joe White was unable to produce malt within specification for customers: see pars 1212-1213, 1216,

(2) Ignored evidence post-Acquisition regarding the impact on sales and customers due to Joe White's inability to produce malt within specification.[3454]

(3) Did not analyse matters Klein considered a hypothetical purchaser would identify that Klein did not quantify.

4108 The Cargill Parties also noted that where Potter did include discounts on pricing in his scenarios, he adopted Klein's assumption of a discount of $50 per tonne.

4109 Lastly, Potter did not adjust his analysis for price premium risk; however, under cross-examination he acknowledged that for the purpose of the joint expert report he agreed with Klein that it was in the range of $11 million to $13 million.

X.73.7.3 Analysis

X.73.7.3.1 Klein's approach

4110 The court is satisfied that the assumptions relied on by Klein were reasonable.

4111 The Viterra Parties' submissions relating to Klein's failure to have regard to post-Acquisition events are rejected to the extent that they suggest that Klein should have relied on hindsight. To reiterate, while post-Acquisition information can be relied upon to the extent it might shed light on the true value at the valuation date, the absence of consideration of post-Acquisition events did not mean that Klein's assumptions were flawed.

4112 For reasons already stated,[3455] it was reasonable to assume both the level of rejection assumed and that the price of rejected malt would be discounted by $50 per tonne. Further, a hypothetical purchaser would have assumed the need for future storage

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1218 above.

3454 Such evidence included: Commitment Review Reports from financial year 2014 to 2016 (see pars 1784, 1823, 1837 above), which demonstrated volume falls after cessation of the Viterra Practices; Joe White's supply rates of out-of-specification malt under derogation (see fn 1034 above); emails of complaints from customers (see par 2358 above); reports of falling demands from customers as a consequence of quality issues (see par 1839 above); evidence from Sagaert regarding customers looking for alternative suppliers as a result of Joe White not producing malt within specification (see par 1840 above); and evidence from Scaife that the impact on Joe White's performance of changing malt varieties after Completion was related to the Viterra Practices: see pars 1799-1800 above.

3455 See fn 3431 above.

and would have gone about assessing the storage requirements in a not dissimilar way as was done by Viers on 28 October 2013. However, unlike Viers, the hypothetical purchaser would have had knowledge of the full extent of the Viterra Practices. Therefore, it was only appropriate to refer to Viers' email and rely on it with the qualification that the estimates contained within it were made in the absence of full knowledge of the extent of the Viterra Practices. Furthermore, it was reasonable to assume that hypothetical purchasers would have requested information and used available information with knowledge of the extent of the Viterra Practices to assess the expected discount price for rejected malt. Based on the available information, a hypothetical purchaser reasonably could have arrived at a conclusion that the discounted malt would sell at a price discounted by $50 per tonne.[3456] The reasonableness of this assumption was confirmed by the fact that in reality Joe White suffered substantially higher discounts.[3457]

4113 Moreover, it was reasonable to assume that hypothetical purchasers would estimate that Joe White's pricing premium of $25 would halve in light of customers learning of the Viterra Practices. It was represented to Cargill during the Due Diligence that Joe White had margins that were generally $25 per tonne higher than its competitors'.[3458] It was explained that this price premium was achievable due to Joe White's features;

3456 In seeking to test this assumption, Potter reviewed external data concerning the price of malting barley and feed barley. Potter noted that the average price difference was $43 per tonne in the 5 years to financial year 2014 and argued that the $50 discount Klein applied was overstated. However, looking at Potter's data, in the 5 years to financial year 2013, which was the data that would have been relevant to a hypothetical purchaser of Joe White, the average price difference was $52.70 per tonne. As a result the data supported Klein's assumption of a discount of $50 per tonne. Potter also took a 10 year average, which suffered from the same problem of using the 2014 figures. Further, a 5 year period would be more relevant to a hypothetical purchaser than an average figure using prices going back as far as 10 years.

3457 For example, Klein noted that between November 2013 through February 2014, Joe White sold malt and barley as downgraded stock as feed at an average of $162 per tonne, compared to the average selling price of malt of $582 per tonne in financial year 2014. If the average was confined to malt sales as feed the figure per tonne was slightly higher. Between November 2013 through February 2014, Joe White sold malt as downgraded stock as feed at an average of $177 per tonne, compared to the average selling price of malt of $582 per tonne in financial year 2014. It is noted that the Viterra Parties submitted that there was no material discounting of rejected malt. However, this was contrary to this evidence, which was corroborated by McIntyre's evidence (see par 1603 above) that some customers required compensation before accepting malt and other evidence of discounts being given or offered: see, for example, pars 1580-1708 above.

3458 See par 912 above.

namely, high quality malt, ability to satisfy customer needs, a supply-risk profile and fast turnaround time. It must be assumed that similar representations would be made to other hypothetical purchasers as part of explaining the historical position of the Joe White Business, which would have constituted a reliable basis for hypothetical purchasers to conclude that generally Joe White had a $25 pricing premium. It would be sensible, if not inevitable, that hypothetical purchasers would assume that if the Viterra Practices were ceased with the inevitable disruption that would follow, Joe White's ability to achieve such a high price premium would be materially undermined.[3459] Therefore, it was reasonable to assume that the hypothetical purchaser would discount the pre-existing prices or remove the price premium altogether, or at least discount prices until Joe White could deliver the features required to command the $25 pricing premium. Although there would necessarily be a level of uncertainty, in the circumstances, a 50 percent discount was a reasonable assumption. Moreover, it was realistic to assume that Joe White would not be in a position to restore the price premium or make other improvements to other possible factors relevant to its margins until sufficient blending and storage facilities became available, in approximately 2 years' time.

X.73.7.3.2 Potter's approach

4114 The court is not satisfied that Potter's initial approach to the price of malt sold was appropriate. Potter's premise necessarily assumed the required barley varieties were available at a price, which was contrary to the considered position of the relevant Joe White executives shortly before Completion.[3460]

4115 Further, even if expenses were to be incurred to acquire the correct barley varieties and increase storage capacity, it was unreasonable to assume that hypothetical purchasers would have anticipated no additional losses due to a reduction in the price

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3459 Even on the assumption that an immediate disclosure of the Viterra Practices was not intended, a hypothetical purchaser would assume the change in approach would become readily apparent to customers because of the inability to supply malt within specification with the accompanying need to seek derogations regularly.

3460 See, for example, par 1212 above.

of malt sold.

4116 Prior to the Acquisition, Joe White executives did not expect that Joe White would be able to meet customer specifications.[3461] It was unreasonable, if not completely implausible, to expect that a hypothetical purchaser would assume that Joe White would be able to meet all customer specifications *immediately*, or if Joe White could not meet the specifications that all customers would be willing to pay the same premium price for non-compliant malt.

4117 Overall, each of Klein's assumptions related to this issue were reasonable. To the extent the independent experts disagreed on the impact of the Viterra Practices on the pricing of malt, the court accepts Klein's approach in favour of Potter's approach.

X.73.8 Operational costs (including barley and production costs)

4118 An input used to estimate future cash flow was the operational costs.

X.73.8.1 Klein's approach

4119 Klein considered that in order to purchase more expensive barley varieties to rectify the Varieties Practice, the hypothetical purchaser would estimate a permanent increase in the cost of barley of $8.10 per tonne. To arrive at this figure Klein used evidence of an actual $8.10 per tonne increase (after taking into account changes in market prices) in Joe White's barley costs post-Acquisition as a proxy. It appeared that ultimately Klein accepted the figure of $8.15 for this increased cost on the basis of Potter's assumption as to this amount.

4120 Further, Klein assumed that the cost of production would increase by $3.25 per tonne to account for the additional costs involved in the cessation of the Gibberellic Acid Practice. Klein arrived at this number by averaging pre-Acquisition estimates sourced from records of Viterra and Cargill.[3462]

3461 See pars 1212-1213, 1216, 1218, 1439 above.

3462 Klein relied on notes made by Rees at a meeting on 29 October 2013 to conclude that Viterra estimated that the elimination of the Gibberellic Acid Practice would increase cost of production by $1.50 per tonne and the email from Viers on 28 October 2013 (see pars 1419, 4009-4011 above) to conclude that

4121 Furthermore, Klein expected that the net realisable value of Joe White's inventory would have been considered to be lower than reported, which would have prompted a hypothetical purchaser to investigate the extent of such a difference. Klein used the provision calculated post-Acquisition of $1.02 million as a proxy for the amount that hypothetical purchasers would have identified.[3463] Under cross-examination he explained that he expected that if a hypothetical purchaser had been told of the Viterra Practices during the bidding process, it would have done exactly the same exercise that was done after the Acquisition to ascertain the net realisable value in the marketplace of the inventory. Accordingly, he was of the view that it was appropriate to use this information as part of the assumptions that would have been adopted by a hypothetical purchaser.

4122 Moreover, Klein considered, but did not quantify, there would be a cost of replacing customers and volumes lost, or a cost of retaining existing customers, due to the Viterra Practices. Further, he also referred to the possibility of compensatory payments for past deliveries of out-of-specification malt, which he also did not quantify. He said he took a conservative approach by not incorporating these matters into his valuation model by way of increased operational costs.

X.73.8.1.1 The Cargill Parties' submissions

4123 The Cargill Parties relied on the fact that Potter did not take issue with Klein's figures, and that all experts agreed that, generally speaking, the effect on the costs of sales and production was permanent. Accordingly, they submitted Klein's approach should be accepted.

X.73.8.1.2 The Viterra Parties' submissions

4124 The Viterra Parties submitted that Klein used hindsight to determine the increase in barley costs, however other than market fluctuations, he failed to have regard to the

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Cargill estimated an increase of $5 per tonne. The evidence by Rees was not tendered, nor was Rees called to give evidence: see pars 4031-4033 above. However, when Klein was cross-examined by the Viterra Parties it was put to him that the document he had referred to (being Rees' notes) was a Viterra document and that the figure of $1.50 was more credible than the Cargill estimate, a proposition with which Klein did not agree.

3463 This figure was derived by totalling the provisions made for all items of "downgraded stock sold as feed" of $1,019,664.58 which Klein rounded to $1.02 million.

numerous extrinsic events. Klein's evidence was that he believed he neutralised supervening or extrinsic outcomes by looking at broader economic impacts on the cost of barley but also acknowledged that to use hindsight it was necessary to be fully aware of all the circumstances of the Joe White Business post-Acquisition. On this topic Klein gave further evidence that in order to remove all the possible extrinsic circumstances, Klein had looked at the best information available to him. The Viterra Parties submitted that Klein failed to take into account the "numerous extraneous events impacting barley procurement" after Completion by reference to factual submissions, the substance of which has been addressed elsewhere in these reasons.

4125 Further, the Viterra Parties submitted that Klein's adoption of a mid-point estimate for increased production costs was inappropriate.[3464] It was submitted that it was unreasonable that Klein did not accept the "Joe White executive" estimate, which was a more credible source than Cargill's estimate.[3465] Further, it was submitted the adjustment was inconsistent with the actual impact of ceasing the Gibberellic Acid Practice.[3466]

4126 Addressing Klein's inventory costs assumption, the Viterra Parties submitted that it should be rejected. It was submitted that Klein relied on hindsight in concluding that the hypothetical purchaser would have forecasted loss in the same manner that Cargill did post-Acquisition. Further, it was submitted that Klein's estimate was inconsistent with the determination made by the Independent Expert, who assessed the amount claimed with respect to inventory as $814,881. Furthermore, neither Potter nor Meredith made a similar adjustment.

X.73.8.2 Potter's approach

4127 Potter adopted Klein's assumption that a hypothetical purchaser would have incorporated a permanent increase in cost of barley, and fixed this at $8.15 per tonne.

4128 Further, Potter adopted Klein's assumption that eliminating the Gibberellic Acid

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3464 See fn 3462 above.

3465 Ibid.

3466 The Cargill Parties submitted that this was not put to Klein, again making the point that it was not his task to value the business using hindsight, and submitted it was a matter for him as a valuer whether he cross-checked reasonableness against actuality or not.

Practice would increase production costs by $3.25 per tonne.

X.73.8.2.1 The Viterra Parties' submissions

4129 In closing submissions, the Viterra Parties contended that in making these assumptions Potter gave away "a bit too much". Further, to the extent that Potter relied on Klein's assumptions, the Viterra Parties submitted the assumptions were inconsistent with the evidence at trial and therefore had the effect of understating the true value of Joe White.

4130 The Viterra Parties submitted that the court should accept Potter's approach, with the following adjustments:[3467]

(1) Additional barley costs should be $3 per tonne.[3468]

(2) Increased production costs, due to ceasing the Gibberellic Acid Practice, should only apply up until August 2014.[3469]

X.73.8.2.2 The Cargill Parties' submissions

4131 The Cargill Parties submitted that, in contrast to Klein, Potter assumed that there would be no losses on inventory sold as feed on the basis that expenditure to acquire conforming barley varieties would mitigate any losses to inventory. It was submitted that in doing so, Potter ignored that buying new barley varieties would not resolve the issue of Joe White having existing stock that was out of specification that would

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3467 Again the Cargill Parties submitted that it was an erroneous methodology to contend that there was a need to correct what Klein did because in pointing to facts post-Acquisition the position was in fact different.

3468 The Viterra Parties relied on Meredith's second scenario in his first report. Meredith calculated 3 scenarios based on the different information available to him. The cost for using the correct barley varieties was calculated as $15 per tonne in scenario 1, $3 per tonne assuming volumes of 500,000 tonnes in scenario 2 and $7 per tonne in scenario 3. The Viterra Parties submitted scenario 1 was inappropriate because it referred to "lesser grade barley," which they submitted was not contrary to customer contracts. Additionally, the Viterra Parties submitted that scenario 3 was inappropriate as it relied on post-Acquisition information without any adjustments for extraneous causes. Whereas, it was submitted that scenario 2 was the most reliable as it was based on the estimates of Joe White executives that there would be an increase in the cost base of approximately $1.5 million per year. In response to this, the Cargill Parties submitted and the Viterra Parties acknowledged that Meredith accepted the cost increase set by Klein in his second report, but did not adopt a specific adjustment, instead considering it to have been accounted for in his assessment of manufacturing costs. Further and for completeness, Meredith adopted the additional barley cost of $8.15 in his second report, on the basis that it had been agreed between Klein and Potter and noting that it was materially similar to the third scenario in his first report.

3469 See fn 3422 above.

need to be disposed of. Further, Potter did not analyse volumes lost and compensation due to the Viterra Practices or compensatory payments for past deliveries of out-of-specification malt.[3470] Furthermore, it was submitted that in oral evidence Potter did not identify Klein's inventory adjustment as a matter of disagreement.

X.73.8.3 Analysis

X.73.8.3.1 Klein's approach

4132 The court is satisfied that the assumptions relied on by Klein were reasonable. Essentially the only difference between Klein and Potter on this issue was the question of the net realisable value of the inventory.

4133 It was not a conventional means adopted by Klein to arrive at the conclusion that a hypothetical purchaser would have assumed that costs for purchasing the correct barley variety would result in an increase of $8.15 per tonne, as the basis of such reasoning was the actual post-Acquisition losses of Joe White.[3471] For Klein to have been able to have removed extrinsic factors, he would have needed to remove not only the broader macroeconomic impact, but also any other factors. That said, there was nothing to suggest that his assumption that those operating the Joe White Business both before and after Completion were acting in a rational, profit-maximising way when incurring expenditure for barley was other than correct. In short, it appeared Klein used the best available evidence and there was nothing to indicate a hypothetical purchaser would have assumed a different amount. Furthermore, that it was a reasonable assumption to make was borne out by Potter's approach.

4134 The evidence upon which the assumption that Joe White estimated that moving from 4 day to 5 day malting would increase costs by $1.5 per tonne was based was never

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3470 Although the Cargill Parties referred to compensation for past deliveries, this was not quantified. It was possible that hypothetical purchasers would have considered the possibility of compensatory claims and factored into their analysis a low risk of such claims. However, leaving aside reputational issues a brewer might have had, it was far from apparent what compensation might be payable in circumstances where the malt had been accepted by the customers (without knowledge of the Viterra Practices) and used to make beer, presumably at prices no less than the prices that would have been achieved if malt in compliance with specifications had been supplied by Joe White.

3471 See pars 3917-3921 above.

actually adduced at trial. Further, Cargill's estimate of $5 per tonne was made at a time when all the facts were not known.[3472] There could be no issue that increased costs would have resulted because of this issue. On the very limited material available, I consider the input used by Klein of $3.25 per tonne was reasonable. This conclusion was supported by the position adopted by Potter.

4135 It was reasonable to assume that, upon learning of the Viterra Practices, a hypothetical purchaser would have performed an analysis of the inventory. Realistically, a hypothetical purchaser would assess the net realisable value of the inventory using the available financial statements. Accordingly, based on the available information, it was reasonable to conclude that they could have employed a similar method used by Cargill to estimate a loss of $1.02 million. The reasonableness of the figure was confirmed by the actual analysis that Cargill undertook soon after Acquisition with little, if any, impact of extrinsic factors,[3473] which would not have been materially different from any analysis undertaken immediately prior to Acquisition. The determination made by the Independent Expert, who assessed the amount of the claimed inventory as $814,881, was made post-Acquisition on 23 December 2014. The amount of $814,881 was not so dissimilar from $1.02 million that it made the assessment of $1.02 million unreasonable. Further, the assessment by the Independent Expert demonstrated that this was plainly a matter that ought to have been considered to be material by a hypothetical purchaser. Therefore, it was reasonable for Klein to assume that, prior to Acquisition, a hypothetical purchaser would perform the same or a similar analysis as Cargill and arrive at the same conclusion.[3474]

X.73.8.3.2 Potter's approach

4136 It was reasonable for Potter to adopt Klein's cost increases for purchasing additional

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3472 See par 4004(7) above.

3473 See par 4121 above. Given the subject matter, it was highly unlikely that extrinsic factors could make any significant difference. The evidence was that in significant respects Joe White's barley inventory did not accord with what was required to meet customer specifications and nothing that occurred subsequently was going to change that fact without the need for some customers to change their specifications and for the disposal of non-compliant barley. The position as known in April 2014 also strongly suggested that this assumption was soundly based: see par 1717 above.

3474 For completeness, Potter stated in his first report that if he were to include the effect of the actual inventory write-down in his assessment, the present value effect would have been approximately $0.98 million.

barley varieties and cessation of the Gibberellic Acid Practice, based on the reasoning above.

4137 However, it was unreasonable to assume that rectification costs would eliminate any losses to inventory. A hypothetical purchaser would assess that even if additional costs were incurred to purchase conforming barley varieties, there would still be inventory losses as a result of the need to dispose of or relocate non-conforming barley.

X.73.8.3.3 The Viterra Parties' adjustments to Potter's approach

4138 The Viterra Parties' submission, that the hypothetical purchaser would estimate an increase in cost for purchasing additional barley varieties of $3 per tonne, in accordance with Meredith's second scenario in his first report, must be rejected as it appeared to be no more than an adoption of the scenario that best suited their case without further substantive reasoning. The difficulties with this approach include the following. *First*, Meredith's approach to his valuation was inappropriate for the reasons above.[3475] *Secondly*, Meredith noted that the information relating to the impact of using incorrect barley varieties was inconsistent and therefore he provided 3 alternative scenarios without indicating a preference for the second scenario. *Thirdly*, in Meredith's second report he adopted the cost increases set by Klein, thereby moving away from his own previous estimates. *Fourthly*, the Viterra Parties chose not to put in evidence the key document that was said to support this approach.

4139 Further, the Viterra Parties' submission that the increased production costs, due to ceasing the Gibberellic Acid Practice to produce gibberellic-acid-free malt when required should only apply up until August 2014, must be rejected for the reasons already set out above.[3476]

X.73.9 Capital costs

3475 See pars 3948-3950 above.
3476 See par 4067 above.

4140 An input used to estimate future cash flow was capital costs in relation to storage.

X.73.9.1 Klein's approach

4141 Based on his instructions,[3477] Klein assumed that the capital expenditure required to construct additional storage would be $30 million.[3478] Due to declines in demand, as a result of a forecast loss of customers, Klein concluded that a hypothetical purchaser would not expect to complete the construction until lost customers were replaced and sales progressively recovered. Therefore, Klein allocated the $30 million over the 5 years post-Acquisition.

X.73.9.1.1 The Cargill Parties' submissions

4142 The Cargill Parties submitted that the experts agreed, and the court should accept, that construction of storage was required and that the amount of capital expenditure was $30 million. In short, the only material area of disagreement was as to the allocation of that expenditure over time. It was submitted that Klein's timeline recognised demand decrease and had the effect of reducing Cargill's loss when compared to Potter's shorter period of 2 years. Further, it was submitted that Klein's use of $30 million was not based on hindsight, rather Klein correctly gave evidence that it was quantified prior to Acquisition, by reference to Viers' email of 28 October 2013.[3479] Furthermore, the Cargill Parties submitted that $30 million was conservative and should be accepted as this figure did not factor in ongoing maintenance, repairs and personnel costs.

X.73.9.1.2 The Viterra Parties' submissions

4143 The Viterra Parties took issue with the instructions provided to Klein, submitting that the amount Cargill alleged was estimated to be required for additional storage as a

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3477 See also pars 4009-4011, 4030 above.

3478 In his report, Klein referred to 2 sources as a basis for the $30 million capital expenditure figure. (1) A memorandum prepared by Youil dated 21 February 2014, which estimated capital expenditure of $30 million: see par 1670. (2) Viers' email to Eden and Jewison on 28 October 2013, which estimated $33 million of capital expenditure: see pars 1419-1424 and 4009-4012. Klein gave oral evidence that he relied on Viers' email as an indication of anticipated expenditures pre-Acquisition.

3479 Viers' email referred to capital expenditure of $33 million "to erect malt blending capacity sufficient to eliminate the 25% nonconformance": see par 1419 above. It appeared that Klein was not instructed to take into account Viers' revised figure for capital expenditure of $21 million (see par 1421 above), but the existence of this subsequent estimate before Completion was also not raised with Klein in cross-examination.

result of ceasing the Viterra Practices had not been proven, and nor had the amount which Cargill alleged was actually spent on such storage. The Viterra Parties submitted that the Cargill Parties' instructions to Klein should not be accepted because:[3480]

(1) The estimate of $30 million relied on by Cargill contained in the February 2014 memorandum,[3481] was prepared by Youil who was not called to give evidence.

(2) Youil's estimate was for malt storage, not barley storage.

(3) Cargill did not call any witnesses to give evidence regarding the amounts that were alleged to have been spent by Cargill in relation to additional storage.

(4) The document relied upon by Cargill for expenditure at Joe White's Sydney plant indicated that the majority of costs were for barley silos, rather than silos for malt storage.

(5) It was unclear from the documents relied upon by Cargill for Port Adelaide whether the costs were for malt storage, barley storage or some other capital expenditure.

(6) It was unclear from the documents relied upon by Cargill for Perth what proportion of the silos rented from Co-Operative Bulk were for malt storage and for barley storage and what costs, if any, were incurred from 2016 onwards.

4144 Further, it was submitted that the theoretical blend method of reporting required greater malt storage capacity than reporting methods based on wet chemistry analysis. The Viterra Parties submitted that based on the evidence that most

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3480 Again, the Cargill Parties submitted that none of these matters were put to Klein to ascertain what difference they might have made to his assessment.

3481 See pars 1670-1671 above.

commercial maltsters did not use theoretical blending as a basis for reporting,[3482] it should be assumed that the hypothetical purchaser would not use theoretical blending and therefore would not have forecast additional capital expenditure for extra storage.[3483]

4145 With regard to Klein's analysis and his reliance upon Youil's memorandum, the Viterra Parties referred to the fact that Klein conceded it contained information that would not have been known pre-Acquisition.[3484] It was submitted that the court should reject Klein's oral evidence that he relied on Viers' email of 28 October 2013 for 2 reasons. *First*, in Klein's report, the memorandum dated 21 February 2014 was the first source identified in the footnote relating to the $30 million capital expenditure figure. *Secondly*, even if Klein did rely on Viers' email, the information contained in that email was inappropriate because the estimates were made at a time when the Viterra Practices had not been fully disclosed, and therefore such estimates were irrelevant to what a hypothetical purchaser would have forecasted with full knowledge.

X.73.9.2 Potter's approach

4146 In his first report, Potter adopted the amount that Klein was instructed to assume of $30 million. However, Potter considered that the hypothetical purchaser would undertake the value-maximising course of action, which would involve incurring required capital expenditure as soon as practicable in order to minimise the effects of the Viterra Practices, as opposed to incurring it over the course of 5 years.[3485] In his third report, Potter was instructed to take a different approach and assumed capital expenditure between nil and $11.4 million at $2 million integers, the upper end of the range based on his instructions that that was the maximum amount Cargill alleged

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3482 To be clear, the effect of French's evidence was *not* that most participants in the malting industry do not use the theoretical blending method as part of the production process (it was used by Joe White as part of its production process, as well as in operations with which French was involved), but rather his evidence was it was not used by most participants as the basis for the final reporting to the customer of the malt specifications.

3483 The Cargill Parties submitted that this was not put to Klein.

3484 See fn 3478 above.

3485 For completeness, he further assumed that the additional capital expenditure would be depreciated over a 20 year period.

had been spent in this regard.[3486]

X.73.9.2.1 The Viterra Parties' submissions

4147 The Viterra Parties submitted that Potter's approach in his third report should be accepted and that the amount of capital expenditure should be assumed to be:

(1) Nil, if the court finds that the hypothetical purchaser would not have adopted the theoretical blend method.

(2) Otherwise, no more than the amount which Cargill proved was actually spent on additional malt storage, rather than for barley storage or other expenditure.

X.73.9.2.2 The Cargill Parties' submissions

4148 The Cargill Parties submitted that Potter's assumption that capital expenditure would be incurred immediately and only over a period of 2 years was based on his flawed conclusion that sales volumes would not be affected. As to Potter's alternative capital expenditures, the Cargill Parties submitted it was all based on hindsight, and there was nothing that ought to shift the position from the $30 million assumption.

X.73.9.3 Analysis

X.73.9.3.1 Klein's approach

4149 Klein's assumptions that there would be $30 million of capital expenditure incurred for additional storage were based on instructions from Cargill.[3487]

4150 It was not determinative of this factor as to which of the 2 sources Klein actually relied upon. The question was whether there was a proper basis for the assumption that a hypothetical purchaser would have assumed that Joe White would incur $30 million in capital expenditure for additional storage and would have assumed those costs would be incurred over 5 years. Further, the assumption Klein was instructed to make related to storage generally, and was not confined to malt storage.

4151 There could be no issue that additional storage was required, whether or not the

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3486 See par 4029(3) above.
3487 See par 4029(1) above.

theoretical blend approach was adopted. This was the unanimous view of the Joe White executives before Acquisition with respect to every plant, except Tamworth.[3488] Further, the position was that additional storage was required with respect to both malt and barley storage. The fact that the 2 sources of information Klein was referred to only related to malt storage suggested that the overall cost of additional storage would be greater than what had been forecast in the 2 documents relied upon. Therefore, the Viterra Parties' submissions highlighting the limitation of the forecast in these 2 documents did not detract from the appropriateness of a figure of $30 million.

4152 In any event, given the low storage capacity, it could be expected that a hypothetical purchaser would have assumed that, due to the capacity constraints of Joe White, upon ceasing the Viterra Practices there would be a need to spend capital to rectify storage issues. To assess the associated expenses, a hypothetical purchaser would use the information available to determine the additional storage required.

4153 It did not form part of Klein's (or any expert's) instructions whether the hypothetical purchaser would have used a theoretical blend approach to reporting or another approach. In my view, in seeking to ascertain the true value of Joe White, this was the correct approach. As the evidence was that there were a significant number of strategic purchasers who did not adopt this approach (including some operations of Cargill Malt itself),[3489] it would have been a mistake to base the valuation on the assumption that the hypothetical purchaser would use this approach.

4154 In any event, on the evidence available it was not material, for the purposes of an assessment of capital expenditure, to determine whether the hypothetical purchaser would have intended to use a theoretical blend or not. The evidence as to the difference in storage requirements of the alternative approaches was far from clear. Although French gave evidence that additional storage was required for the theoretical blend method, his evidence was that he had never personally observed the

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3488 See pars 1216, 1218 above.

3489 The theoretical blend approach to reporting was only implemented by Cargill with customer approval: see pars 335, 340 above.

implementation of Cargill's theoretical blend policy and gave no specific evidence about the level of increased malt storage that would be required for a reporting process based on theoretical blend. In this regard, it must be noted that in making the comparison that French did, his contrast was not only to the theoretical blend approach but to a theoretical blend approach that also did not make any allowance for parameters that were "slightly out of specifications". There was no identification of what was required by way of extra storage because of making no allowance for parameters slightly out of specification, as opposed to the theoretical blend reporting approach.

4155 Further, no quantitative evidence was given by any other witness. During his cross-examination, Eden agreed that it "could be" the case that more storage capacity would be needed for the theoretical blend method, however he stated it would depend on the Certificate of Analysis policy. When Eden gave the first part of this evidence, the Viterra Parties' senior counsel commented it was a fair answer.

4156 In these circumstances, there was no proper basis to make a finding whether there was any material difference between the storage costs of the 2 methods and thus, whether there was any substantial impact on the hypothetical purchaser's evaluation.

4157 On the evidence available before Acquisition, there could be little doubt that upon learning of the Viterra Practices, the hypothetical purchaser would consider capital expenditure would be required for storage if malt was to be produced in accordance with customer specifications. Further, the evidence indicated $30 million was a reasonable, and potentially conservative figure for a number of reasons. *First,* Joe White's storage was deficient in relation to both barley and malt storage. *Secondly,* estimates both before and after Completion had the cost of additional malt storage alone at around $30 million. *Thirdly,* the Joe White executives were of the view that all plants except Tamworth required further barley and malt storage.[3490] The actual cost for Sydney and Port Adelaide was $11.4 million. *Fourthly,* the Viterra Practices

3490 See pars 1216, 1218 above.

resulted in less storage requirements than would otherwise have been required.[3491] *Fifthly*, the amount $30 million did not factor in ongoing maintenance, repairs and personnel costs.

4158 Accordingly, with reference to the information available at the time, and upon an analysis of the available data, it would have been reasonable for a hypothetical purchaser to conclude that expenses for storage would be about $30 million. Further, although far from determinative, the fact that Potter accepted that his first report was the report the court should prefer in ascertaining the true value of Joe White was of some significance, as in that report he adopted the capital expenditure of $30 million. Furthermore, to assume that either no or minimal capital expenditure was required would run entirely counter to the underlying premise of Potter's first report; namely, to remedy the effects of ceasing the Viterra Practices, a substantial amount of capital expenditure for storage would be required.[3492]

4159 As to the matter of timing, Klein's assumption that the hypothetical purchaser would expect a decrease in sales volumes over 3 years before returning to equilibrium over the subsequent 3 years has been accepted. Consistent with this, a hypothetical purchaser also would conclude that additional storage would be built over a 5 year time period that correlated with the initial reduction and then the rise in demand, in preparation for a return to full capacity in year 6. Therefore, Klein's assumption that capital expenditure would be spent pro-rata over 5 years was appropriate.

X.73.9.3.2 Potter's approach

4160 It follows that Potter's assumption that the hypothetical purchaser would incur required capital expenditure as soon as practicable was unreasonable. This was because there would be no need for all the additional storage until there was a

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3491 Further storage would have been required if all required barley varieties were available at all plants (according to the requirements of customers receiving malt from particular plants). In addition, further storage would have been required for malt storage in relation to malt that would not be delivered, or the delivery of which was delayed, because of non-compliance issues.

3492 To be complete, Potter stated that, to ascertain the true value of Joe White, the effect of the Viterra Practices could be "corrected by assuming additional operating costs and/or additional capital expenditure costs". As to how capital expenditure of $30 million was integral to Potter's assumptions and calculations in his first report, see pars 4074, 4077, 4090, 4102 above.

sufficient demand for malt. Further, the view Potter expressed in the first joint report, that he assumed capital expenditure would be incurred as soon as practicable so that the effect of the Viterra Practices were minimised, was made before he had adopted Klein's assumptions with respect to a reduction in volume for a period of time after Completion. Notwithstanding Potter's evidence on the topic, the rationale for the assumed urgency of the expenditure was largely dissipated once Potter assumed reduction in volume and the entirety of the increased storage capacity was not needed immediately to meet the presumed reduced demand.

X.73.9.3.3 The Viterra Parties' adjustments to Potter's approach

4161 The Viterra Parties' adjustments to Potter's approach should be rejected. It was not appropriate to rely on hindsight, by adopting the amount which Cargill proved was actually spent on additional malt storage. Even if Potter did consider a range of alternative calculations in his third report, Potter did not rely on that report and hindsight reasoning in this manner was inappropriate.

4162 Overall, Klein's assumptions were reasonable. To the extent the experts disagreed on the impact of the Viterra Practices on capital expenditure, the court accepts Klein's approach in favour of Potter's approach.

X.73.10 Synergies

4163 A critical item of disagreement between the experts was the treatment of synergies. *First*, they disagreed upon whether the hypothetical purchaser would have been a financial or a strategic bidder and therefore, whether there would have been any synergistic value at all. That matter has been determined on the basis that the hypothetical purchaser would not have been confined to financial bidders.[3493] *Secondly*, if the hypothetical purchaser would have been a strategic bidder, they disagreed upon the synergistic value.

4164 The experts agreed on the definition of synergistic value:[3494]

> [A]n additional element of value created by the combination of two or more assets or

[3493] See par 4054 above.
[3494] See fn 3314 above.

interests where the combined value is more than the sum of the separate values. If the synergies are only available to one specific buyer then it is an example of special value.

4165 Further, the experts agreed that:

(1) Synergies available to all market participants ("Common Synergies") should be included in an assessment of market value.[3495]

(2) Synergies available to a specific or only some participants ("Unique Synergies"), also known as special value, should be excluded from market value.

4166 Accordingly, market value is the standalone value of the business plus any Common Synergies.[3496]

X.73.10.1 Klein's approach

4167 Klein considered that if the hypothetical purchaser would have been a strategic bidder, there would be Common Synergies of $8.6 million. Klein disregarded Unique Synergies and subtracted dis-synergies which Goldman Sachs stated were assumed to be 100 percent of Cargill's for all bidders over 2014 and 2015.[3497] To ascertain the value of Common Synergies, Klein had regard to the pre-Acquisition Goldman Sachs valuation. Klein explained that Goldman Sachs were well-known strategic advisers that he understood had advised in relation to more mergers and acquisitions in the

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3495 Market participants in this context are not confined to strategic purchasers, but financial purchasers by definition have no synergies available to them. It was accepted that if strategic purchasers formed part of the group of market participants for the purpose of determining the hypothetical purchaser, then it would be the strategic purchasers that would set the value as they would have Common Synergies that would form part of the market value. Klein's evidence was that his "secondary model" incorporated Common Synergies for strategic buyers.

3496 The Viterra Parties observed that they were unable to locate any authorities in relation to the question of synergies in the context of considering the concept of true value. They noted that in various statutory contexts, it has been held that synergies are not to be included in fair value. See *Winpar Holdings Ltd v Austrim Nylex Ltd* (2005) 193 FLR 457, 463 [19]; 469 [35] (Charles JA, with whom Buchanan and Eames JJA agreed); *Capricorn Diamonds Investments Pty Ltd v Catto* (2002) 5 VR 61, 77 [62]; 80 [73]-[74]; 81 [76] (Warren J) for examples under the *Corporations Act*. Also see *Commissioner of State Revenue (WA) v Placer Dome Inc* (2018) 265 CLR 585, 623-625 [132]-[138] (Kiefel CJ, Bell, Nettle and Gordon JJ) for an example in a statutory valuation exercise of the *Stamp Act 1921* (WA).

3497 Klein evaluated Common Synergies as $8.6 million, applying a discount rate of 11.7 percent to give a value as at 31 October 2013. The total synergies taken into account for 2014 included $9.1 million of dis-synergies for integration costs, as a result of which Klein concluded $8.6 million were common dis-synergies for 2014. In 2015, Klein estimated dis-synergies at $0.5 million, but in his first report did not make further provision for dis-synergies for the later years. See also fn 3498 below.

United States (if not the world) than anyone else. He considered the work done by Goldman Sachs on synergies was the best available evidence, and had a high degree of credibility. The Goldman Sachs valuation analysed the ability of competing bidders to capture synergies relative to Cargill. Klein quantified the amount of Common Synergies between bidders and adjusted the Common Synergies for the impact of the Viterra Practices.[3498] Klein made the general observation, by reference to empirical data, that there was a poor track record of purchasers realising synergies that were estimated when purchasing another entity, including by reason of under-estimating dis-synergies.

X.73.10.1.1 The Cargill Parties' submissions

4168 The Cargill Parties submitted that, if the court were to find that the hypothetical purchaser would have been a strategic bidder, then the court should accept Klein's conclusion that no part of the Unique Synergies ought to be included and that Common Synergies would have been $8.6 million.

X.73.10.1.2 The Viterra Parties' submissions

4169 The Viterra Parties made the following submissions regarding Klein's treatment of synergies.

4170 *First,* Klein made assumptions about the hypothetical purchaser's ability to realise synergies which were not based on instructions or evidence, and which were contrary to the evidence at trial. It was submitted that despite Klein's attempts to justify his conclusions and reliance on instructions of post-Acquisition events, he did not enquire as to what synergies were actually realised, nor was he provided with any instructions

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[3498] To analyse Common Synergies on the basis that the Viterra Practices and Policies were disclosed, Klein applied a number of adjustments to the value of synergies given in Cargill's deal model. First, Klein multiplied Cargill's projected synergies by the percentage identified by Goldman Sachs as common across all strategic bidders. Then, Klein assumed that "new volume" synergies were likely to have the same requirements for barley varieties and certification as existing sales volume based on his assumptions about volume, discounts and margins and adjusted them accordingly. Thus, on the basis that new volumes of exports were diminished by 9.7 percent upon the cessation of using non-compliant barley varieties, Klein assumed that 9.7 percent of new volume projected synergies would also be lost. Similarly, on the basis that 37.2 percent of export volume had Certificate of Analysis problems, Klein assumed that the same percentage of new volume would have Certificate of Analysis problems, as well as price discount issues. Further, Klein made adjustments on the basis of the assumption of loss of half of the premium price.

in that regard.[3499]

4171 *Secondly,* Klein did not independently assess the financial values of any synergies, he merely relied upon the estimates included in the Goldman Sachs valuation. However, it was submitted that there was no reasoning provided for the estimates or assumptions. In the Goldman Sachs valuation, the expected synergies of other bidders were estimated as a percentage of synergies available to Cargill and all strategic bidders were assumed to bear 100 percent of Cargill's integration costs over financial year 2014 to 2015.

4172 *Thirdly,* Klein's valuation was informed by a page in the Goldman Sachs valuation which contained a series of pie charts indicating the estimated synergies available to other bidders. It was submitted that Klein's explanation as to how he used the information was confusing and unclear. The Viterra Parties gave the example that in the Goldman Sachs valuation that 1 of the 4 strategic bidders, Soufflet, was listed as having 25 percent of the available Cargill synergies. Soufflet was estimated as having no ability to capture synergies in production or in selling, general and administrative expenses, and consequently, Klein excluded those synergies entirely on the basis they were not Common Synergies. In relation to the listed synergies that Soufflet was able to capture, the entire value of Common Synergies was limited to 25 percent, which was equivalent to the proportion that Soufflet was able to capture. The Viterra Parties submitted that Klein explained the reason that Soufflet had no synergies for selling, general and administrative expenses was because Soufflet had no relevant existing operations in the Asia-Pacific region. Given that Soufflet was the only 1 of the 4 strategic bidders identified by Cargill which did not have operations in the Asia-Pacific region, it was submitted that Soufflet had lower prospects of matching the offers of the other participants, and accordingly should not have been treated as a relevant bidder in the market for the purpose of assessing Common Synergies.

4173 *Fourthly,* it was inconsistent for Klein to simply accept Goldman Sachs' assumption

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[3499] The Cargill Parties submitted that, for the purposes of valuing Joe White at October 2013, it was not relevant to evaluate synergies that were actually achieved post-Acquisition.

that all bidders would incur identical integration costs, given that Klein identified that Soufflet did not have any existing operations in the Asia-Pacific region. It was submitted that Klein's explanation, that all mergers and acquisitions have integration costs, was not credible given that he significantly limited the amount of positive synergies to only those that would be obtained by Soufflet. Further, it was submitted that Goldman Sachs appeared to have excluded dis-synergies from their own assessment of net synergies.[3500]

4174 *Fifthly,* Klein said that he "accepted [Goldman Sachs'] assessment of [C]ommon [S]ynergies as the best available estimate of such synergies". However, it was submitted that Goldman Sachs had a synergy category called "origination" which did not appear to translate to any of the synergies incorporated into Klein's calculations. The Viterra Parties submitted that in the absence of an explanation of origination it should be inferred that origination referred to the types of synergies that Cargill anticipated would be realised by its grain and oilseeds supply chain. However, it was submitted that Klein excluded such synergies. Further, the Viterra Parties referred to Klein having excluded freight synergies which Goldman Sachs identified, but which it was submitted were not addressed in the analysis of synergies available to other bidders.

4175 *Sixthly,* Klein discounted many of the synergies from the Goldman Sachs valuation on the basis that he assumed that volume synergies would be affected due to the Viterra Practices in the same way as he anticipated adjustments would be applied to the existing volume forecasts.[3501] It was submitted that those assumptions were not established.

4176 *Seventhly,* it was submitted Klein provided no evidentiary basis or reasoning in his report for the conclusions reached about hypothetical purchasers expecting positive synergies to be difficult to realise.[3502] It was further submitted that those conclusions

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3500 Whether or not this was the case was not explored with any witness. The table referred to provided for total dis-synergies, and then for net synergies excluding dis-synergies.

3501 See pars 4070-4071 above.

3502 The Cargill Parties noted that this proposition was not put to Klein. Further, they submitted that for

were contrary to evidence at trial regarding the actual realisation of synergies post-Acquisition.[3503]

4177 *Eighthly,* it was contended that Klein's approach was flawed because he did not separately assess the value of the benefits that Cargill acquired that were attributed to synergies, and thus the effect of his approach would be to significantly over compensate Cargill for its claimed loss.[3504] The Viterra Parties submitted that the Cargill Parties overlooked synergies (other than Common Synergies). It was submitted that, in the absence of evidence otherwise, Cargill would have obtained a benefit, which would presumably be recorded in their internal business accounts for benefits obtained on behalf of their associated entities. Further, it was submitted that the experts were not provided with instructions concerning how to value synergies or lost synergies or assumptions by which they could attribute value to synergies. Furthermore, it was submitted that on the evidence, many synergies were gained. Therefore, it was submitted that apart from Common Synergies, the Cargill Parties did not take into account synergies in their valuation, which resulted in an amount of approximately $100 million being unaccounted for in their case.

4178 In addition, the Viterra Parties noted that Klein accepted that if the court found the additional $15 million paid by Cargill to secure the agreement was paid because Cargill saw benefit in creating a worldwide reach of its malt business, then that would have been a Unique Synergy. This was notwithstanding Klein accepted the market price was ultimately $420 million.

X.73.10.2 Potter's approach

4179 In applying the discounted cash flow method, Potter assumed that the hypothetical purchaser would expect cash flows that were projected in Cargill's deal model.

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the purposes of evaluating the Viterra Parties' objections to Klein's figure of Common Synergies it was necessary to consider whether the details of how Klein arrived at his figure were the subject of challenge.

3503 Again, the Cargill Parties noted that this proposition was not put to Klein.

3504 The Cargill Parties submitted that the relevant true value was not the Cargill true value, it was the doctrinal true value. Further, it was submitted that it was inappropriate to use hindsight to determine further value that Cargill obtained.

Cargill's deal model included a best case, a base case and a downside case scenario for synergies, of which Potter adopted the base case of $107 million of synergies forecast to be achieved by Cargill.[3505] Potter did not attribute any value to strategic synergies that were identified but not quantified by Cargill. Potter applied a discount rate to the relevant cash flows that he considered included a level of specific risk.

4180 Further, in applying the capitalisation of future maintainable earnings method, Potter assumed that the value of synergies that a hypothetical purchaser would be willing to pay would be incorporated via the multiple applied to assumed maintainable earnings.

4181 As already explained, to arrive at an overall value, inclusive of synergies and absent the Viterra Practices, Potter averaged the results from the discounted cash flow method and the capitalisation of future maintainable earnings.

X.73.10.2.1 The Viterra Parties' submissions

4182 The Viterra Parties submitted that the court should either:

(1) Accept Potter's approach to synergies as it was the only approach which fully accounted for the benefits that Cargill Australia actually obtained (albeit partly for the benefit of other Cargill entities) and thereby avoided over compensating Cargill Australia.

(2) Or, exclude all synergies for the purpose of the valuation evidence (or at least any that were not treated as part of the value of Joe White), and for them to be treated as a separate benefit forecasted to be acquired by Cargill Australia and other entities, which the Cargill Parties did not

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3505 Perhaps this was explained by Potter's observation in his first report that he considered the nature of preparing a valuation based on "market value" was that the purchaser to whom the highest level of synergies accrued in essence became "the market". Potter continued by stating that the purchaser to whom the highest value accrued (including all sources of value such as synergies) was assumed to offer the highest price which would be assumed to be accepted by the seller. Potter then stated that it was the value to this hypothetical purchaser that became the market value of the asset. This position did not appear to sit entirely comfortably with the position stated later in this first report (that in calculating the market value of Joe White he was only concerned with the level of synergies available to any purchaser), nor that ultimately adopted by Potter: see par 4164 above.

prove was lost nor accounted for in Cargill Australia's claim.

4183 With regard to Potter's approach of adopting the entirety of Cargill's estimated synergies of $107 million, the Viterra Parties submitted that Potter gave evidence during cross-examination that he did not have enough information about other bidders to determine the value of their synergies relative to Cargill. It was submitted that in acknowledging that he could have adopted the Goldman Sachs valuation, Potter said that he did not know how strong an opinion that would be because it was Goldman Sachs' opinion of other bidders' synergies, based on desktop research.

4184 It was submitted that Potter acknowledged that if the other bidders did not have grain and oilseeds businesses, then it was clear that such synergies should be excluded. However, the Viterra Parties contended that Potter was correct to include such synergies, as it was contended all 4 of the strategic bidders did have similar business which could obtain origination synergies similar to Cargill.[3506]

4185 Further, the Viterra Parties submitted that Potter's response at the end of his evidence that the court should adopt the $107 million of synergies in the discounted cash flow method, without qualifying his answer, should be considered in light of the assumptions and limitations upon which he had already acknowledged he based his opinions regarding synergies available to other bidders.

X.73.10.2.2 The Cargill Parties' submissions

4186 The Cargill Parties submitted that Potter's analysis of synergies should be rejected for the following reasons:

(1) Cargill would not have been a bidder for Joe White, therefore Cargill's Unique Synergies were not a useful proxy for the hypothetical purchaser.

(2) Cargill's assessment of synergies in Cargill's deal model were prepared without knowledge of the Viterra Practices, and therefore did not reflect

3506 See par 4174 above.

an assessment of the impact of Viterra Practices upon synergies.

(3) Cargill's deal model assessed Cargill's Unique Synergies, not Common Synergies.

(4) If, contrary to the Cargill Parties' primary submission, the court were to consider events after Completion to seek to ascertain the amount of synergies actually achieved, hindsight confirmed that the effect of the Viterra Practices upon Cargill's synergies was dramatic.[3507]

(5) Potter ignored direct evidence in Goldman Sachs' valuation of the synergies of other bidders at lower levels than Cargill, and Potter did not undertake any other analysis of the other bidders' synergies.

(6) Potter expressly accepted that if he assumed that other participants did not have a grain and oilseeds business, the synergy for that business would need to be taken away, but he would not accept the direct evidence of Goldman Sachs' analysis of the synergies of other bidders.

X.73.10.3 Analysis

X.73.10.3.1 Klein's approach

4187 On the premise (which has been found) that the hypothetical purchaser would include strategic bidders, the best evidence before the court as to the synergies of strategic bidders was Goldman Sachs' draft valuation. The Viterra Parties noted that this evidence was from someone that did not give evidence at trial. So much is plain, but it was a business document created in 2013 for the purpose of assisting Cargill with its bid and was admitted into evidence without limitation. Further, it was prepared by an organisation which had been retained by Cargill for its expertise in relation to such matters. In summary, there was no good reason put forward as to why this document could not be relied upon for the valuation exercise.

4188 The Goldman Sachs valuation identified 4 strategic bidders, 3 with existing operations

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3507 The Cargill Parties referred to the third commitment review as the document containing the relevant information on this issue: see par 1837 above.

within the Asia-Pacific region, and the other, Soufflet, without existing operations within the Asia-Pacific region. In contrast with the other 3 bidders, Soufflet was identified by Goldman Sachs as unable to capture synergies for 2 of the 6 identified synergies, namely production synergies, and service, general and administrative synergies. However, all 4 bidders were similar in that they were identified as all having abilities to capture new volume, margin improvement, new revenue and origination synergies. Given the similarities as strategic bidders between the identified competitors, notwithstanding their differences, Soufflet was a relevant bidder for the purposes of assessing the value of Common Synergies.[3508] In short, it was a strategic purchaser of substance and was considered as such by Goldman Sachs in 2013.[3509]

4189 A hypothetical purchaser would have determined the true value of Joe White by adding the value of Common Synergies to the standalone value. To do so, the hypothetical purchaser would assess all strategic bidders in the market to determine to what extent competitors had the ability to capture synergies. As part of this, a hypothetical purchaser would undertake a synergy estimating exercise, likely to involve desktop or other market research (including from advisers), to quantify various competitors' abilities to capture synergies. It was reasonable to assume that the assessments undertaken by the hypothetical purchaser would not be dissimilar from the Goldman Sachs valuation, given that they would be based on publicly available information.[3510] This provided a sound basis to conclude it was reasonable

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3508 For completeness, the International Valuation Standards defined participants as "… the whole body of individuals, companies or other entities that are involved in actual transactions or who are contemplating entering into a transaction for a particular type of asset. The willingness to trade and any views attributed to market participants are typical of those of buyers and sellers, or prospective buyers and sellers active in the market on the valuation date, not to those of any particular individual or entity."

3509 Although Soufflet was not considered amongst the leading competitive bidders, being Malteurop, Co-Operative Bulk and "Sumitomo/Emerald", Goldman Sachs prepared an analysis of an internal rate of return for Soufflet on an illustrative bidding price of $400 million.

3510 The "Fair Value Measurement" information on IFRS 13, as disseminated by KPMG as part of a questions and answers publication and as relied upon by Klein, referred to a prospective purchaser adjusting for "unobservable inputs" by using "reasonably available information" that indicated that market participants would use different data, or there being something particular to the entity including entity-specific synergies: International Financial Reporting Standards, "Fair Value Measurement, Questions and Answers, US GAAP and IFRS", KPMG December 2015, 28.

for Klein to rely on Goldman Sachs' calculation of positive synergies where he assumed such synergies would be available.

4190 Klein did not include Goldman Sachs' estimate for "origination" synergies, a category which was identified but not defined in Goldman Sachs' valuation. As noted above,[3511] the Viterra Parties contended that it should be inferred that origination synergies were synergies anticipated to be realised by grain and oilseeds supply chains. Although not explored at trial, on the face of the Goldman Sachs valuation, this submission must be correct.[3512] Klein explained under cross-examination that he determined that any available synergies for grain and oilseeds supply chain would have been included by Goldman Sachs within margin improvement synergies. Whether or not this explanation was correct, because of Klein's treatment of this item, the issue was more apparent than real.

4191 Klein included a line item in his calculations for grain and oilseeds supply chain, which he assumed to be nil. This was inconsistent with the information available from the Goldman Sachs valuation, which had all strategic purchasers having some synergies in this regard, albeit Soufflet had only 25 percent of those forecast to be realised by Cargill.[3513] That said, the synergies provided by Goldman Sachs were estimated without any knowledge of the Viterra Practices.

4192 Klein's evidence was that he believed the historical outcomes that Goldman Sachs had relied upon in forecasting anticipated sales attracting premium prices would no longer be achieved once a hypothetical purchaser ceased the Viterra Practices. Relevantly, Klein concluded that the anticipated synergy related to the increase in the margin for the grain and oilseeds supply chain would be difficult for a hypothetical purchaser to achieve if, as he assumed, the failure to comply with customer

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3511 See par 4174 above.

3512 A comparison between page 25 (which listed the competitors and their estimated synergies) and page 10 (which provided an overview of synergies) showed a list of the same items (new volumes, margin improvement, new revenue, production, and selling, general and administrative expenses) except that instead of origination there appeared the items "Leveraging OT" and "Leveraging GOSC Australia". Further, the evidence at trial more generally indicated that origination was part of the functions of the grain and oilseeds supply chain.

3513 Klein stated in his model that all synergies identified by Cargill had been adjusted for the percentages attributed to other bidders in the Goldman Sachs valuation.

specifications in the past was caused (at least in part) by insufficient storage capacity. The connection between this reasoning and why no margin increase at all was allocated in this regard was somewhat opaque, but Klein's adjustments to Common Synergies were overall very minor and conservative. As he noted in re-examination, the difference between his estimate of Common Synergies of $8.6 million (taking into account the Viterra Practices) and Goldman Sachs' of $9.6 million (which made no allowance for the Viterra Practices) was relatively minor.

4193 An adjustment downwards on Common Synergies was an appropriate approach, as it would be likely that a hypothetical purchaser would anticipate considerable disruption upon learning of the Viterra Practices, including in relation to synergies that were previously considered achievable. To summarise, having determined the Common Synergies, the hypothetical purchaser would adjust the synergistic value to reflect any impact that the Viterra Practices would have on synergies. Based on the above reasoning, hypothetical purchasers would expect the Viterra Practices to impact cash flows, such as the volume of malt sold and the reduction or loss of premium on sales, and consequently this would have been likely to have a detrimental effect on the synergies available to strategic bidders. Therefore, the hypothetical purchaser would adjust their analysis to reflect the impact of the Viterra Practices on Common Synergies. On balance, and subject to the matter of dis-synergies which is discussed immediately below, the approach taken by Klein to Common Synergies ought to be accepted.

4194 However, I cannot be satisfied it was appropriate for Klein to adopt Goldman Sachs' assumption of dis-synergies, whereby he assumed that all bidders would incur identical integration costs in their entirety.[3514] Whilst it was reasonable for Klein to rely on Goldman Sachs' positive synergy calculations, the dis-synergies calculations, namely the integration costs of $9.6 million, assumed a single cost for all bidders, including Soufflet. Notwithstanding what was contained in the Goldman Sachs

[3514] Klein's evidence was that integration costs were managerial joinder costs and were treated as actual dis-synergies of bringing 2 firms together.

valuation,[3515] it was unreasonable to assume that Soufflet would incur the same integration costs given that it was assumed that it would not be able to capture certain synergies that the other bidders could capture. Klein noted that all mergers and acquisitions have integration costs. So much was plainly correct. Klein acknowledged that there would be some variability, but did not know whether the costs would tend to skew higher or lower than what Goldman Sachs had allowed. On this basis, he suggested that his calculation of integration costs was a "mid-point determination" based on the paucity of data.

4195 Given the limited data available from Goldman Sachs and the differences between bidders, the assumption that the integration costs would be consistent with the Goldman Sachs valuation has not been satisfactorily established. Ordinarily, with a strategic buyer there would always be a level of integration costs, but in light of the limited evidence it is not possible to arrive at a figure with any certainty. Further, it was clear that Klein's adoption of this common position on dis-synergies was based on no more than his interpretation of the ambiguous language used by Goldman Sachs, rather than any information in the Goldman Sachs valuation that would provide some justification for the assumption made.[3516] Although the evidence was far from perfect, on the material available dis-synergies representing integration costs ought to form part of the calculation referrable to Common Synergies also at a level of 25 percent[3517] of what had been allowed by Goldman Sachs.[3518]

4196 In seeking to arrive at the appropriate figure for synergies for the purpose of assessing true value, Klein was correct not to rely on post-Acquisition events.[3519] For this reason, Klein was correct to disregard any benefits Cargill may have actually acquired that

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3515 See par 4167 above.

3516 It was stated by Goldman Sachs: "All bidders … are assumed to bear 100% of Cargill's integration/dis-synergy costs over FY14-15". In short, there was nothing beyond this which indicated that Goldman Sachs considered that was the actuality or that there was any basis to assume that such costs were likely to be common.

3517 In the Goldman Sachs valuation, it was estimated that all strategic bidders would achieve 25 percent or more of Cargill's synergies.

3518 This is likely to be a conservative figure as it would be expected that some integration costs would be proportionately less when the synergies were greater. In other words, some integration costs would be likely to be fixed or only marginally decreased if the synergies were less.

3519 See pars 3917-3921 above.

were attributable to the synergies.

X.73.10.3.2 Potter's approach

4197 Potter's approach to valuing synergies was inappropriate. Potter incorrectly adopted, as part of his discounted cash flow, Cargill's deal model not only as a starting point but also as an end point. Potter assessed Cargill's Unique Synergies as a proxy for the hypothetical purchaser without considering the synergies available to other potential purchasers. This was a flawed approach because, as Potter himself acknowledged, only Common Synergies are relevant in determining true value. If it were the fact that Potter did not have information available to him to ascertain what the Common Synergies amongst strategic bidders might have been, this did not provide a legitimate basis simply to ignore valuation principles and use the Cargill deal model as a default.

4198 In addition, fundamentally it was incorrect, without further investigation, to use any particular bidder as a proxy for the hypothetical purchaser's assessment of Common Synergies. Further, on the facts as found, the inappropriateness of using Cargill as that proxy was compounded as Cargill would not have been a market participant once the existence of the Viterra Practices had become known. Furthermore, Cargill's deal model was prepared absent knowledge of the Viterra Practices, therefore it did not reflect the impact of the Viterra Practices on synergies.

4199 Moreover, it would be unreasonable for a hypothetical purchaser to assume that the Viterra Practices would have no impact at all on synergies given the assumed impact on volume and cash flows.

4200 As for Potter's approach of capitalising future maintainable earnings, his approach to synergies was flawed for similar reasons. Potter's approach necessarily assumed the hypothetical purchaser would be willing to pay an amount for Joe White that assumed the full value of the synergies in total.[3520] This approach made no allowance for the hypothetical purchaser substantially reducing its forecasts for anticipated synergies in light of learning of the Viterra Practices, much less for the fact that Cargill itself would

[3520] For completeness, this was contrary to the evidence of Klein that such an approach would effectively involve a hypothetical purchaser agreeing to transfer all of the value in the synergies to the vendor which would wipe out any benefit those synergies would otherwise have realised for the purchaser.

not have proceeded with the Acquisition.

X.73.10.3.3 The Viterra Parties' adjustments to Potter's approach

4201 The Viterra Parties' submission that the court should exclude all synergies for the purpose of the valuation evidence, and actual synergies should be treated as a separate benefit forecasted to be acquired by Cargill and other entities, is rejected. The experts agreed the true value of Joe White was the standalone value of the business plus any Common Synergies. To seek to attribute the actual synergies achieved as the relevant input would be to engage solely in considering hindsight on this issue, rather than using it to ascertain the accuracy of assumptions made in assessing true value. To not include Common Synergies would be to undervalue the business. To adopt Viterra's alternate approach would be to seek to engage in a task of analysing many years of trading, with the almost impossible task of determining what matters were intrinsic and what were independent or extrinsic. Moreover, it would also give rise to an issue with respect to synergies that were achieved by subsidiaries of Cargill, Inc which were not Cargill Australia. No attempt was made by the Viterra Parties to engage in such an exercise in suggesting this alternate approach.[3521]

4202 Overall, Klein's approach was reasonable, save for the inclusion of all the dis-synergies from the Goldman Sachs valuation. A hypothetical purchaser would have concluded that the common dis-synergies would be the integration costs that were common to all market participants, and would not assume that such costs would be consistent amongst competitors.[3522] Therefore only $2.4 million (being 25 percent of the integration costs of $9.6 million) will be allowed,[3523] to reflect the difference between the Goldman Sachs valuation of dis-synergies and the amount that a hypothetical purchaser would have been likely to calculate as common dis-synergies.

X.73.11 Risk and discount rate

4203 In adopting the discounted cash flow method, the experts agreed that the discount

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3521 The Viterra Parties submitted that this was a matter for Cargill to engage in and to exclude extrinsic factors in so doing. However, in circumstances where Cargill appropriately adopted the *Potts v Miller* approach this was not necessary.

3522 In exhibit 6 to Klein's first report, Klein identified integration costs as the only dis-synergy.

3523 See pars 4194-4195 above.

rate is set to reflect the riskiness of the cash flow; the higher the risk, the higher the rate of return required by a hypothetical purchaser acting commercially. As Potter put it, the discount rate reflects the required rate of return, and the appropriate rate of return is the rate that would be required by a purchaser to compensate it for the time value of money and the uncertainty or risk of the expected future returns being generated. Further, as Klein explained, the anticipated degree of dispersion or range of future outcomes define the level of risk, so that if the degree of anticipated dispersion is low, the risk of the investment (and hence the cost of capital and debt) is lower than if the anticipated dispersion had potentially much higher and lower outcomes.

4204 However, the experts used different methods for calculating their discount rates and disagreed on the company-specific risk. Otherwise, they generally agreed with the other components of the discount rates.

X.73.11.1 Klein's approach

4205 Klein determined the discount rate in 2 steps. *First,* he identified the baseline weighted average cost of capital discount rate determined by Deloitte, absent knowledge of the Viterra Practices.[3524] *Secondly,* Klein considered that, upon learning of the Viterra Practices, the hypothetical purchaser would have revised their perception of customer stability due to the risk of the potential loss of customers. Therefore, Klein adjusted the baseline required rate of return upward, reflecting his assessment of the additional risk-related returns required by a hypothetical purchaser.[3525] Klein considered accounting restatement literature, referencing an analogy between the situation concerning the Viterra Practices and accounting errors. Accordingly, he increased the cost of debt from 5 percent to 6 percent and the cost of equity from 15.7 percent to 17.7

3524 Klein relied on the assessment by Deloitte because Goldman Sachs only provided a rate for a financial bidder and did not assess the discount rate that a strategic bidder would have applied. Klein reviewed Deloitte's conclusions, including the calculations underlying them, and satisfied himself that they were accurate and reasonable. Deloitte determined the weighted average cost of capital as between 10 percent and 11 percent, based on a debt to equity ratio of 45 percent, with the cost of debt at 5.2 percent and the cost of equity at between 14.8 percent and 16.5 percent.

3525 In his evidence Klein noted that there were no studies that support the degree of risk to be adopted with the disclosure of the Viterra Practices as the circumstances were quite unique.

percent.[3526] This resulted in a discount rate between 11.7 percent and up to 17.7 percent. The top end of the range would be applicable if purely equity financing was used, on the basis that debt capital providers would not accept the increased risk.

4206 In Klein's primary report, he provided the formula he used to determine the weighted average cost of capital, adjusted by him for the effect of the Viterra Practices and Policies as follows:

		Deloitte estimate	**Adjusted for the effect of Viterra Practices and Policies**
Base rate	[a]	2.6%	2.6%
Spread over base rate	[b]	2.7%	3.8%
Cost of debt	**[c] = [a] + [b]**	**5.2%**	**6.3%**
Lower bound cost of equity		14.8%	16.7%
Upper bound cost of equity		16.5%	18.6%
Cost of equity	**[d]**	**15.7%**	**17.7%**
Weighted average cost of capital for Joe White			
Adjusted cost of debt	[c]	5.2%	6.3%
Adjusted average cost of equity	[d]	15.7%	17.7%
Assumed long-term debt-to-capital ratio	[e]	45.0%	45.0%
Corporate tax rate	[f]	30.0%	30.0%
Weighted average cost of capital	**[g] = [c] x [e] x (1-[f]) + [d] x (1-[e])**	**10.2%**	**11.7%**

4207 If the assumed long-term debt-to-capital ratio input in this formula (represented by "e") were changed, the weighted average cost of capital would change accordingly:

3526 See fn 3524 above.

Assumed long-term debt-to-capital ratio	Weighted average cost of capital (adjusted for the effect of Viterra Practices and Policies)
0%	17.7%
10%	16.4%
20%	15.0%
30%	13.7%
40%	12.4%
45%	11.7%
50%	11.1%
60%	9.7%
70%	8.4%
80%	7.1%
90%	5.7%
100%	4.4%

X.73.11.1.1 The Cargill Parties' submissions

4208 The Cargill Parties submitted that Klein's discount rate range of 11.7 percent to 17.7 percent should be adopted and that 17.7 percent was most appropriate.

4209 The Cargill Parties summarised Klein's approach as based on his assessment that a hypothetical purchaser, after receiving disclosure of the Viterra Practices, would have:

(1) Altered its perception of the risks inherent in owning Joe White and become concerned about customer stability.

(2) Viewed the risks of investing in Joe White as higher than they were prior to learning of the Viterra Practices.

(3) Identified various risk factors that were unknown to bidders at the time of the Acquisition, including concerns about the reliability of Joe White's financial information.[3527]

(4) Required a higher return to compensate for higher risk.

(5) Adjusted the discount rate upwards to reflect higher risks which could not be addressed in cash flows.

3527 The Cargill Parties noted that Klein had considered 24 specific risks, including risks regarding losing premium pricing, increasing rejection rates and reputational damage. The Viterra Parties submitted that Klein's assumption that hypothetical purchasers would review their perception of the reliability of financial statements was based upon academic studies that were not relevant as they were concerned with the correction of published financial data.

4210 The Cargill Parties submitted that Klein emphasised certain risks to forecasting the cash flows that would be identified by hypothetical purchasers, including customer loss and the flow-on impact, the lack of judgment and integrity of management, litigation risks and future discounts. Consequently, it was submitted that Klein considered that a bidder would reconsider and determine afresh all the valuation inputs in light of the new information.

4211 Further, the Cargill Parties submitted that Klein cross-checking the discount rate by looking at the analogous scenario of adjustments to discount rates caused by accounting standard errors and arriving at a range of 11.7 percent to 17.7 percent was a useful exercise, given the uniqueness of the Viterra Practices.

4212 Furthermore, the Cargill Parties submitted that given the risk associated with Joe White's cash flow, the court should assume that no lender would provide debt capital, and therefore, all financing would be equity capital, resulting in a discount rate of 17.7 percent. Regardless, it was submitted that given the riskiness of Joe White's cash flow, the discount rate would have sat at the top end of Klein's range.

X.73.11.1.2 The Viterra Parties' submissions

4213 The Viterra Parties noted that both Potter and Meredith disagreed with Klein's discount rate.

4214 With regard to Klein's usage of the Deloitte valuation report, the Viterra Parties submitted that the discount rate in the report included risk in relation to synergies which Cargill had hoped to achieve, and which Klein had mostly excluded from his valuation and therefore it was inapposite to his task of valuing Common Synergies.[3528] Further, it was submitted that Potter considered that the Deloitte discount rate was also an inappropriate starting point for "other reasons".[3529]

3528 The Cargill Parties submitted that this was not put to Klein.

3529 It was difficult to identify what was intended by this submission. Potter spoke to 5 components. For risk free rate, he adopted the same rate as Deloitte. For market risk premium, there was a difference of only 1 percent (from 7 percent to 6 percent). The geared beta applied by Deloitte was only "slightly higher" than that applied by Potter. In relation to capital structure, Deloitte assumed 45 percent debt and 55 percent equity, which Potter noted reflected a higher level of debt than he (and Meredith)

4215 Further, the Viterra Parties submitted that Klein applied a significant specific risk uplift to his discount rate, which was excessive and unjustifiable, for a number of reasons.

4216 *First*, it was submitted that Klein's approach to the discount rate was inconsistent with valuation standards. The Viterra Parties relied on Potter's explanation that Klein's valuation was not open as a matter of valuation practice. Potter noted the dramatic effect a small change in discount rate would have and that the rate assumed an effect on the value in perpetuity, whereas Potter considered many of the effects of the Viterra Practices were temporary. Potter continued by stating that there was no observable market data that allowed for the measurement of the Viterra Practices' effect on the discount rate and therefore adjusting the discount rate would be guesswork. As such, Potter claimed that the only appropriate way to address the risk was by adjusting cash flows, as he had done, and that this was the preferred method according to the accounting standards. Further, Potter considered that the concept of true value would allow the use of hindsight to some extent to assess if any unmeasurable risks at the date of valuation did have a significant value and whether they did emerge.

4217 The Viterra Parties referred to Potter's evidence on the topic and submitted that Potter's reasoning was fully supported by the accounting standards document that Klein had been provided during opening statements.[3530] In this document it was stated that an "arbitrary adjustment for risk, or one that cannot be evaluated by comparison to marketplace information, introduces an unjustified bias into the measurement". The accounting standards provide that where a reliable estimate of the market risk premium is not obtainable, "the present value of expected cash flows, discounted at a risk-free rate of interest, may be the best available estimate of fair value

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assessed (which presumably, with a higher level of debt, would make the overall cost of funds for the transaction less not more). With respect to the specific risk premium, Potter reviewed each of the matters Deloitte raised in determining the specific risk premium and agreed with the concept that adjustments could be made reflecting each of those matters. However, rather than taking any issue with the matters, Potter noted that he would "prefer" to make adjustments to the forecast cash flows rather than the discount rate.

3530 Statement of Financial Accounting Concepts No. 7 Using Cash Flow Information and Present Value in Accounting Measurements, published by the Financial Accounting Standards Board in February 2000.

in the circumstances".

4218 *Secondly,* it was submitted that Klein incorrectly assumed that Joe White had erroneous or inaccurate financial statements. The Viterra Parties noted that the experts had agreed in writing in a joint expert report that it was immaterial whether the Viterra Practices rendered Joe White's financial statements unreliable as foundational underpinnings for the true value. However, it was submitted that Klein attempted to backtrack on this (by stating that he understood the agreed position between the experts to be in the context of the experts' extrinsic discussion about compliance with formal accounting rules as opposed to the financial statements being reliable as a prediction of future outcomes in projecting the impact of the Viterra Practices and Policies).[3531] The Viterra Parties submitted that Klein acknowledged that the reliability of the financial statements was 1 of the most important factors he advanced in relation to determining the weighted average cost of capital for a strategic bidder.[3532]

4219 It was submitted that Klein merely asserted that his primary report concluded that the financial statements summarised in the Information Memorandum were unreliable.

4220 The Viterra Parties submitted that Klein maintained his position that, by referring to "financial statements" he was referring to the information contained in the

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3531 Klein's evidence on this point was plainly correct. A significant thrust of Klein's approach was to proceed on the basis that the historical financial statements could not form a reliable basis for estimates of future cash flows and therefore were unreliable in assessing the true value of Joe White. There was no backtracking as contended by the Viterra Parties. Klein's position was expressly referred to in his first expert report, where Klein stated that disclosure of the Viterra Practices would be likely to generate concerns among potential purchasers regarding the reliability of Joe White's financial accounts. This observation referred to an earlier part of his first report, in which Klein stated that potential purchasers commonly rely on the historical performance to gauge future profitability. Not surprisingly, Klein suggested that the existence of the Viterra Practices and Policies would cast doubt upon the professionalism of the company and the integrity of its management. He referred to the prospect of potential purchasers having substantial doubts about a company's historical financial statements and the trustworthiness of a seller's representations, with the consequence that they were likely to refrain from participating as bidders or to reduce their bid prices to incorporate lower expectations of future profitability and increased uncertainties about the achievability of such profits.

3532 This submission reflected Klein's evidence, but did not indicate that Klein thought that Joe White's historical financial statements were reliable for the purposes of forecasting or that he thought their reliability was immaterial. Klein gave evidence that the reliability of the financial statements went to the ability to assess risk and therefore the appropriate weighted average cost of capital. Indeed, as set out above, he specifically rejected the proposition when it was put to him in cross-examination that the reliability of the historical financial statements was immaterial.

Information Memorandum, even though he had been taken to passages in the first joint report where Klein: (1) opined that the Viterra Practices likely affected the reliability of Joe White's financial statements; and (2) separately, acknowledged that Deloitte had not detected misstatements in Joe White's financial statements. Klein explained that he defined financial statements in both the broad sense and the narrow sense. The Viterra Parties submitted his explanations were confusing. They contended Klein's explanation, that on the first occasion he had meant financial statements in the broader sense found in the Information Memorandum and in the second he had been referring to a narrow meaning of statutory accounts or equivalents, should be rejected.

4221 Further, it was noted that Klein acknowledged that whilst his report had statements such as "there *might* be a basis" for concluding that the financial statements were unreliable, he had not in fact concluded in his report that the Joe White financial statements were unreliable. The Viterra Parties referred to Klein's acceptance that the issue of whether he concluded that the statements were false, arose because he relied on studies that showed how a weighted average cost of capital would be influenced by an entity that had issued incorrect financial statements and subsequently corrected those financial statements.

4222 Furthermore, it was submitted that after preparing the first joint report, upon learning that Joe White's financial statements were not the subject of misstatements, Klein commented in the further joint report that he only relied on the studies regarding misstatements to the extent that they were an analogous benchmark for gauging how market participants would respond to the disclosure of the Viterra Practices and the relevance of those studies did not depend on the financial statements being erroneous. However, the Viterra Parties submitted that Klein's explanation for how he used the studies was inconsistent with what he had previously stated and that his report was therefore premised on the incorrect assumption that there were misstatements in Joe White's financial statements.[3533]

3533 But see par 4221 above.

4223 *Thirdly,* it was submitted that Klein partly relied on general business risks to justify the discount rate he arrived at, which were simply inherent in most businesses. It was further submitted that the evidence did not establish that any of the many general risks identified actually eventuated.[3534] It was submitted that the court is permitted to, and should, use hindsight to exclude the impact of such risks.

4224 *Fourthly,* the Viterra Parties submitted that Klein relied on speculative risk to justify his high discount rate, that he had already accounted for in other ways, for example:[3535]

(1) The risk that Joe White would no longer be able to charge a price premium, which was already accounted for in his cash flow adjustments.[3536]

(2) The risk of an increased customer rejection rate, which was already assumed by Klein to be much higher than the evidence suggested actually did eventuate.[3537]

(3) The risk that total costs of acquiring conforming barley varieties would be much higher, which was already accounted for in his cash flow adjustments.[3538]

(4) The risk that some of the positive synergies would no longer be obtainable, despite most positive synergies having already been excluded.[3539]

4225 Further, it was submitted that Klein's discount rate would continue to impact the forecast cash flows in perpetuity, which was inconsistent with his conclusions that the

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3534 The Cargill Parties submitted that it made no difference whether the risks eventuated, the question was whether in October 2013 they were perceived. Further, it was submitted that if the Viterra Parties suggested that the risks were overstated, it should have been put to Klein, which it was not.

3535 The Cargill Parties submitted that none of these examples were put to Klein.

3536 See par 4096 above.

3537 See pars 4066-4067, 4096 above.

3538 See par 4119 above.

3539 See par 4167 above.

effect of the Viterra Practices would only be temporary.[3540]

X.73.11.2 Potter's approach

4226 In the first stage of his analysis, in assessing the market value of Joe White absent the Viterra Practices, Potter adopted Cargill's deal model discount rate of 10 percent.[3541] In the second stage of his analysis, when assessing the net present value of the impact of the Viterra Practices, Potter adopted a discount rate of 8.75 percent. In cross-examination, Potter explained that he considered that Cargill's deal model discount rate of 10 percent was inclusive of specific risk, and accordingly he adopted a lower discount rate to avoid double counting risk as the Viterra Practices were a specific risk to the cash flows themselves.[3542]

4227 In the joint expert report of December 2018, Potter stated that he considered the lower discount rate of 8.75 percent "should be applied because the application of a higher discount rate inclusive of specific risk, *including risk associated with the Viterra Practices* would result in a mismatch of the cash flows and the discount rate applied to those cash flows, leading to an under valuation of the effect of the Viterra Practices" (emphasis added). Under cross-examination, Potter accepted that he made no assumption that the Viterra Practices were included as part of the Cargill deal model risk and to the extent that he indicated as much in this passage, he was in error.

X.73.11.2.1 The Viterra Parties' submissions

4228 The Viterra Parties submitted that Potter's discount rates should be accepted. They pointed out that his discount rate for valuing Joe White was in line with the discount rate used in Cargill's deal model. Further, they submitted that, by adopting a discount rate of 8.75 percent to assess the net present value of the Viterra Practices, Potter created a larger assessment of their impact than would have been the case if the higher rate in the Cargill deal model had been used.

3540 The Cargill Parties submitted that this was not put to Klein.

3541 The rationale for this rate was not disclosed in the Cargill deal model, beyond it being stated that it was inserted as reflecting "the discount rate calculated as using Cargill cost of capital …".

3542 Meredith took a similar approach and arrived at a discount rate of 10.2 percent; Potter calculated that the small company premium would be lower and considered that the terminal growth rate would be higher, resulting in a lower discount rate than Meredith. All experts agreed that there was little empirical data for Australian companies on how to calculate and apply a small company premium.

X.73.11.2.2 The Cargill Parties' submissions

4229 The Cargill Parties submitted that Potter's discount rates should be rejected for the following reasons:

(1) Potter adopted Cargill's deal model discount rate which had been prepared without knowledge of the Viterra Practices and therefore did not account for risk caused by them.

(2) Potter recognised that a purchaser faced with high risk may seek to be rewarded with higher returns, but failed to adjust the discount rate.

(3) Potter recognised that risk can be taken into account using an expected cash flow approach where different cash flows are modelled and probability weighted, but did not undertake that approach.

(4) Potter's adjustments to cash flows were limited[3543] and he assumed that his cash flow adjustments would cure the effect of the cessation of the Viterra Practices, giving no consideration to any further increase in risks identified by Klein and thereby affording them no value at all in his valuation.

(5) Potter adopted some parts of Klein's analysis, wherein impact on cash flows and discount rates were inextricably linked in Klein's valuation. By including only cash flow adjustments and not discount rate adjustments, he ignored the full impact of the Viterra Practices.

4230 Further, the Cargill Parties noted that Potter did not know how Cargill's deal model discount rate was calculated, what component was specific risk, and what risks it covered, so it was submitted that reducing it by 1.25 percent was entirely arbitrary. Furthermore, during cross-examination of Potter it was demonstrated (and Potter agreed) that by changing the discount rate from Cargill's 10 percent to 8.75 percent, the value of Joe White was assessed at a value which increased by $83.2 million, with

3543 These were confined to increased barley costs, increased manufacturing costs after ceasing the use of prohibited gibberellic acid, loss of production for 2 years after ceasing the use of prohibited gibberellic acid and capital expenditure of $30 million.

the impact of the Viterra Practices as assessed by Potter going from negative $86.9 million to negative $170.1 million. In closing submissions, the Viterra Parties submitted Potter was in error in making the concessions he did in this regard (but it is unnecessary to elaborate on this in any great detail in light of the conclusion I have reached in relation to the inappropriateness of Potter's overall approach).[3544]

X.73.11.3 Analysis

X.73.11.3.1 Klein's approach

4231 Klein's approach to discount rate was an acceptable approach.

4232 As the Goldman Sachs valuation did not provide the relevant analysis, the Deloitte valuation report was an appropriate starting point. It was reasonable to assume that a hypothetical purchaser would come to a similar assessment as Deloitte regarding the discount rate for a strategic bidder, notwithstanding reductions in synergies. Klein gave specific evidence on the point and was not challenged on this evidence.[3545] That is not to say that it would be unreasonable to revise the discount rate in circumstances where synergies were reduced from an original estimation.[3546] However, it may also be reasonable for a hypothetical purchaser to assume that the reduction of certain synergies did not change the overall riskiness of the cash flow to such a degree that

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3544 Without descending into too much detail, the exercise Potter was asked to engage in during cross-examination involved keeping the "unadjusted value" of $621.9 million, based on the discount rate of 8.75 percent, but decreasing the adjusted value purporting to incorporate the impact of the value of the Viterra Practices by using the discount rate of 10 percent. The Viterra Parties submitted to assess the impact more accurately, it would be appropriate to deduct $451.8 million from the amount representing the value without any impact of the Viterra Practices calculated using the same discount rate of 10 percent (being $533.6 million, leaving a difference of $81.8 million), rather than deducting it from the sum of $621.9 million.

3545 See fn 3524 above.

3546 While it may be possible that reducing the forecast synergies to Common Synergies might require some adjustment to the discount rate, this was not really explored with Klein. Klein clearly stated that he had assessed the Deloitte valuation with respect to the discount rate and considered it an appropriate starting point. In appendix 4 to the Deloitte valuation, Deloitte gave an extensive explanation as to why a discount rate it chose was appropriate. None of this was the subject of challenge, and although no one from Deloitte gave evidence, the document was tendered without limitation. As was stated by Deloitte, the selection of an appropriate discount rate is a matter of judgment having regard to available market pricing data and the risks and circumstances specific to the business being valued. Klein, as an expert, adopted Deloitte's approach. In circumstances where it was not put to him that the Deloitte approach was inapplicable to assessing risk in the context of Common Synergies, there was no proper basis to depart from Klein's premise. For completeness, it is noted that Meredith also had regard to the Deloitte assessment of the weighted average cost of capital being between 10 and 11 percent, as well as the Cargill deal model and a rate of 10 percent used by Grant Samuel in a cross-check valuation of GrainCorp Malt.

the discount rate needed to be adjusted. Given the enormous impact even a slight variation to the discount rate can have on the assessment of true value, it would be inappropriate for the court to make any change in light of Klein's unchallenged expert evidence.

4233 Fundamentally, a discount rate is applied to an estimated cash flow to reflect the riskiness of the cash flow. Klein was correct to consider that upon learning of the Viterra Practices, the hypothetical purchaser would revise their perception of risk, and make the assumption that the cash flows were riskier than they were prior to obtaining knowledge of the Viterra Practices.[3547] This was because of additional uncertainties that would present an additional risk for the cash flows, for example the uncertainties surrounding the stability of key customers, and therefore risk to volumes and prices. Such a risk would continue to exist even after adjustments were made to the cash flows in light of the Viterra Practices.

4234 Given the greater uncertainty, it is likely that a hypothetical purchaser would seek some sort of benchmark to assist them to quantify the additional riskiness to assign to the cash flows. On the materials put forward by the experts (and on the evidence more generally at trial) Joe White's situation was unique; as such it was reasonable to assume that a hypothetical purchaser would not have specifically comparable benchmarks and would be likely to seek, by way of analogy, some other benchmarks. Klein chose discount rate revisions for financial accounting misstatements. While obviously not perfect, this was a reasonable means of gauging an appropriate adjustment, as both hypothetical purchasers of companies with financial misstatements and hypothetical purchasers of Joe White with knowledge of the Viterra Practices would anticipate an impact on costs of capital as a result of concerns around the reliability of the historical financial statements for forecasting purposes.[3548] Ultimately, it was reasonable to assume that the disclosure of the Viterra Practices would have generated uncertainty and such uncertainty would translate into a perception of increased risk in cash flows, not dissimilar to the effect of financial

3547 See par 3968 above.

3548 Albeit, the nature of the unreliability was different: see par 4242 below.

misstatements, and consequently hypothetical purchasers would commensurately increase the discount rate.

4235 The contention of the Viterra Parties that adjusting the discount rate as Klein did was inconsistent with his assessment that the effect of the Viterra Practices on the cash flows would cease after 5 years cannot be accepted. While it was correct to submit that Klein's forecast showed that the effect of cash flows could be negated after 5 years, it did not follow that the inherent risk to the Joe White Business created by the Viterra Practices ceased at that point in time.

4236 On the contrary, in my view and with respect to Potter, it would be bordering on the fanciful to assume as at October 2013 that all risks associated with the cessation of the Viterra Practices would be gone within 5 years, much less a period of 2 years. By way of example only, there was a risk that 1 or more customers may be lost as a result of the Viterra Practices ceasing and Joe White (as least in the short to medium term) being unable to reliably supply malt within specifications. In light of the dependency of the Joe White Business on a limited number of large customers, the loss of just 1 customer could have an effect on the Joe White Business which would be felt for many years. In those circumstances, it would be likely that Klein's forecast cash flows over the first 5 years would not be achieved; and that risk needed to be reflected in the denominator reflecting the relevant risk. In other words, the historical implementation of the Viterra Practices made the stability of the future cash flows inherently more uncertain than a business without the blight of the Viterra Practices for a hypothetical purchaser who intended to conduct the Joe White Business without relying on the Viterra Practices to supply customers on the misleading basis that delivered malt was within specifications when it was not.

4237 However, the Cargill Parties have not established that the higher end of the discount rate range, being 17.7 percent, was appropriate. The Cargill Parties contended that no lender would provide debt capital given the risk and therefore there would be a greater cost required due to pure equity financing. However, it cannot be assumed, in the absence of probative evidence, that no debt capital would have been available,

particularly in circumstances where the hypothetical purchaser is assumed to be a strategic bidder. To the contrary, Klein's report stated that "in assessing the additional risk-related upward adjustment, *one possible scenario* is that a potential strategic acquirer would not be able to secure debt capital to finance this acquisition. In such a scenario, the acquisition of [Joe White] would be financed solely with equity" (emphasis added). Further, Klein observed that the attendant risks, where the loss of a single customer could have a substantially adverse effect, would make banks and other debt capital providers wary, and the cost of debt capital would indefinitely increase. This evidence did not equate to saying that debt capital would not be available.

4238 While pure equity financing was 1 of multiple possible scenarios,[3549] the court has not been provided with any probative evidence to conclude the likelihood of such a possibility, or for that matter, the likelihood of any level of decrease to the proportion of available debt capital. Further, in these circumstances, when the uncontroverted evidence was that the purchaser of Joe White would acquire land and buildings worth $63.2 million and plant and equipment worth $174.8 million,[3550] there could be no proper basis to assume that debt finance could not be raised to fund some part of the purchase.

4239 Doing my best on the evidence available, and acknowledging the increased level of risk created by the Viterra Practices, a discount rate of 13.7 percent, being in the middle of the lower end of the range provided by Klein, should be adopted as the appropriate discount rate.

4240 The Viterra Parties' other submissions objecting to Klein's approach are rejected.

4241 *First,* for reasons already discussed, Klein's approach, which used the discounted cash flow method, was open to him and was not inconsistent with valuation standards.[3551] So much was common ground.

3549 See pars 4206-0 above.
3550 See fn 674 above.
3551 See pars 3957-3970 above.

4242 *Secondly,* the benchmarks from the financial accounting misstatements studies were available to Klein. Klein acknowledged that his report did not conclude that there were in fact financial accounting misstatements in the Joe White financial statements, merely that he had concluded it was a possibility. In the absence of financial misstatements, Klein was still able to rely on the studies, by way of analogy, without presuming that there were actual misstatements within Joe White's financial statements. That is to say that the hypothetical purchaser's response in evaluating discount rate in the unique scenario of the Viterra Practices would be likely to seek out a benchmark in assessing any appropriate adjustments. Such a benchmark could be the scenario of a company publishing financial restatements. In both scenarios, the market would receive new information and would likely perceive an increase in riskiness of cash flows, and make appropriate adjustments.

4243 *Thirdly,* it was reasonable to assume that a combination of general business risks and specific risks would contribute to a higher discount rate. Regard to hindsight should only be had to the extent that it sheds light on the true value of Joe White at the time of Acquisition. The appropriate treatment of risks is not to be determined simply by using hindsight as a means of excluding risks or the perceived potential impact of relevant risks. The mere fact that, with the benefit of hindsight, a risk may be observed as not having materialised does not mean that the risk was anything other than real (and ought to be accounted for) at the time hypothetical forecasts are prepared and a discount rate is set. For many risks it is more likely than not that they will not come to pass (such as, perhaps, the loss of a particular customer). But that does not mean the risk is not real, nor that in the foreseeable future it would not eventuate into an actual loss or detriment to the business. It is because of the fact that some risks, even though not probable, are real and may materialise, that allowances for those risks (in conjunction with other risks) must be made in a forecast or a discount rate, or both, if the assessment in question is to properly reflect the true value of the business in question.[3552]

[3552] Of course, not all risks must necessarily be accounted for when seeking to ascertain the true value;

4244 *Fourthly,* Klein's adjustment to the discount rate did not result in double counting. Klein first identified additional risks to various components contributing to the cash flows as a result of the Viterra Practices and incorporated those into the forecasts. He separately acknowledged that the risk of those cash flows increased, reflecting greater uncertainty. The fact that the discount rate impacts the forecast in perpetuity was not inconsistent with the fact that the effects of the Viterra Practices might possibly have been temporary. There was plainly a risk that the effects could be long term.

4245 *Fifthly*, in relation to Klein's evidence about the historical financial statements of Joe White, I did not find his evidence confusing. There was a clear distinction between the question of reliability in reporting what had occurred and the question of reliability for the purposes of forecasting. In agreeing with the other experts not to address whether the Viterra Practices and the Viterra Policies made the financial statements unreliable on the basis that the issue was immaterial, Klein was simply agreeing not to address whether or not the financial statements reliably reported Joe White's financial performance as it had actually occurred.[3553] It was clear that, by agreeing not to address this issue, Klein was not suggesting that the manner in which the historical performance of Joe White might have been affected if it had been conducted without the Viterra Practices was immaterial. Such an agreement would have run directly counter to much of the views he expressed in his reports in adopting the approach that he did. Further, as has been found in issue 10 above, the historical financial statements from 2010 to 2013 were underpinned by the Viterra Practices and would have been likely to have been materially different if the Viterra Practices had not been engaged in for the 3 or so years in question. Accordingly, Klein was correct to factor in a risk that the results could not be repeated.

4246 Also Klein's use of the term "financial statements" was clear. Depending on the context, either he was referring to the statements made in the Information Memorandum relating to financial performance, or to the end-of-financial-year

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whether an adjustment needs to be made is a matter of an assessment of the nature and extent of the risk.

3553 This was despite the possibility that they might be unreliable in reporting the actual performance given the conduct management had engaged in with respect to the Viterra Practices.

statements. On a fair reading of his reports, there was no inconsistency in this regard.

X.73.11.3.2 Potter's approach

4247 Potter's approach to risk resulted in numerous risks that he accepted actually existed not being accounted for in his modelling. Speaking broadly, if a risk could not be properly quantified so as to be capable of forming an adjustment to the forecast cash flows, then it was not factored into Potter's calculations at all. However, the mere fact that Potter considered the risk could not be measured or quantified did not mean the risk ceased to exist or was not material. In effectively ignoring a large number of risks on this basis and excluding the possibility that they might be accounted for in the denominator as part of his calculations,[3554] Potter's approach was flawed.

4248 Potter's adoption of a discount rate of 10 percent to assess market value was not reasonable. Although this figure or a closely proximate figure was used by various industry experts to assess the value independent of the effect of the Viterra Practices, such a discount rate made no allowance for the effect of the Viterra Practices. Equally, the discount rate calculations made in Cargill's deal model were calculated without any knowledge of the Viterra Practices. Therefore, it was misplaced to assume that a hypothetical purchaser would make calculations that were similar to the calculations in Cargill's deal model and arrive at a discount rate of 10 percent. Further, Potter's methodology of considering the impact of disclosure of the Viterra Practices was confined to treating the impact as being only relevant to his assessment of the net present effect of the Viterra Practices. This was a limited and artificial approach, as it failed to make allowance for the risk overall to the Joe White Business caused by the historical use of the Viterra Practices. Further, it had the result that, in substance, Potter did not ever produce a valuation of a hypothetical purchaser of the true value of Joe White itself which assumed a disclosure of the Viterra Practices.[3555]

4249 Similarly, Potter's discount rate when calculating the net present effect of the Viterra Practices was not reasonable when considered in combination with his cash flow

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3554 This is not to say that Potter ignored the risks entirely, as he acknowledged the risks and said he considered them before deciding not to include them in his calculations.

3555 In making this observation, Potter's second report purported to do this, but in that report Potter used subsequent facts and did not proffer it as a proper assessment of true value: see pars 4268-4290 below.

adjustments. The ultimate issue was whether Potter reflected the risks associated with the Viterra Practices in his valuation, in either the discount rate or the cash flow. As concluded above, Potter failed to adequately take into account the impact of the Viterra Practices on the price of malt, inventory losses, and volume of malt reductions within his cash flows,[3556] thereby failing to meaningfully take into account the associated risks. Further, Potter excluded certain risks identified by Klein, which he accepted that absent hindsight reasoning he could not value. To reiterate, to assess the net present value of the Viterra Practices, Potter calculated the value of Joe White taking account of the Viterra Practices and deducted this from the value absent the Viterra Practices.[3557] As part of this exercise, Potter used the same discount rate, 8.75 percent, for both his assessment of the value of Joe White absent and taking account of the Viterra Practices.

4250 How Potter arrived at 8.75 was not properly explained.[3558] In circumstances where he was working from the Cargill deal model in valuing Joe White without the Viterra Practices and accepted the discount rate Cargill had used, and he did not know the amount of the relevant components that made up the rate in that model, there was no proper explanation as to why the different rate was applied.[3559] Further, by way of general observation, the appropriateness of a discount rate of 8.75 percent must be seriously doubted when to apply such a rate to the projected cash flows in the Cargill deal model resulted in a notional value of $621 million; a figure that bore no resemblance to reality. Further, it is noteworthy that no other expert at trial or analyst in 2013 adopted a discount rate at or near 8.75 percent.[3560] Indeed, in Potter's second report where he set out his opinion regarding the true value of Joe White using

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3556 See pars 4090, 4114, 4137, 4160 above.

3557 See pars 3974-3975 above.

3558 Potter assumed a rate of 10.55 percent for the cost of equity and a rate of 4.55 percent for the cost of debt, with a debt to equity ratio of 30 percent.

3559 In his first report, Potter explained why he chose the rates he did for the risk free rate, the market risk premium, the beta, the small company premium, the cost of debt and the corporate tax rate, but these explanations did not grapple with why there was a need to depart from the rate used in the Cargill deal model given that he had accepted that was the appropriate discount rate for the purpose of ascertaining the true value of Joe White absent the Viterra Practices.

3560 Meredith used a discount rate of 10.2 percent or 10.3 percent (being his assessment of the weighted average cost of capital), which included a risk premium of 2.5 percent for the size and company-specific risks. For completeness, Cargill did use a rate of 8 percent for its best case model, which was not used by Cargill for the purpose of valuing Joe White.

forecasts created a year after the Acquisition as a proxy for forecasts of a hypothetical purchaser in October 2013 with knowledge of the Viterra Practices, Potter himself chose to use the discount rate from the Cargill deal model rather than 8.75 percent or some other rate.

4251 Speaking broadly, in relation to his adoption of the discounted cash flow method, Potter's general approach involved a mismatch in discount rates, the absence of an attempt to value Joe White as a whole on the basis that the Viterra Practices had been disclosed, and a failure to address risk properly in the discount rate chosen for his calculations using the discounted cash flow method. In short, in addition to further matters discussed below, Potter's approach to the discounted cash flow assessment of value did not provide a sound basis to ascertain the true value of Joe White (either on its own or in combination with the capitalised maintainable earnings approach).

X.73.12 Transaction and integration costs

4252 This issue has largely been resolved. The experts (and the parties) were in agreement that transaction costs should not form part of the valuation exercise in obtaining the true value of Joe White, and the issue of integration costs has already largely been dealt with in addressing synergies.[3561] However, the submissions will be addressed briefly, as there was a level of controversy concerning transaction costs before the ultimate position was reached.

X.73.12.1 Klein's approach

4253 In Klein's first report, he included transaction and integration costs totalling $22.7 million in 2014 and approximately $2.8 million for each year thereafter. Klein later updated his calculations to exclude transaction costs, which were approximately $20 million of the total transaction and integration costs.

X.73.12.1.1 The Cargill Parties' submissions

4254 The Cargill Parties submitted that Klein accepted that he was in error on the issue and corrected for this factor.

3561 See par 4194 above.

X.73.12.1.2 The Viterra Parties' submissions

4255 The Viterra Parties accepted that Klein was correct to acknowledge the error but submitted that Klein's explanation for retrospectively excluding transaction costs was not credible. In cross-examination, Klein stated that "once [he] noticed [transaction costs] had been embedded within certain numbers and Potter pointed that out, [he] agreed with [Potter] and [he] removed it". However, it was submitted, correctly, that Klein's initial valuation had specifically identified "transaction and integration costs" as a line item. Further, they pointed out that, in the first joint report submitted by the experts, there was a question specifically about whether to exclude transaction and integration costs. They submitted that Klein had maintained they should be included.[3562] Under cross-examination he admitted as much.

4256 Further, it was submitted that Klein's credibility was undermined as he contradicted himself by initially denying that the inclusion of transaction costs was intentional, and only later admitted that it was deliberate, albeit a mistaken application of principles. Initially, Klein denied that he had changed his position, claiming in cross-examination that he "didn't know that number was included and when [he] noticed it, [he] corrected that mistake". It was submitted that Klein continued to maintain that he had not noticed that the data included transaction costs. However, subsequently, when Klein was taken to his comments about transaction costs in the first joint report,[3563] it was submitted that Klein accepted that his initial inclusion of transaction costs had nothing to do with him not having noticed them in the data. Instead, it was submitted that he acknowledged that he had ultimately changed his position.

4257 Without going into the minutiae, these submissions fairly summarise what occurred. It was not until well after the first expert conclave was completed that Klein changed his position and, to use his words, decided to "offer it up" when the next conclave was

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3562 In the report, Klein stated that he had assumed the transaction and integration costs in the Goldman Sachs report without making any suggestion that such an assumption needed to be qualified in any way.

3563 See par 4255 above.

held in December 2018.[3564]

4258 Furthermore, the Viterra Parties submitted that even though Klein eventually removed transaction costs, he continued to include integration costs of $2.3 million in 2014 and about $2.8 million per year thereafter. It was submitted that it was unclear why Klein incorporated integration costs for financial years 2015 to 2019 that were significantly higher than what he assessed as being the common dis-synergies in those years.

X.73.12.2 Potter's approach

4259 Potter excluded transaction and integration costs from his valuation. He said he did so in accordance with the International Valuation Standards. Potter explained the standards provided that "[m]ost bases of value represent the estimated exchange price of an asset without regard to the seller's costs of sale or the buyer's cost of purchase and without any adjustment for taxes payable by either party as a direct result of the transaction."[3565]

X.73.12.2.1 The Viterra Parties' submissions

4260 The Viterra Parties submitted that Potter's approach was in accordance with standard valuation practice and should be accepted.

X.73.12.2.2 The Cargill Parties' submissions

4261 In their closing submissions, the Cargill Parties did not address Potter's treatment of transaction and integration costs, save for their submission that Klein accepted he was in error with regard to transaction costs and corrected for this error.

X.73.12.3 Analysis

X.73.12.3.1 Klein's approach

4262 Both experts agreed that pursuant to international valuation standards the transaction

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3564 The Viterra Parties sought to attack Klein's credit based on his initial account of what occurred in relation to transaction costs being removed from his modelling with the evidence he ultimately gave. There could be no question that Klein's explanation shifted during his cross-examination, but this occurred as further facts were pointed out to him and his memory was refreshed. In a case of this size, on such a relatively minor matter, it was far from surprising that Klein could not precisely recall what occurred in mid and late 2018 when giving his evidence in May 2019. Considering Klein's evidence as a whole, there was no real basis to conclude anything other than Klein was trying to give his evidence as an independent expert to the best of his ability, and that he was frank and honest witness.

3565 International Valuation Standards 2017, IVS 104, 28, [210.1].

costs were not to be included in the true value of Joe White. Whilst this may not have been Klein's initial position, he ultimately agreed with Potter and revised his calculations.

4263 On this issue, the evidence of Klein was somewhat confusing. He stated categorically under cross-examination that he contemplated integration costs as being a dis-synergy, but also stated he "fully excluded it from [his] calculation". He expressed a desire to show why that was so while under cross-examination, but was not given the opportunity to do so. This evidence was confusing because both in his calculations of Common Synergies and in his final calculations of value (both in his first report and as revised as part of the December 2018 joint expert report) integration costs were expressly included. Further, as the Viterra Parties noted, Klein included integration costs that were different from the integration costs estimated in Klein's synergy and dis-synergy analysis. It was unclear why Klein included additional integration costs that exceeded the integration costs already accounted for in calculating the net synergies.[3566] This issue was not addressed by the Cargill Parties in closing submissions.

4264 Without further explanation by Klein of what these assumed integration costs included, there was no proper basis to conclude that it would be likely that a hypothetical purchaser would adopt all the integration costs adopted by Klein. Further, it appears inappropriate to include integration costs as an independent line item as well as reducing the net value of synergies on this account, because without further detail this appears to give rise to the risk of double counting. Furthermore, although there may be no correlation between dis-synergies and integration costs on an ongoing basis, based on valuation principles, I cannot be satisfied $2.8 million from 2015 onwards was the appropriate figure. Therefore, based on the manner in which this issue was addressed, the court cannot be satisfied that integration costs, beyond those that might have been incorporated by way of common dis-synergies,[3567] ought

3566 See par 4167 above.
3567 See pars 4195, 4202 above.

to be included in ascertaining the true value of Joe White.

X.73.12.3.2 Potter's approach

4265 The effect of the above analysis is that Potter's approach of excluding transaction and integration costs ought to be accepted as the appropriate approach on this issue, save for any component of integration costs captured by dis-synergies.

X.73.13 The Co-Operative Bulk dispute

4266 As noted in issues 61 to 64 above, the allegations concerning Co-Operative Bulk were ultimately not pressed by the Cargill Parties in closing submissions. Neither Potter nor Meredith considered the matter. Potter was not instructed to do so, and Meredith also stated his reasons for not doing so. As a result, they made no adjustment in relation to the Co-Operative Bulk dispute.

4267 Thus, the only expert to meaningfully consider the matter was Klein. Klein took into account the amount actually paid by Cargill Australia to settle the dispute and assumed, based on his instructions at the time, that the amount paid, being $2.18 million, represented a loss to Joe White. As this has not been established on the evidence, it is unnecessary to consider this matter further.[3568]

X.73.14 What conclusions should be drawn in respect of Potter's valuation of Joe White in his second report?

4268 Potter explained that the valuation in his second report was an illustrative example of the value of Joe White using a discounted cash flow methodology and adopting the forecasts contained in Cargill's commitment report that was prepared in October or November 2014, approximately a year after the Acquisition.[3569] Although the forecasts used obviously consisted of post-Acquisition information, Potter referred to these forecasts as a proxy for what a hypothetical purchaser would have expected once it had known of the Viterra Practices. In this report, Potter evaluated the true value of

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3568 For completeness, it should be noted that the Cargill Parties made no substantive closing submissions in support of this aspect of Klein's valuation.

3569 See par 1784 above.

Joe White as $372.8 million.[3570]

4269 The report was not intended to be a proper valuation. It was not in accordance with valuation standards, and nor did Potter consider the methodology satisfactory. Accordingly, he did not advocate that the valuations contained in his second report were the valuations the court should principally rely upon. Indeed, his position was that he considered reliance upon the 2014 commitment review unsuitable as it was potentially bringing into account extrinsic factors that occurred after Acquisition.[3571]

4270 Potter considered that his second report confirmed the range of his assessed value of the impact of the Viterra Practices.[3572] Further, Potter concluded that Meredith and Klein's assessment of true value relied on assumptions that were materially less favourable than those that Cargill itself utilised in its forecasts 12 months post-Acquisition, with knowledge of the Viterra Practices.

4271 In his second report, Potter concluded that:

(1) It was inappropriate for Meredith to have relied on Joe White's actual sales as a proxy for the sales that would have been expected by a hypothetical purchaser.

(2) It was inappropriate for Klein to have relied on Joe White's actual sales as support for the lower level of sales that a hypothetical purchaser would forecast.

4272 Potter considered that if the court were to find that post-Acquisition information was appropriate in valuing Joe White, then the forecast contained in the 2014 commitment report provided more appropriate assumptions. Further, by reference to the additional materials available in the first year after Completion,[3573] Potter suggested there were numerous reasons to explain the shortfall in sales that were independent

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3570 This figure included rectifying capital expenditure; the amount was $396 million excluding rectifying capital expenditure.

3571 His evidence in re-examination was that this was the only reason it was unsatisfactory.

3572 Potter considered that a year post-Acquisition, Cargill, with knowledge of the Viterra Practices, would have included the anticipated impact of such practices within their forecasts.

3573 Potter did not consider the 2015 or 2016 commitment reports as part of this exercise.

of and unrelated to the Viterra Practices. These were said to include:

(1) Environmental factors that resulted in poor barley crop in 2015, which in turn affected the availability and quality of the supply of malt by Joe White.[3574]

(2) Farmers electing to grow types of barley that were unsuitable for Joe White's purposes.

(3) A surplus in global malt supply.

(4) Increased market competition from Europe and China.

(5) Cargill ignoring the cyclical nature of the barley malt industries in Australia when preparing its original forecasts in Cargill's deal model.

(6) The shutdown of the Cavan facility as a result of a silo collapse.[3575]

(7) Cargill's application of its own policies with respect to Certificates of Analysis "to the extent that Cargill's [policy] was higher than industry standards or what was represented by [Joe White]".

(8) Cargill's application of its own [Certificate of Analysis policy] "possibly causing derogations and loss of sales and customers".[3576]

X.73.14.1 The Viterra Parties' submissions

4273 The Viterra Parties submitted that the court should draw the following conclusions from Potter's valuation in his second report:[3577]

(1) The second report corroborated the valuations made in his first report.

(2) The second report represented the lowest possible true value of Joe

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3574 This evidence was not given on the basis that it was relevant to the forecast used that was prepared in 2014, but rather in response to Meredith's reliance on post-Completion events.

3575 In fact, this did not occur until March 2015 and there was no evidence to suggest that the collapse was foreshadowed in any way: see par 1796 above.

3576 The documents relied upon by Potter in forming these views were set out in his report.

3577 The Viterra Parties accepted that certain parts of the report could be disregarded, particularly in light of the Cargill Parties' decision to rely on Klein's assessment rather than Meredith's.

White at the time of Acquisition, on the basis that removal of any extraneous causes of decline in value in the first year after the Acquisition would have had the effect of increasing the true value of Joe White.

4274 The Viterra Parties noted that Potter's value in his second report was materially higher than any of the assessments undertaken by the other experts.

4275 Further, to elaborate on the second point above, the Viterra Parties submitted that whilst the valuation in Potter's second report brought into account some extrinsic factors that occurred post-Acquisition, it was apparent that there were many extraneous causes of decline in value. It was submitted that the effect of removing those extraneous factors would be Potter arriving at a higher true value of Joe White.

4276 Furthermore, the Viterra Parties submitted that the fact that the forecasts in the 2014 commitment report later proved to be inaccurate illustrated the significant impact that extraneous factors had on Joe White in the subsequent years. It was submitted that the forecasts were not unreliable at the time they were prepared and the information contained within the report was not unreliable simply because the forecasts were subsequently proved to be inaccurate.

4277 Finally, the Viterra Parties rejected the Cargill Parties' submission that Potter relied on a line item called "other BU synergies after tax", representing synergies of other business units after tax, in the commitment report.[3578] It was submitted that the Cargill Parties had confused Potter's reliance on a different line item "BU EBITDA",[3579] representing business units' Unadjusted Earnings, and he had not included synergies of other business units after tax in his report. Further, it was submitted that had Potter included synergies of other business units after tax, his valuation would have been higher.

X.73.14.2 The Cargill Parties' submissions

4278 The Cargill Parties submitted that Potter's second report ought to be disregarded

3578 See pars 4281(3), 4284 below.

3579 EBITDA stands for earnings before interest, tax, depreciation and amortisation.

completely.

4279 The Cargill Parties submitted that, by Potter's own assessment, the valuation in his second report was:

(1) Intended to be illustrative only.

(2) Not consistent or in accordance with international valuation standards.

(3) Not a suitable or satisfactory valuation methodology. It was flawed both for using hindsight impermissibly and for taking a document prepared a year after the sale and pretending it was a suitable proxy for a hypothetical purchaser.

4280 The Cargill Parties submitted there were further reasons why Potter's second report was not useful.

4281 *First,* the assumptions underpinning the 2014 commitment report's cash flow forecasts were unknown and the forecasts were proven to be significantly inaccurate compared with the actual results, based on the following:

(1) Potter mostly agreed with Klein's assessed future cash flow, whereas Cargill's 2014 commitment report was nowhere near the expert's detailed assessments, and in any event the relevant assumptions were unexplained.

(2) It was unclear if and how the commitment reports were being adjusted year on year by Cargill.

(3) The forecasts included, and Potter relied upon, a line item for synergies of other business units after tax, notwithstanding the fact that Unique Synergies of Cargill said nothing about market value.

(4) Cargill's later forecasts in the 2015 and 2016 commitment reports discredited the 2014 commitment report's forecasts.

(5) The 2014 commitment report forecasts were a long way off the actual results. Potter agreed that the 2014 forecasts were inaccurate and accepted that he was concerned about the reliability of the forecasts.

(6) Accordingly, evaluated in a multitude of different ways the forecasts were unreliable in estimating true value.

In short, it was submitted it was likely that in late 2014 Cargill underestimated the ongoing impact of ceasing the Viterra Practices.

4282 *Secondly,* market value is limited to knowledge at valuation date and therefore use of the 2014 commitment report forecast of cash flows from a year post-Acquisition was impermissible. The information was not known or knowable at the time of the Acquisition. Further, Potter's use of post-Acquisition information conflicted with valuation standards and Potter's position regarding the use of hindsight in determining market value.

4283 *Thirdly,* even if Potter was attempting to use hindsight to determine true value, the use of the 2014 commitment report forecast cash flow was illogical and unsound, because:

(1) Cargill was unable to accurately incorporate the effect of the Viterra Practices in their cash flow forecasts in the first year post-Acquisition. In particular, the comments in later commitment reports suggested that the effect of the Viterra Practices continued beyond the first 12 months.

(2) If the assessment of true value required the adoption of hindsight, regard should be had beyond the first 12 months post-Acquisition.

(3) The post-Acquisition Unadjusted Earnings adopted by Potter did not appropriately account for the ongoing risks of the Viterra Practices.

4284 *Fourthly,* it was inappropriate to use a forecast reflecting Cargill's synergies given that Cargill would not have been a bidder.

4285 *Fifthly,* Potter's approach set out in his first report demonstrated that the forecast in his second report was inappropriate, illustrated by the following:

(1) If Potter's capitalised maintainable earnings approach from his first report was applied to future maintainable earnings based on the financial years 2012 to 2014, with Potter's or Klein's multiples of 11.3 or 8,[3580] respectively, the value would be $235 million to $171 million.

(2) If Potter's capitalised maintainable earnings approach were applied to future maintainable earnings based on financial years 2014 to 2016, with the same multiples, the value would be $75 million to $55 million.

4286 *Sixthly,* Potter's use of Cargill's discount rate of 10 percent "back-solved" to 10.97 percent was inappropriate, given that the riskiness of the cash flow eventuating in Cargill's 2014 commitment report was far greater than the riskiness Cargill assessed in its deal model, demonstrated by the variance in the forecast and actual results.

X.73.14.3 Analysis

4287 As Potter himself acknowledged, his second report was of limited relevance. This acknowledgement was made at a time during the trial when Cargill was seeking to

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3580 In Klein's supplemental report he explained why he considered a multiple of 6 the most appropriate, but "conservatively" adopted an earnings multiple of 8 as being more appropriate than Potter's multiple of 11.3. In Potter choosing 11.3 as the appropriate multiple, he referred to transactions involving "grain companies" from March 1999 to October 2012 with sales prices ranging from $10 million to $9.835 billion, which provided an average multiple of 12.1 percent, a median multiple of 9.7 percent and an average multiple for malt transactions of 10.1 percent. However, he concluded that it was not possible to identify any particular trends and decided not to analyse the data to ascertain the relevant effects. He further observed that his analysis in arriving at 11.3 involved businesses for which synergies were identified as part of the transaction. Notably, of the 6 transactions Potter referred to in arriving at a multiple of 11.3, 5 had reported synergies in the range of 22.5 percent to 54.9 percent as a percentage of Unadjusted Earnings (being earnings before interest, tax, depreciation and amortisation). The sixth transaction with reported synergies of 289.9 percent which used a multiple of 23.8 times Unadjusted Earnings was excluded in deriving the 11.3 multiple. Based on these 5 transactions (4 of which were in Australia), a multiple of 11.3 seemed too high given there was no suggestion of any significant concerns with the respective businesses such as the existence of the Viterra Practices. In any event, Potter concluded by stating that he had had regard to the various matters he had raised and considered a high level of expected synergies for Cargill of approximately 35 percent meant that the appropriate multiple to value Joe White was higher than that which he had observed in the identified comparable transactions. Potter acknowledged a number of limitations that confronted him in seeking to ascertain an appropriate multiple. Klein also made a large number of criticisms of Potter's choice of multiple in the first joint expert report and in his supplementary report. It is unnecessary to refer to these matters.

rely on the evidence of both of the experts it called. A large aspect of the second report was to address Meredith's approach of using the details of actual sales after the Acquisition as a reliable proxy.[3581] As the Cargill Parties withdrew any support for such an approach, much of whatever relevance there may have been in Potter's second report dissipated. Further, Potter was acting on specific instructions in undertaking the exercise that he did in the second report. As he readily acknowledged, the basis of the report did not accord with the relevant principles applicable to determining the true value of a business. Accordingly, the conclusions expressed in it concerning true value cannot be given any real weight.

4288 Even if it were permissible to rely on subsequent performance and to use it as *the* basis of cash flows and risk in assessing true value, Potter's use of the commitment report prepared a year after Acquisition was inappropriate. The forecasts contained in this commitment report were merely a point in time estimate by Cargill and not indicative of the ultimate position of Joe White. They were made a year post-Acquisition, before the full impact of the Viterra Practices had been realised. Further, the actual results and subsequent commitment reports materially differed from this early forecast. Whilst this does not mean that the forecast was necessarily unreliable at the time it was prepared, it obviously demonstrated that the forecast was an inaccurate prediction of what subsequently occurred. In other words, if it were permissible to use hindsight, then properly informed hindsight would be a far more appropriate touchstone than relying on information that was opaque as to its compilation and turned out to be substantially inaccurate.

4289 The contention that the 2014 commitment report was the most accurate reflection of the value of the impact of the Viterra Practices independent of extrinsic factors, requires hindsight to be considered with extreme caution. It would be inappropriate simply to rely on an estimated forecast at an earlier point in time merely because it was less impacted by extrinsic events. In this instance, especially given the interplay

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3581 This is to be contrasted with Klein, who referred to the actual decline in sales as a means of checking the assumptions that he considered a hypothetical purchaser would make (albeit this was also the subject of comment in Potter's second report: see par 4271(2) above).

of some extraneous factors, post-Acquisition information in the 2014 commitment report was not a means to obtain a useful proxy for assumptions that would be made by a hypothetical purchaser in establishing Joe White's value.

4290 Given the conclusion reached, it is unnecessary to go through the individual matters raised by the Cargill Parties. Suffice to say, most of the criticisms made were warranted and provided further reasons as to the lack of soundness in adopting Potter's second report as the means of ascertaining the true value of Joe White.

X.73.15 What conclusions should be drawn in respect of Potter's valuation of Joe White at the time of sale of Cargill's global malt business in his third report (insofar as it might be relevant to the true value of Joe White at the time of the Acquisition)?

4291 Cargill entered into a final sale agreement to sell its global malt business including Joe White on 23 April 2019, and Potter used the sale price of Cargill Malt as a basis for assessing a value for Joe White.[3582] In Potter's third report, dated 29 April 2019, he determined Joe White's market value on the basis of allocating a portion of the sale price of Cargill Malt.

4292 In order to do this, Potter calculated the market value of each of the 4 regions. Interestingly, Potter's valuations of each region both individually and collectively were greater than the amounts paid; so that for a sale price of US$847 million, Potter valued Cargill Malt in total at US$1,116.8 million. The value of the Asia-Pacific region was estimated as representing 34.7 percent, being the largest allocation to any region.[3583]

4293 Thus for a region allocated a price of US$293.6 million out of a total of US$847 million, Potter valued the Asia-Pacific region at US$387.1 million (nearly US$100 million more

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3582 As may be seen from par 1846 above, the final allocation did not occur until after Potter had given his evidence.

3583 This compared with 22.2 percent that had been allocated (based on the 2018 Unadjusted Earnings figure for each region) by the parties to the sale at the time of Potter giving his evidence, which accorded with the final allocation: see par 1846 above.

than what had been agreed).

4294 In any event, using the respective percentages and valuations, Potter then allocated a sale price to each in United States dollars. After converting that amount (US$293.6 million) to Australian dollars, he calculated that the value attained by Cargill in relation to the sale of Joe White was $410.1 million (representing 99 percent of the value attributable to the Asia-Pacific region). It must be noted that Potter's valuation of Joe White was nearly $150 million more than the price allocated as part of the resale.[3584] Potter then arrived at a total assessed value of $450 million for Joe White by adding the value he stated ownership of Joe White contributed to the total sale price of Cargill Malt.[3585]

X.73.15.1 The Viterra Parties' submissions

4295 The Viterra Parties submitted that Potter's assessment of the amount received by Cargill for Joe White as part of the sale of Cargill Malt was not only relevant to the left in hands approach.[3586] They submitted this assessment was also relevant to the question of true value at the time of Acquisition in the sense that it corroborated the values assessed by Potter in his first and second reports. In particular, it was submitted that the values in Potter's third report confirmed his earlier assessment of the effect of the Viterra Practices and his assumption regarding the temporary effect of the practices.

4296 Further, the Viterra Parties submitted that if the court did not accept Potter's initial valuation, then this third report could be relied on as another piece of evidence as to the value of Joe White at the time of Acquisition. The Viterra Parties acknowledged that Potter said that in his opinion, assuming 1 of the scenarios in his first report was

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3584 Using the same exchange rate used by Potter, the amount of $410.1 million compares with $263.13 million (being the equivalent of US$188.3 million) actually allocated for Joe White as part of the resale.

3585 Potter calculated that relative to the sale price, Joe White was valued at $410 million and that an additional $39.7 million of value was obtained by virtue of including Joe White within the sale of Cargill Malt, representing a total assessed value of $450 million: see further par 4317 below. In light of the conclusion on this point, it is unnecessary to consider whether the alleged additional amount of $39.7 million in value was a benefit Cargill Australia (as opposed to some other entity in the Cargill group) received or ought to have been taken into account in assessing Cargill Australia's loss.

3586 See pars 4314-4320 below.

correct, then the true value was the value generated in his first report rather than his second report. Therefore, the Viterra Parties submitted that Potter's first report was to be preferred above his second report, if it were determined that Joe White was to be valued at the time of Acquisition. However, Potter's third report was to be preferred if Joe White was to be valued at the time of resale.[3587]

4297 Furthermore, it was submitted that the numerous extrinsic factors affecting the Joe White Business post-Acquisition were likely to have a negative effect on the value of Joe White. Therefore, it was submitted that the relevant value left in Cargill's hands showed the third report corroborated Potter's assessment in his first report and significantly contradicted Klein's (and Meredith's) valuation(s).

X.73.15.2 The Cargill Parties' submissions

4298 The Cargill Parties submitted that the court should completely disregard Potter's valuation of Joe White at the time of the sale of Cargill Malt. It was submitted that it was not a valuation of Joe White. The sale of Cargill Malt did not contain a sale price (as opposed to an allocation) for the Australian asset. Further, it was submitted that the left in hands approach was inappropriate because in 2013 Cargill was not locked in but chose to keep Joe White. Furthermore, it was contended there was no occasion to value Joe White at a later date and the fact that it had been sold did not alter this.

4299 The Cargill Parties contended Potter's methodology was unsatisfactory for the following reasons:

(1) The value of Joe White when Cargill Malt was sold said nothing useful about the value of Joe White in October 2013. Post-Acquisition, Cargill operated the business, changing its nature for over 5 years.[3588]

(2) A suggestion that the later time value could inform the assessment on the valuation date of 31 October 2013 would be inconsistent with Potter's

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3587 When Potter was asked which was his preferred methodology, he replied that his scenario approach in his first report was his preferred methodology to arrive at the true value: see fn 3307 above.

3588 The period of 5 years was based on the fact that an initial conditional sale of Cargill Malt was entered into in December 2018.

earlier statements eschewing hindsight in determining true value.[3589]

(3) Even if the allocation of value was relevant, Potter's allocation of value was not of Joe White "today". When Potter was asked what he was intending to ascertain, he said he was seeking to undertake a proper allocation of Cargill Malt's sale price, but he accepted that what he assessed was not the allocation of the vendor or of the purchaser under the contract.[3590]

(4) Potter's method of allocating value to Joe White lacked credence given its sensitivity to a particular inflation integer contained in the terminal multiple.[3591] As Potter accepted during cross-examination, if the projected inflation rate were reduced from 4 percent to 2.6 percent and no other alterations were made, Joe White's value would fall from $385 million to approximately $270 million.

X.73.15.3 Analysis

4300 Potter's third report did not assist the court to determine the true value of Joe White at 31 October 2013. To the extent that subsequent events are relevant to illuminating the true value of Joe White at the time of Acquisition,[3592] Potter's treatment of the sale

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3589 Under cross-examination, Potter accepted knowing the value of Joe White 5 years after Acquisition would not assist in assessing its value in October 2013. In an earlier answer to a question on this topic, Potter accepted it was not a proxy for the position in 2013 but also stated that he considered it helpful because it suggested that the Joe White Business had recovered from its value in 2013 "if it was a damaged business", and in so deposing also stated that it was consistent with Klein's modelling of a decline in sales and then a recovery.

3590 The Cargill Parties clarified that this submission was not to suggest that the appropriate thing to do would be to deal with the allocation in the contract rather than something else.

3591 Potter converted United States dollars to Australian dollars and assessed the Asia-Pacific region at $387.1 million, of which $385.7 million was the calculation of present value of terminal period cash flows. The present value of terminal period cash flows was calculated using the present value of free cash flows ($10 million) divided by the difference between the discount rate (6.6 percent) and the projected inflation rate (4 percent, which was made up of an inflation rate of 3.5 percent and 0.5 percent for expected growth in Unadjusted Earnings). The projected cash flows for 2019 to 2023 contributed only $1.4 million to Potter's assessment of value, bringing the present value of the regional unit to $387.1 million. In response to the Cargill Parties' criticisms, the Viterra Parties submitted that the Cargill Parties had not adduced evidence from their own expert contradicting Potter's opinions or the inputs used, they had only put to him that terminal growth rate figure was sensitive. Further, they submitted that there was no basis that the projected inflation figure could be as low as 2.6 percent. The Viterra Parties submitted that using a terminal growth rate figure that applied in 2023 was an accepted valuation methodology.

3592 See par 3919 above.

of Cargill Malt did not assist in any meaningful way in checking relevant assumptions for a 2013 assessment, as Potter himself readily acknowledged.

4301 When Cargill Malt was sold, Joe White had been owned by Cargill Australia for over 5 years. During this period there had been numerous extrinsic factors that impacted the value of Joe White, including both market factors and changes made to Joe White under the control of Cargill. Supervening events should not be taken into account in assessing true value.[3593] Given that supervening events were embedded within the value at the time at which Joe White was sold (and accounted for by Potter),[3594] it was inappropriate to consider that value when determining true value or using the information as some method of checking the reasonableness of the assumptions that would have been made by a hypothetical purchaser in 2013. Further, it was irrelevant whether Potter's determination of Joe White's value as a result of the sale of Cargill Malt was similar to his valuation in his first report, because the later "valuation" did not reflect or have any real connection with the true value at the time of Acquisition.

X.73.16 What was the true value of Joe White at the time of the Acquisition?

4302 Broadly speaking, for the reasons set out above, Klein's strategic bidder valuation of Joe White as at 31 October 2013, subject to certain necessary re-calculations, provided the appropriate method of establishing the true value of Joe White.[3595]

4303 As a result of the findings made, the following adjustments are necessary to Klein's strategic bidder valuation:

(1) A reduction in dis-synergies by $7.2 million, resulting in $2.4 million of dis-synergies, being 25 percent of $9.6 million, as not all strategic bidders

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3593 See par 3920 above.

3594 There was no attempt by any party to definitively and exhaustively identify every factor impacting the Joe White Business between 31 October 2013 and December 2018, and then seek to establish whether such factors were extrinsic or intrinsic.

3595 Given the fundamental difficulties with some aspects of Potter's capitalisation of maintainable earnings approach and that no other expert sought to use this method of valuation, on the evidence before the court it is appropriate to confine the assessment of the true value of Joe White as at 31 October 2013 to the discounted cash flow method.

would have incurred dis-synergies at the same level as forecast for Cargill.[3596]

(2) A lower discount rate of 13.7 percent.[3597]

(3) Removal of the additional line item for integration costs,[3598] being $2.3 million in 2014 and $2.8 million per year thereafter.[3599]

(4) Removal of $2.18 million on account of the dispute with Co-Operative Bulk.[3600]

4304 Klein's valuation, subject to these adjustments, provides the true value of Joe White at the time of Acquisition.

4305 A further observation should be made about the approach taken in assessing the true value. There was no dispute that Joe White as a going concern was a business that was valuable and was capable of generating profits based on Unadjusted Earnings. It was common ground that, given Joe White was operating as a going concern, a valuation based on net realisable value of Joe White's assets was not appropriate. However, the value as at 31 October 2013 of the land and buildings, together with plant and equipment, being $63.2 million and $174.8 million respectively, must have provided a floor on any estimate of value of Joe White as these amounts were realisable regardless of the state of the Joe White Business itself.

X.73.17 What conclusions should be drawn from the valuation of Joe White by Potter in his third report and any other evidence as to the value of Joe White at the time of sale of Cargill's global malt business or judgment?

4306 Potter concluded that Joe White's sale price was $410.1 million, as a proportion of the total sale price of Cargill Malt.[3601] On that basis Potter concluded that Cargill had

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3596 See par 4202 above.
3597 See par 4239 above.
3598 See par 4263 above.
3599 See par 4258 above.
3600 See pars 4266-4267 above.
3601 See pars 4291-4294 above.

$410.1 million left in hands, which was a benefit that Cargill would not have had if it had not acquired Joe White.

X.73.17.1 The Viterra Parties' submissions

4307 The Viterra Parties submitted that the sale of Joe White was relevant to an assessment of loss on the basis of the left in hands approach. Further, it was submitted that the value received was also relevant for the purpose of any other approach to assessment, given that it was a benefit that Cargill would not have obtained had Cargill not acquired Joe White.

4308 It was submitted that Potter never indicated a preference for valuing Joe White in accordance with his first report, which valued Joe White at the time of Acquisition, as opposed to valuing it as at the time of sale of Cargill Malt.[3602]

4309 Further, the Viterra Parties submitted that the court should accept Potter's assessment of the value of Joe White at the time of sale of Cargill Malt given that the Cargill Parties did not adduce any of their own expert evidence and did not adequately challenge Potter's valuation. It was submitted that the Cargill Parties' submissions on the sensitivities of particular integers[3603] lacked merit in the absence of any evidence that demonstrated that Potter's methodology or the integers adopted were incorrect.

4310 The Viterra Parties submitted that it was irrelevant to the question of what loss Cargill suffered whether or not Potter included synergies for which the purchaser paid into his assessment in his third report. It was submitted that even if the payments for the purchaser's synergies were not treated as part of the Joe White Business, they were a separate benefit which Cargill acquired as a consequence of the Acquisition and received as a consequence of selling Joe White.

4311 As an aside, the Viterra Parties submitted that Cargill had constantly contested and resisted providing the Viterra Parties access to documents relevant to the sale of

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3602 The Viterra Parties submitted that Potter said that assuming 1 of the scenarios in his first report was correct, the true value was the value generated in his first report rather than in his second report and that the scenario approach was his preferred method to arrive at the true value. It was submitted that this did not amount to an indication of preference of his first report as opposed to calculating the value of Joe White at the time of the sale of Cargill Malt: see fn 3307 above.

3603 See par 4299(4) above.

Cargill Malt, together with delaying the details of region allocations without explanation, which they contended was entirely unsatisfactory. However, as the final allocation was the subject of evidence in November 2019, these matters need not be considered further.

X.73.17.2 The Cargill Parties' submissions

4312 The Cargill Parties' relied on their submissions as set out above.[3604]

X.73.17.3 Analysis

4313 In the circumstances of this case, a valuation of Joe White at the time of the sale of Cargill Malt did not assist in the assessment of loss.[3605] Even if Potter's approach to valuing Joe White in 2019 were accepted as fair,[3606] the lapse of time and the myriad of extrinsic or potentially extrinsic factors made it impossible to draw any sensible conclusions about true value in 2013 or benefits being derived in any relevant sense. Further, these matters also made it completely inapposite for a left in hands approach to be taken in assessing loss. Accordingly, there is no need to discuss any further Potter's allocation of value attributable to Joe White.

X.73.18 What conclusions should be drawn from Potter's third report and any other evidence as to what other benefits Cargill obtained as a consequence of the Acquisition of Joe White and the value of those benefits?

4314 This question has essentially been addressed in answering the previous question. However, in deference to the submissions made, a short account of the points raised follows.

4315 Potter's third report identified the following benefits he suggested were obtained by Cargill as a consequence of owning Joe White:

(1) An additional $39.7 million added to the sale price for Cargill Malt through the inclusion of Joe White in addition to the $410.1 million for

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3604 See pars 4298-4299 above.
3605 See pars 3935-3939 above.
3606 This would not have been a conclusion I would have reached for various reasons.

Joe White.

(2) Benefits of $70.9 million in financial years 2014 to 2019.[3607]

(3) An unknown amount for adjustment to the cash free, debt free price obtained from the sale of Cargill Malt in the form of working capital.

(4) An unknown amount of value obtained by other Cargill entities due to Cargill Australia owning Joe White.

(5) An unknown amount of sales to Joe White customers from other Cargill plants.

X.73.18.1 The Viterra Parties' submissions

4316 The Viterra Parties submitted that the benefits received by Cargill as a consequence of acquiring Joe White were relevant to an assessment of loss on the basis of the left in hands approach or otherwise. It was submitted that had Cargill not acquired Joe White, it would not have obtained the abovementioned benefits and therefore those benefits needed to be accounted for in order to avoid overcompensating Cargill.

4317 It was submitted that the amount of an additional $39.7 million to the sale price was likely to be understated because it did not necessarily include the value that would be attributed to an organisation with a complete global footprint, including for the reason that additional value could be attributed to a company with primary operations in Asia (being a higher growth region). Further, the Viterra Parties submitted that even though Potter did not quantify the value obtained by other Cargill entities, there were benefits realised by other parts of Cargill, including the grain and oilseeds supply chain. Furthermore, for the payment of an additional $15 million Cargill obtained a benefit in the form of an agreement from the Viterra Parties regarding key terms of the Acquisition Agreement, including the final form of the Warranties, and the benefit of those terms was not a component of the purchase price that Cargill lost as a result

3607 This was said to consist of $48.8 million in profits (being Joe White's 99 percent share of $49.33 million for the Asia-Pacific region (1 percent was allocated to Japan), taking into account "over-allocated corporate costs" of $22.1 million).

of its claims.[3608]

4318 The Viterra Parties also noted that Potter did not attribute any benefits in respect of synergies. However, the Viterra Parties submitted that the Cargill Parties failed to adduce evidence establishing the proportion of estimated synergies that was acquired for the benefit of Cargill Australia and what proportion was acquired for the benefit of other Cargill entities. Accordingly, it was submitted that it could not be said on the evidence that Cargill Australia suffered any loss by reason of a synergy that was forecast to be earned by some other entity within the group, therefore it was irrelevant if that synergy was realised or not.

X.73.18.2 The Cargill Parties' submissions

4319 The Cargill Parties again relied on their submissions above.[3609]

X.73.18.3 Analysis

4320 Leaving aside the distinction between Cargill Australia and Cargill, Inc (or other companies in the Cargill group), the benefits Cargill obtained as a consequence of the resale and the value of those benefits were of little assistance to an assessment of loss. As already explained, in the circumstances of this case, the left in hands approach was inappropriate.[3610] Further, there was no sensible basis upon which a relevant connection could be made between the business acquired in 2013 and the business sold in 2019 so that benefits could be accounted for in a manner that did not include extrinsic or independent factors. Thus, there is no need to discuss any further Potter's assessment of any alleged additional benefits attributable to Cargill Australia's ownership and subsequent sale of the shares in Joe White (and the related assets).

X.73.19 What loss, if any, did Cargill Australia suffer, and to what, if any, damages is Cargill Australia entitled in respect of its claims for misleading or

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3608 As to this last submission, it must have been made as a matter of logic on the premise that there was some form of parity between the $15 million increase in the purchase price from $405 million and the further amendments to the Acquisition Agreement. While it must be accepted that some changes were made in connection with the agreement to pay a further $15 million (there was no evidence as to what might have been agreed or not agreed had the additional $15 million not been offered), such a premise is contrary to the findings on this point: see issues 54 to 60 above.

3609 See pars 4298-4299 above.

3610 See pars 3939-3943 above.

deceptive conduct?

4321 As it has been found that, if Cargill had been properly informed about the Viterra Practices it would never have agreed to acquire Joe White, or having so agreed would not have completed the Acquisition, the loss suffered by Cargill Australia was the difference between what it paid for Joe White, $420 million, and the true value of Joe White at Completion.

4322 For completeness, it should be observed that on any view Cargill Australia suffered a substantial loss. On the assumption, which has been found, that each of the practices comprising the Viterra Practices occurred as alleged, Potter's opinion was that the true value of Joe White on 31 October 2013 was $384.8 million, thereby establishing a loss of up to $35.2 million. Although capital expenditure of $30 million over 5 years has been accepted as the appropriate assumption, this fact was of little moment in considering Potter's analysis. This is because it was only on the basis that $30 million was expended over 2 years that Potter was willing to assume (at least initially) that there would be no reduction in production capacity, sales or price.[3611]

X.73.20 What loss, if any, did Cargill Australia suffer, and to what, if any, damages is Cargill Australia entitled in respect of its claims for deceit?

4323 The approach in *Potts v Miller* is often adopted in assessing loss by reason of a plaintiff being induced by deceit to make an acquisition.[3612] On the facts of this case, it was appropriate that any assessment of loss by reason of Cargill Australia's cause of action in deceit be approached on this basis. This was because it has been found that, but for the deception, Cargill Australia would never have purchased Joe White.[3613] Accordingly, it never would have paid $420 million for the Acquisition. It is entitled to the return of those moneys, less the value of what it received at Completion.

3611 See par 4158 above.

3612 *HTW Valuers (Central Queensland) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 656-657 [35], 667 [65] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ). See also *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 449 [93] (Gummow J), 459 [123] (Kirby and Callinan JJ); *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 284A (Lord Steyn, with whom Lords Keith and Slynn agreed).

3613 See issue 33 above.

X.74 To what, if any, damages is Cargill Australia entitled, and against any or which of Glencore or Viterra:

(1) Pursuant to section 236 of the Australian Consumer Law?
(2) For deceit?
(3) For breach of the Acquisition Agreement?
(4) For breach of the Due Diligence Information Duty?
(5) For breach of the Co-Operative Bulk Information Duty?

4324 The answer to (3), (4) and (5) is none.[3614] Accordingly, only the damages claimed under the Australian Consumer Law and for deceit need to be addressed.

X.74.1 The approach for claims under the Australian Consumer Law and in deceit

4325 The appropriate basis upon which Cargill Australia's loss is to be quantified is the same whether it is calculated for the purposes of section 236 of the Australian Consumer Law or for its claims in deceit. As explained in issues 73.19 and 73.20 above, on either basis the assessment is to be made on the premise that the loss suffered was represented by the amount paid by Cargill Australia less the true value of what it acquired, which value was substantially less than $420 million.[3615]

4326 Further, the amount derived using this approach need not be adjusted by reason of any of the terms of the Acquisition Agreement. This follows from the fact that, had Cargill not been misled and deceived, or alternatively been subjected to fraudulent conduct by way of deceit, Cargill Australia would never have entered into the Acquisition Agreement, or having done so acting on the impugned conduct it would never have completed the Acquisition.[3616]

3614 See par 3907 above and pars 5294-5325 below.

3615 In circumstances where Cargill Australia has been successful in establishing its claim for misleading or deceptive conduct based upon the Financial and Operational Performance Representations as well as its claim for misleading or deceptive conduct based on the Warranty Representations, it is unnecessary to consider separately its claim for loss based upon the Pre-Completion Representations, which were made subsequent to the Acquisition Agreement being entered into. For completeness, the claims based upon both the Warranty Representations and the Pre-Completion Representations were quantified by Cargill Australia on the same basis as the claims made concerning the Financial and Operational Performance Representations and for deceit.

3616 *Warwick Entertainment Centre Pty Ltd v Alpine Holdings Pty Ltd* (2005) 224 ALR 134, 147-148 [59] (Steytler P, with whom McLure and Pullin JJA agreed); *Marks v GIO Australia Holdings Ltd* (1996) 63 FCR 304, 323D; (Einfeld J); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 561.2 (Lockhart J, with whom Burchett J agreed and Foster J relevantly agreed); *Clark Equipment*

4327 Despite the apparent simplicity of such an exercise, for the reasons explained below there were difficulties in calculating the precise amount that ought to be awarded to Cargill Australia.

X.74.2 Evidentiary matters

4328 On 27 June 2018, being day 7 of the trial, a direction was given that the parties were not permitted to tender any spreadsheets without specifically identifying which part or parts of the spreadsheets were relied upon by the party or parties tendering the document, and also explaining why they were relied upon. This direction arose out of the fact that the court book contained numerous spreadsheets that were voluminous both in relation to the number of sheets that had been created within them and, in some cases, the vast amount of information they contained.

4329 On 1 May 2019, the Viterra Parties tendered a joint report of Klein, Meredith and Potter dated 3 December 2018, together with all the appendices and annexures. This was done effectively on behalf of both the Viterra Parties and the Cargill Parties, as both groups of parties sought to rely upon this joint report. Relevantly, the joint report as inserted in the court book did not contain the spreadsheets concerning the strategic bidder valuations in their original form, but rather showed the product of the work that had been done in single page spreadsheets that did not reveal all underlying workings, including any formulas used. Accordingly, for the purpose of the court making any adjustments to the assumptions that had been made by Klein as part of his calculations, it did not have the benefit of the specific workings that gave rise to the totals contained in the spreadsheets.[3617]

4330 In February 2021, the court emailed the parties requesting that the Cargill and Viterra

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Australia Ltd v Covcat Pty Ltd (1987) 71 ALR 367, 371.5-372.1 (Sheppard J, with whom Fox J agreed and Jackson J relevantly agreed); *Petera Pty Ltd v EAJ Pty Ltd* (1985) 7 FCR 375, 377.9-378.4 (Wilcox J), and the cases there cited; *Commercial Banking Co of Sydney Ltd v R H Brown & Co* (1972) 126 CLR 337, 344.7 (Menzies J, with whom Barwick CJ, McTiernan and Gibbs JJ agreed). Mindful, of course, of the fact that the terms of a disclaimer may be otherwise relevant to questions of fact concerning whether misleading or deceptive conduct has been engaged in, and whether loss or damage has been suffered because of any such conduct: see pars 2941-2944 above. See also issue 33 above.

3617 To be clear, the spreadsheets (coupled with the explanations in the joint report) made plain the basis upon which the totals were arrived at, but the precise formulas used and calculations undertaken for some items were not readily apparent.

Parties provide the underlying spreadsheets used by the respective experts as part of the preparation of the 3 December 2018 joint report. Soon after, the Cargill Parties provided the spreadsheets of their experts. However, the Viterra Parties' solicitors informed the court that in the time available they had not had the opportunity to check what had been provided by the Cargill Parties or complete their response to the court's request.[3618] Further, additional time was sought by the Viterra Parties coupled with a request that the court would not seek to access the spreadsheets provided by the Cargill Parties until the Viterra Parties had had the opportunity to review them. This request was acceded to.

4331 Subsequently, the position changed. The Viterra Parties ultimately objected to the further spreadsheets being accessed. The court was notified accordingly. As a result, a directions hearing was listed for the following day.

4332 At the directions hearing, the Cargill Parties submitted that the further spreadsheets should not be treated as new evidence and could be accessed by the court on that basis. However, it was further submitted that if the court considered them to be fresh evidence then they should not be accessed under objection. The Viterra Parties maintained their objection. Accordingly, directions were given for the filing of submissions by the Viterra Parties setting out the basis of their objection, and for submissions in response from the Cargill Parties. Further, the parties were informed that the court would not access the further spreadsheets without giving the parties notice of its intention to do so (if that were the position that the court was minded to adopt after considering the written submissions).

4333 On 11 March 2021, the Viterra Parties filed submissions maintaining their objection broadly on the basis that the underlying formulas in the spreadsheets tendered were not in evidence and could not be relied upon by the court. They submitted that it would be inappropriate for the court to change any figures in the spreadsheets as tendered at trial as complex interactions might have existed between formulas, and

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3618 The Viterra Parties' current solicitors were not retained until 2020 and were not involved in the conduct of the trial.

unforeseen issues may arise as a result. Further, they contended that the prudent course would be for the court to seek the assistance of the parties with any calculations of any complexity.[3619]

4334 On 18 March 2021, the Cargill Parties filed responding submissions in which they contended that the position was not entirely clear on whether the underlying spreadsheets had been tendered at trial. Further, they submitted that if there were any "non-straightforward mathematical calculations", then the parties should be given the opportunity to make submissions with respect to them.

X.74.3 The approach to quantifying Cargill Australia's loss

4335 There was no issue between the parties that if the court were only required to make mathematical calculations that were relatively straightforward (in the sense that it did not need the assistance of expert evidence or the parties), then it could proceed to calculate the amount of any loss without their involvement.[3620] Further, there was no suggestion that the court could not perform calculations on a provisional basis, subject to the parties checking the calculations before any final orders were made.[3621] However, on the state of the evidence that the parties agreed was formally tendered, there is little that may be done presently beyond setting out the relevant findings and directing the parties to assist the court in calculating the precise amount that ought to be awarded.[3622]

4336 In some respects, this is regrettable as the sooner this litigation may be brought to its finality the better. There was a strong desire on my part to seek to perform the calculations as part of these reasons. However, having considered the submissions of the parties, I have decided to err on the side of caution.

4337 In adopting this approach, no invitation is made to the parties to revisit the premise

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3619 *Government Insurance Office of New South Wales v Rosniak* (1992) 27 NSWLR 665, 671D (Kirby P).

3620 See, for example, *Schmidt v AHRKalimpa Pty Ltd* [2020] VSCA 193, [199]-[200], [241]-[242] (Kyrou, Hargrave and Emerton JJA).

3621 *Campton v Centennial Newstan Pty Ltd (No 2)* [2014] NSWSC 1799, [843]-[845] (Hall J); *Long v McDonald* [2000] NSWCA 10, [13] (Priestley JA, with whom Mason P agreed).

3622 In making this observation, there is no intention to make any definitive ruling on the status of the further spreadsheets.

upon which loss is to be calculated. It is envisaged that the court will be provided with calculations based upon the approach used by Klein, with the amounts that ought to be inserted to reflect these reasons in order to arrive at the amount of loss to be awarded. Of course, while the parties will be able to make submissions on the correct approach, any such submissions will only be permitted to be made on the basis that they align with the findings made concerning the true value of Joe White as at 31 October 2013.

X.74.4 Quantum

4338 It suffices for present purposes to state that the findings set out in paragraph 4303 above are to form the basis upon which the true value of Joe White is to be assessed, which amount shall then be deducted from the sum of $420 million, the product of which will be awarded as the quantum of Cargill Australia's loss.

4339 As would be apparent from the previous paragraph, the amount to be awarded shall include the additional $15 million that Cargill agreed would be paid as a result of the Other Bidders Representations. Even if Cargill Australia had been unsuccessful in establishing its claims based upon the difference between $420 million and the true value of Joe White, it would have been entitled to judgment in its favour in the sum of $15 million.[3623]

X.75 Is Cargill entitled to payment in the sum of $774,886.64 together with interest, under the Acquisition Agreement, in respect of the Adjustment Amount?

4340 It is unnecessary to answer this question.[3624]

X.76 What is the effect, if any, of clauses 10.2 and 10.3 of the Confidentiality Deed on Cargill Australia's claims?

3623 See issue 60.3 above.
3624 See pars 3908-3910 above.

4341 Clauses 10.2 and 10.3 are set out above,[3625] but for convenience were as follows:

> **10.2 No legal proceedings to be brought by Recipient**
>
> Subject to clause 10.4 ("Representations") and absent fraud or wilful misconduct by [Glencore], [Cargill, Inc] agrees to:
>
> (a) not bring or institute any legal proceedings against [Glencore] or its Representatives in respect of any Confidential Information; and
>
> (b) procure that its Representatives do not bring or institute any proceedings of the kind specified in clause 10.2(a) above.
>
> **10.3 Release by Recipient**
>
> Subject to clause 10.4 ("Representations") [Cargill, Inc] unconditionally and irrevocably releases [Glencore] and its Representatives from any liability which (notwithstanding the disclaimer in clause 10.1 ("Disclaimer by [Glencore]")) may arise, whether directly or indirectly, in relation to, in connection with, or as a result of the provision of the Confidential Information or any reliance placed by any person on any Confidential Information or the non disclosure of any Information including any liability resulting from any negligence, default or lack of care on the part of [Glencore] or any of its Representatives or from any misrepresentation or any other cause.

X.76.1 The Cargill Parties' submissions

4342 The Cargill Parties submitted that clauses 10.2 and 10.3 of the Confidentiality Deed had no effect on Cargill Australia's claims and relied on their submissions under issues 84 to 86 below, and principally issues 100 to 103 below. The Cargill Parties listed the following 4 principal reasons why it was contended that these clauses relevantly had no effect:

(1) Clauses 10.2 and 10.3 were ineffective or unenforceable as against public policy to the extent that they purported to bar an action in deceit or under section 18 of the Australian Consumer Law.[3626]

(2) Cargill, Inc's obligations under the Confidentiality Deed were released by the Deed of Release.[3627]

3625 See par 590 above.
3626 They referred to their submissions in relation to issue 100 below.
3627 Ibid.

(3) As a matter of construction, there was no breach of clauses 10.2 and 10.3 of the Confidentiality Deed by reason of Cargill Australia commencing this proceeding.[3628]

(4) Even if the clauses were breached, there was no loss caused by that breach.[3629]

X.76.2 The Viterra Parties' submissions

4343 The Viterra Parties referred to their submissions for issue 86 below to submit that Cargill Australia had breached clauses 10.2 and 10.3 of the Confidentiality Deed by instituting legal proceedings. It was submitted that for the reasons outlined under issue 144 below, the clauses did not constitute any attempt to contract out of the Australian Consumer Law, and accordingly were not void or unenforceable, nor contrary to public policy. Further, it was submitted that the effect of these breaches entitled the Viterra Parties to relief,[3630] including damages for that breach or alternatively that Cargill, Inc be ordered to procure that Cargill Australia not continue with this proceeding. In this respect, it was submitted that the third party claims against Cargill, Inc indirectly impacted Cargill Australia's claims.[3631]

X.76.3 Analysis

X.76.3.1 Clause 10.2

4344 There are a number of reasons why clause 10.2 could have no effect on Cargill Australia's claims.

4345 *First*, clause 10.2 was subject to clause 10.4. By clause 10.4, it was agreed that Glencore and its Representatives (which included Viterra)[3632] would be responsible for representations or obligations set forth in separate written agreements. Obviously, the contemplated separate written agreements included an agreement of the kind that became the Acquisition Agreement, which contained the Warranty Representations.

3628 See the Cargill Parties' submissions in relation to issue 102 below.
3629 See their submissions in relation to issues 103, 106 below.
3630 See the Viterra Parties' submissions in issues 88, 110-114 below.
3631 See their submissions in issues 103, 106, 109 below.
3632 Viterra was a Related Body Corporate: see par 588 above.

Accordingly, under the express terms of clause 10.2, Cargill Australia was entitled to sue to hold Viterra responsible for the representations and obligations made in or arising from the Acquisition Agreement.

4346 *Secondly*, the allegations made by Cargill Australia included claims based upon fraud and wilful misconduct by Glencore and Viterra. In circumstances where those allegations have been upheld with respect to the Financial and Operational Performance Representations (as against Viterra)[3633] and the Other Bidders Representations (as against Glencore and Viterra),[3634] the further express limitation of the operation of clause 10.2 was incontrovertibly enlivened.[3635]

4347 *Thirdly*, in circumstances of fraud or wilful misconduct by Glencore, clause 10.2 could have no operation in relation to Cargill Australia's claims. On the face of the wording of the clause, once this proviso was enlivened, then there was no limit on the claims that Cargill, Inc (as the Recipient) could bring or institute in any legal proceeding against Glencore or Viterra, or that Cargill, Inc was required to procure that Cargill Australia (as a Representative) did not bring or institute. The same observation is made in relation to Cargill Australia to the extent that clause 10.2(a) operated directly against Cargill Australia by operation of clause 2.1.

4348 This position may be contrasted with the proviso in relation to clause 10.4. When clauses 10.2 and 10.4 are read together, the apparent intention was that Glencore and its Representatives would only be liable under separate written agreements to the extent they contained representations or obligations;[3636] but neither that proviso nor clause 10.2 generally applied in circumstances where fraud or wilful misconduct was established.

3633 Express allegations of fraud or wilful misconduct against Glencore were not made in relation to the Financial and Operational Performance Representations, but Hughes was acting for both Glencore and Viterra at the relevant times: see issues 11, 22, 23 above.

3634 See issues 59, 60 above.

3635 In light of these findings, it is unnecessary to consider whether simply making allegations of fraud or wilful misconduct in itself would be sufficient to establish that clause 10.2 had not been breached.

3636 This position was based on the terms of the Confidentiality Deed itself, without consideration of any effect the Deed of Release may have subsequently had on the continued operation of these provisions.

X.76.3.2 Clause 10.3

4349 The position with respect clause 10.3 was the same as clause 10.2 in relation to the proviso that it was subject to clause 10.4. In other words, this proviso made clear that nothing contained in clause 10.3 was intended to provide a release in relation to representations or obligations set forth in separate written agreements between the parties.

4350 However, clause 10.3 was to be contrasted with clause 10.2 insofar as clause 10.3 did not contain a proviso in relation to fraud or wilful misconduct. Accordingly, on its face, clause 10.3 purported to release Glencore and Viterra from any liability which might have arisen directly or indirectly in connection with or as a result of the provision of any Confidential Information.

4351 Further, also in contrast to clause 10.2, clause 10.3 did not refer to Cargill, Inc's Representatives expressly. Despite this, the giving of a release fell within the description of the giving of an undertaking in the Confidentiality Deed as referred to in clause 2.1.[3637] Accordingly, the release in clause 10.3 was given by Cargill, Inc on behalf of itself and also on behalf of its Representatives, including Cargill Australia.[3638]

X.76.4 Conclusion

4352 In summary, clause 10.2 had no effect on Cargill Australia's claims. However, clause 10.3 provided that Cargill had released each of the Viterra Parties in relation to all of Cargill Australia's claims, except those that fell within clause 10.4. Other related issues concerning the proper construction and operation of these types of clauses, whether these 2 clauses were breached and whether a claim based on either clause

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3637 See par 590 above.

3638 Although Cargill Australia joined issue in the pleadings on the matter of whether Cargill Australia was bound, the fact that the terms of cl 10.3 meant a release was also given by Cargill Australia (at least from around 27 May 2013: see issue 5 above) was effectively conceded in the Cargill Parties' closing submissions. In referring to clauses 10.1, 10.2 and 10.3 of the Confidentiality Deed collectively, the Cargill Parties' senior counsel stated that it was plain "that those clauses *both alone* and in combination purport to prevent Cargill, Inc *or its Representatives* bringing any proceedings and achieving any recovery in relation to the Confidential Information" (emphasis added).

was enforceable are dealt with elsewhere.[3639]

X.77 What is the effect of clauses 15.8(b) and 15.9 of the Acquisition Agreement on Cargill Australia's claims for loss and damage?

X.77.1 Clause 15.8

4353 Clause 15.8 is set out above.[3640] In the absence of fraud, a cap on liability was sought to be imposed in relation to some claims up to the amount of the purchase price, being $420 million, and a cap of $100 million for all other claims. As the Viterra Parties acknowledged, this clause would not apply if Cargill Australia established fraud by means of establishing knowledge on the part of Viterra sufficient to justify a finding of deceit. As Cargill Australia has been successful in its claims for deceit with respect to the Financial and Operational Performance Representations, no issue of a cap arises under clause 15.8.

X.77.2 Clause 15.9

4354 Clause 15.9 is set out above.[3641] Essentially, the clause was directed to excluding consequential liability by seeking to confine any claim to direct Loss. It provided that no party would be liable for any indirect Loss.

4355 After referring to the inclusive definition of indirect Loss as set out in clause 15.9, the Viterra Parties' written submissions were confined to submissions concerning contractual damages. In so doing, the Viterra Parties contended that by Cargill Australia pursuing them on the basis of the difference between the purchase price and the true value of Joe White, such contractual damages must have included components of indirect Loss because there was no attempt to quantify losses directly referable to any breach of any particular Warranty. Implicitly, this appeared to be a recognition of the fact that in relation to claims for loss by reason of deceit, or because of misleading or deceptive conduct under the Australian Consumer Law, where the

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3639 See issues 84-86, 100, 102, 108, 144 below.
3640 See par 1030 above.
3641 Ibid.

deceit or misleading conduct had been established there could be no lawful means by which Viterra could exclude a claim for loss by contractual provisions that were agreed because of the deceitful or misleading conduct.[3642]

4356 However, in oral closing submissions, the Viterra Parties argued that clause 15.9 was not an exclusion clause but merely a limitation clause that permissibly provided for a cap on any loss that could be claimed by restricting any such claim to direct Loss.[3643] It was contended that clauses such as clause 15.9 did not exclude the operation of the Australian Consumer Law, but rather merely regulated its application.

4357 Leaving aside the issue as to whether or not the loss claimed by Cargill Australia fell within the description of "indirect Loss", on the assumption that it (or part of it) did, to give effect to clause 15.9 would be to deny Cargill Australia a statutory remedy to which it was entitled for offending conduct under the Australian Consumer Law. It would be contrary to long-standing authority to permit such a denial.[3644] The same may be said in relation to the position with Cargill Australia's claim in deceit.[3645] In short, clause 15.9 could not be characterised as a contractual provision simply regulating the Australian Consumer Law's application, as to give effect to its terms would be to deny Cargill Australia compensation in relation to any indirect Loss to which it was statutorily entitled as a matter of public policy.

4358 In circumstances where it has been found that Cargill Australia was not entitled to contractual damages for any breach of the Acquisition Agreement,[3646] it is unnecessary to address this issue further with respect to any contractual issue.

3642 See, for example, in relation to deceit *Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337, 344.7 (Menzies J, with whom Barwick CJ, McTiernan and Gibbs JJ agreed) 349.5-350.3 (Gibbs J, with whom McTiernan J agreed); and in relation to misleading conduct *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 561.5 (Lockhart J, with whom Burchett J agreed and Foster J relevantly agreed).

3643 This argument was also put in relation to clause 15.8, but for reasons already explained it is unnecessary to refer to this matter. Clause 15.8 was inapplicable because of the existence of fraud: see par 4353 above.

3644 *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 561.5 (Lockhart J, with whom Burchett J agreed and Foster J relevantly agreed). See also issue 144 below.

3645 See *Commercial Banking Co of Sydney v RH Brown & Co* (1972) 126 CLR 337, 344.8 (Menzies J, with whom Barwick CJ, McTiernan and Gibbs JJ agreed), 350.2 (Gibbs J, with whom McTiernan J agreed).

3646 See issue 145 below.

X.78 Is Cargill Australia prevented from recovering any loss in relation to the Co-Operative Bulk Representations or the Co-Operative Bulk Information Duty by reason of:

(1) Clauses 10(a), 10(b), 10(c) and 11 of the 31 October Agreement (as defined in paragraph 42 of the Defence);
(2) Clauses 4.2, 8.1(k)(1) and 8.2(a) of the Co-Operative Bulk Agreement, and Cargill Australia's knowledge of the content of the Co-Operative Bulk Agreement prior to entering into the Acquisition Agreement; and/or
(3) Clause 15.2 of the Acquisition Agreement?

4359 It is unnecessary to answer these questions.[3647]

X.79 Did Cargill Australia take reasonable steps to mitigate the losses alleged at paragraphs 63M,[3648] 63N[3649] and 75 to 77[3650] of the Statement of Claim?

4360 Broadly, the principle of mitigation is a common law concept, and is a corollary to the principle of compensation for breach of contract or in tort that a plaintiff is only entitled to recover losses actually sustained.[3651] Put succinctly, mitigation embraces 2 ideas:[3652]

> First, a plaintiff cannot recover damages for a loss which he or she *ought to have* avoided, and secondly, a plaintiff cannot recover damages for a loss which he or she *did* avoid.
>
> (Emphasis in original.)

4361 The duty to mitigate imposes the duty of taking all reasonable steps to mitigate the loss consequent on a breach of contract or tort.[3653] The onus of proof in respect of an

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3647 See par 3907 above.
3648 Paragraph 63M concerned losses claimed based on contraventions of section 18 of the Australian Consumer Law.
3649 Paragraph 63N concerned losses claimed based on deceit.
3650 Paragraph 75 concerned losses claimed based on contraventions of section 18 of the Australian Consumer Law, breach of the Due Diligence Information Duty and deceit. Paragraph 76 concerned losses for breach of the Warranties as claimed. Paragraph 77 concerned the Co-Operative Bulk Information Duty.
3651 *Love v Thwaites* [2014] V ConvR 54-852, 65,716 [46]-[48] (Warren CJ and Beach JA, with whom Tate JA agreed); *British Westinghouse Electric and Manufacturing Company Ltd v Underground Electric Railways Company of London Ltd* [1912] AC 673, 689.4 (Viscount Haldane LC, with whom Lords Ashbourne, Macnaghten and Atkinson agreed).
3652 *Clark v Macourt* (2013) 253 CLR 1, 9 [17] (Hayne J).
3653 *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, 654 [134] (Hayne J); *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 658.8 (Gibbs CJ); *British Westinghouse Electric and*

allegation of a failure to mitigate rests on the wrongdoer (in this case, the Viterra Parties).[3654]

4362 In respect of claims made pursuant to the Australian Consumer Law, common law principles "are not controlling" on the assessment of damages for claims,[3655] nor do they confine such claims.[3656] That said, there are a number of decisions applying or contemplating the application of the duty to mitigate or at least something akin to that duty. Although not always applied in name, notions analogous to the duty to mitigate may be weighed when considering issues of causation in assessing damages for breach of the Australian Consumer Law. The result of such an exercise may be that an applicant is unable to recover damages for loss that could have reasonably been avoided.[3657]

4363 That said, it is unnecessary to discuss this issue further. Even assuming the law in this area in terms most favourable to the Viterra Parties, this issue did not arise in any substantive way. The Viterra Parties made no submissions of substance in respect of this issue.[3658] Further, the issue was only faintly addressed in the evidence adduced

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Manufacturing Company Ltd v Underground Electric Railways Company of London Ltd [1912] AC 673, 689.4.

3654 *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 673.9 (Brennan J, dissenting); *Metal Fabrications (Vic) Pty Ltd v Kelcey* [1986] VR 507, 512.7-513.3, 514.4 (Murphy J, with whom Brooking and Nicholson JJ agreed); *Watts v Rake* (1960) 108 CLR 158, 159.4 (Dixon CJ). See also *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 414-415 [70] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

3655 See, for example, *Henville v Walker* (2001) 206 CLR 459, 470 [18] (Gleeson CJ). His Honour further acknowledged that common law notions "represent an accumulation of valuable insight and experience which may well be useful": ibid. Note, this case, and those in fn 3657 below concern the predecessor to the Australian Consumer Law, but plainly cases concerning the interpretation of the *Trade Practices Act* may be relevant to the interpretation of the Australian Consumer Law.

3656 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 503 [15], [17] (Gaudron J), 510-512 [38]-[40] (McHugh, Hayne and Callinan JJ), 529 [103] (Gummow J). See also *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 407 [44] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, 504.2, 506.5 (Lockhart and Gummow JJ). See especially in relation to mitigation: *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112, 138.3 (Hill J), quoting *Kewside Pty Ltd v Warman International Ltd* (1990) ASC 55-564, 58,824.7 col 2 (French J); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 2)* (1989) 40 FCR 76, 93.6 (Lee J).

3657 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 413-415 [67]-[70] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Finucane v New South Wales Egg Corporation* (1988) 80 ALR 486, 519.6 (Lockhart J). See also *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 287C (Fisher, Gummow and Lee JJ).

3658 The Viterra Parties' written submissions said nothing on the point. In oral closing submissions, reference was made to a duty to mitigate. It was contended, very broadly, that such mitigation had occurred by making profits and ultimately by selling the Joe White Business. For reasons discussed in

at trial, and not in a manner which was capable of discharging the onus of proof. In short, the Viterra Parties have not established that Cargill failed to mitigate its loss so as to justify a reduction in any award of damages.

X.80 If Cargill Australia has suffered loss as a result of any contraventions by Glencore and/or Viterra of section 18 of the Australian Consumer Law, has Cargill Australia suffered that loss partly as a result of its failure to take reasonable care, and ought Cargill Australia's recoverable loss be reduced?

4364 This issue relates only to Cargill's claim for misleading or deceptive conduct under section 18 of the Australian Consumer Law, and is not relevant to the claim for deceit.

X.80.1 Legal principles

4365 There is authority for the proposition that section 18 of the Australian Consumer Law is directed to whether the conduct would be likely to mislead or deceive a reasonable person and therefore was not designed for the benefit of persons who fail, in the circumstances of the case, to take reasonable care of their own interests;[3659] and what is reasonable will depend on all the circumstances.[3660]

4366 The extent to which claimants who failed to take reasonable care of their own interests are able to recover for conduct that contravenes section 18 is governed by section 137B of the *Competition and Consumer Act,* which provides that:

> If:
>
> (a) a person (the ***claimant***) makes a claim under subsection 236(1) of the Australian Consumer Law in relation to economic loss, or damage to property, suffered by the claimant because of the conduct of another

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issue 73 above, the appropriate means by which to assess the loss suffered did not involve bringing to account any such profits or the amount received from the more recent completion of the sale in 2019 of the shares in Joe White and the assets utilised in the Joe White Business.

3659 *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193, 241.9 (Gummow J), considering s 52 of the *Trade Practices Act,* replaced by s 18 of the Australian Consumer Law. Also see *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 651-652 [39] (French CJ, Crennan, Bell and Keane JJ); *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682, [10] (Gordon J); *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199.4 (Gibbs CJ).

3660 Ibid.

person; and

(b) the conduct contravened section 18 of the Australian Consumer Law; and

(c) the claimant suffered the loss or damage as result:

(i) partly of the claimant's failure to take reasonable care; and

(ii) partly of the conduct of the other person; and

(d) the other person did not intend to cause the loss or damage and did not fraudulently cause the loss or damage;

the amount of the loss or damage that the claimant may recover under subsection 236(1) of the Australian Consumer Law is to be reduced to the extent to which a court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

4367 Thus, under section 137B, certain claims are apportionable between the claimant and another person whose conduct caused the loss where the claimant contributed to their loss by failing to take reasonable care.

4368 In *Pennington v Norris*,[3661] the High Court provided guidance on the approach to be taken with regard to contributory negligence:[3662]

> What has to be done is to arrive at a "just and equitable" apportionment as between the plaintiff and the defendant of the "responsibility" for the damage. It seems clear that this must of necessity involve a comparison of culpability. By "culpability" we do not mean moral blameworthiness but degree of departure from the standard of care of the reasonable [person].

4369 Further, in *Podrebersek v Australian Iron and Steel Pty Ltd*,[3663] the High Court addressed the approach to apportionment, saying:[3664]

> The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of *the degree of departure from the standard of care of the reasonable [person] and of the relative importance of the acts of the parties in causing the damage*. It is *the whole conduct of each negligent party* in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts

3661 (1956) 96 CLR 10 (Dixon CJ, Webb, Fullagar and Kitto JJ).
3662 Ibid, 16.3. See also *Merost Pty Ltd v CPT Custodian Pty Ltd* [2014] FCA 97, [138] (North J).
3663 (1985) 59 ALR 529 (Gibbs CJ, Mason, Wilson, Brennan and Deane JJ).
3664 Ibid, 532.9-533.3 See also *Merost Pty Ltd v CPT Custodian Pty Ltd* [2014] FCA 97, [139] (North J).

> of the parties in causing the damage will be of little, if any, importance.
>
> (Emphasis added, citations omitted.)

4370 By operation of section 137B(d), apportionment is inapplicable under this statutory regime where the misleading or deceptive conduct was intentional or fraudulent. In the context of misrepresentations, fraud may be established in various ways.[3665] It has been said that:[3666]

> If a [person] makes a statement knowing it to be untrue with the intention that another should act upon it, that obviously is fraud: so also if a [person] recklessly, not caring whether it be true or false, makes a statement with the intention that another should act upon it, that also is fraud. In both cases there is the moral turpitude which in my opinion is necessary to maintain an action for damages for deceit.

4371 "Fraudulent" has been given its statutory meaning within the context of the proportional liability regime in the *Competition and Consumer Act*.[3667] It has been held to require "no more than that a defendant has acted dishonestly 'judged by the standards of ordinary, decent people, without [necessarily] appreciating that the act in question was dishonest by those standards'", but also to require proof at least that the defendant knew that the alleged representation was misleading or deceptive.[3668]

X.80.2 The Viterra Parties' submissions

4372 In the Defence, the Viterra Parties pleaded that Cargill Australia failed to take reasonable care in:[3669]

(1) Relying on various representations, notwithstanding the Sale Process

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3665 See issue 22 above.

3666 *Joliffe v Baker* (1883) 11 QB 255, 275.1-3 (A L Smith J, agreeing with Watkin Williams and Cave JJ).

3667 And as previously set out in the *Trade Practices Act*.

3668 *Wieland v Texxcon Pty Ltd* (2014) 313 ALR 724, 750 [102] (Nettle, Hansen and Beach JJA) in which the Victorian Court of Appeal considered s 87CC(1)(b) of the *Trade Practices Act*, citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 162 [173] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

3669 Allegations were made in relation to the Co-Operative Bulk Agreement, and Cargill's knowledge of certain matters, including Co-Operative Bulk's ability to terminate the Co-Operative Bulk Agreement in the event that Joe White became a subsidiary of Cargill Australia. As Cargill Australia did not press its claims in relation to Co-Operative Bulk, it is unnecessary to include these matters in considering this issue as no part of the loss claimed was referable to these issues, which were distinct from the other matters the subject of the Due Diligence.

Disclaimers and the Acquisition Agreement Liability Terms.

(2) Failing to include warranties in the Acquisition Agreement that were sufficient to protect Cargill Australia's interests.

As to the second of these matters, the particulars identified the warranties Cargill Australia failed to include as those that were sufficient to protect Cargill Australia's interests, being whatever warranties Cargill Australia required in order to address the matters the subject of its claims in this proceeding having regard to the Sale Process Disclaimers, and Cargill Australia's obligations as at 4 August 2013 by reason of the terms of the Confidentiality Deed and the Acquisition Agreement.

4373 In their submissions the Viterra Parties contended there were 4 ways in which Cargill Australia failed to take reasonable care of its own interests.

4374 *First,* it was submitted that Cargill Australia's agents failed to have regard, and often ignored, the terms of the Sale Process Disclaimers, which were contended to be obviously relevant to the process by which Cargill Australia formed opinions about the Joe White Business. Specifically, they referred to Eden's evidence that he did not make reference to the Confidentiality Deed to identify the use that he could make of the relevant information and he could not recall reading it, he did not read the Information Memorandum Disclaimers and left that to the lawyers,[3670] and nor did he read the Management Presentation Memorandum Disclaimers.[3671] Further, Le Binh could not recall reading the Information Memorandum Disclaimers or whether he read the Confidentiality Deed.[3672] Furthermore, they pointed to Sagaert's evidence that she did not read the Confidentiality Deed, the Phase 1 Process Letter or the Information Memorandum Disclaimers.[3673] Moreover, Jewison gave evidence that she did not look at the Confidentiality Deed when it was executed and could not recall if she looked at it before entry into the Acquisition Agreement. Turning to Conway, his

3670 See par 485 above.
3671 See fn 512 above.
3672 See par 485 above.
3673 In cross-examination, Sagaert gave evidence that "it was not necessarily expected from [her] in [her] role as global commercial manager" to "read the document from front to end".

evidence was that he did not read the Confidentiality Deed, the Information Memorandum or the Acquisition Agreement as that "was a level of operational detail that [he] didn't have the capacity to do that for every transaction that [Cargill was] doing, and that was not what [his] role was designed to do". Finally, the Viterra Parties submitted that while Engle gave evidence that he read the entire Information Memorandum, he admitted that he probably did not read the legal disclaimer page in great detail and gave further evidence that he could not recall if he read it.

4375 The Viterra Parties submitted that the failure of many of Cargill Australia's agents to read the Sale Process Disclaimers meant that Cargill failed to take those disclaimers into account when conducting the Due Diligence. Therefore, it was submitted, these persons failed to take into account a critical part of the context in which each and all of the Pre-Execution Statements were made, which amounted to a failure to take reasonable care. The Viterra Parties relied on the High Court's statement in *Butcher v Lachlan Elder Realty Pty Ltd* that it was important that the agent's conduct be viewed as a whole and that it was "not right to characterise the problem as one of analysing the effect of its 'conduct' divorced from 'disclaimers' about that 'conduct' and divorced from other circumstances which might qualify its character".[3674] On this basis, the Viterra Parties submitted that it was just as important that a representee, in this case Cargill Australia, view the representor's conduct as a whole when the representee considers the meaning of a statement that the representor made, which Cargill Australia failed to do by selectively reading the documents.

4376 Further, it was submitted that "Cargill Australia's failure"[3675] to read the Sale Process Disclaimers was particularly unreasonable given that Cargill Australia knew that the disclaimers were a customary feature of these transactions.[3676]

3674 (2004) 218 CLR 592, 605 [39] (Gleeson CJ, Hayne and Heydon JJ) in the context of considering whether behaviour was misleading under section 52 of the *Trade Practices Act*.

3675 The submission expanded from "many of Cargill Australia's agents" to Cargill Australia itself. Compare the submissions in par 4378 below.

3676 The Viterra Parties relied on evidence given by Clark that it was customary for disclaimers to be included in information memoranda, evidence from Engle that the terms of the Confidentiality Deed were similar to previous confidentiality deeds he had executed and evidence from Van Lierde that the legal team were expected to advise him of any extraordinary or uncommon terms and did not do so. See also par 475 above.

4377 Therefore, the Viterra Parties submitted that Cargill Australia's failure to view the Viterra Parties' conduct as a whole caused Cargill Australia loss as it precluded Cargill Australia from taking the steps it ought to have taken to avoid loss. For example, it was submitted that Engle failed to read the Information Memorandum Disclaimers and therefore misunderstood the analytical exercise that he was required to carry out when conducting the Due Diligence. It was submitted that Engle understood his function to involve "tak[ing] the information that is provided by the seller" to prepare the valuation and by reference to his own experience of other due diligence processes. Whereas, the Viterra Parties contended, if Engle had read the Sale Process Disclaimers, he could have used (and ensured that Cargill Australia's other agents used) the information provided to him during the Due Diligence in the ways the information was permitted to be used.[3677]

4378 *Secondly*, the Viterra Parties submitted that even when some of Cargill Australia's agents read some of the Sale Process Disclaimers, they failed to ensure that Cargill Australia took those statements into account in the Due Diligence. The Viterra Parties pointed specifically to the warning "you are required to make and rely on your own investigations and satisfy yourself in relation to all aspects of the Proposed Transaction".[3678] It was submitted that at least 1 Cargill representative, if not more, read the Sale Process Disclaimers,[3679] and ought to have known that Cargill Australia was operating under the false assumption that the Viterra Parties or Joe White warranted information to be true, complete and reliable. Therefore the representatives would have known that Cargill Australia was making a mistake in the way it was analysing information and as such, failing to take reasonable care of its own interests.

3677 Precisely what ways the Viterra Parties contended use was permitted was not identified in this submission.

3678 The Viterra Parties referred to terms to a similar effect that were included in the Phase 1 Process Letter (see par 468 above), cl 8.3(c) of the Confidentiality Deed (see par 590 above), the Information Memorandum Disclaimers (see par 475 above), the Management Presentation Memorandum Disclaimers (see pars 711-714 above) and the Phase 2 Process Letter: see par 643 above.

3679 The Viterra Parties submitted that Hawthorne read the Confidentiality Deed, Engle, Viers and Van Lierde were likely to have read the Confidentiality Deed, and Jewison read many parts of the legal disclaimer page of the Information Memorandum: see par 485 above.

4379 The Viterra Parties provided 3 reasons why Sale Process Disclaimers were necessary to take into account when viewing the Viterra Parties' conduct as a whole and understanding the meaning of any of the Pre-Execution Statements:

(1) The Pre-Execution Statements needed to be read alongside the Sale Process Disclaimers, which it was submitted made clear that any Pre-Execution Statements made were only starting points.

(2) The Sale Process Disclaimers were not obscured or hidden, rather they were in prominent positions in each of the relevant documents and were regular features of these types of transactions.

(3) The Pre-Execution Statements were made in the context of the Sale Process Disclaimers and no part of any of the Pre-Execution Statements suggested the Sale Process Disclaimers did not apply.

4380 *Thirdly,* the Viterra Parties submitted that Cargill Australia failed to take care of its own interests by failing to verify the information contained in any of the Pre-Execution Statements. It was submitted that Cargill had experience undertaking these kinds of acquisitions and Cargill Australia knew that its role as purchaser required it to verify the information provided to it during the Due Diligence. The following evidence provided by Cargill representatives was relied upon:

(1) Engle said that in his "experience the confidentiality deed sets up for a requirement that a purchaser is going to need to independently evaluate materials".

(2) Sagaert said that she was told that the due diligence process "is where you go in, that is on behalf of Cargill, and independently assess the information that's been given by the seller".

(3) Jewison said that she understood that "[she] needed to make [her] own

determination or investigation in terms of additional information".[3680]

4381 *Finally,* the Viterra Parties submitted that Cargill Australia failed to take reasonable care of its own interests by failing to conduct its own independent investigations of the Undisclosed Matters. This was said to be because Cargill Australia had reason to suspect that *first,* there was a risk the Operational Practices were a feature of any malting business and *secondly,* because of specific knowledge Cargill became aware of, there was a risk that the Viterra Practices were a feature of the Joe White Business.

4382 Further, the Viterra Parties referred to their submissions regarding the inferences to be drawn from the Cargill Parties' failure to call Hermus[3681] and Christianson[3682] as witnesses.

4383 For these reasons, the Viterra Parties submitted that Cargill Australia's loss was partly a result of its own failure to take reasonable care and the quantum of loss recoverable should be significantly reduced. The Viterra Parties then referred to 2 factors in support of this submission:

(1) The "causative potency" of Cargill Australia's failure to take reasonable care outweighed the "causative potency" of Glencore or Viterra's contravention of section 18.[3683] It was submitted that in circumstances where Cargill Australia knew that no vendor due diligence was available to be relied upon, the onus remained on Cargill Australia to identify the facts about the Joe White Business that Cargill Australia considered to be relevant to its decision to acquire Joe White.

(2) Given that only Cargill Australia knew and had the capacity to know of

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3680 The Viterra Parties also acknowledged that Jewison went on to limit the categories of information that she understood Cargill Australia was required to independently verify to only that information concerning projections, but submitted that she could not provide an explanation for why the Phase 1 Process Letter should be read in that limited way.

3681 See par 2042 above.

3682 See par 2093 above.

3683 Adopting the language used in *Zraika v Walsh* (2015) Aust Torts Reports 82-218, 68,698 [235] (Campbell J) which considered apportionment of liability for negligence.

the matters that were subjectively relevant to its decision to acquire Joe White, and given that Cargill Australia did not let Glencore or Viterra know of the importance of the Viterra Practices before Completion, Cargill Australia was, compared with Glencore or Viterra, more able effectively to prevent loss happening.[3684]

X.80.3 The Cargill Parties' submissions

4384 The Cargill Parties submitted that for the reasons addressed in issues 22 to 23 and 35 to 38 above in respect of representations made both in advance of the Acquisition Agreement being executed and in the period following execution but before Completion respectively,[3685] the Viterra Parties knowingly made false representations with the intention that they would be relied upon. It was submitted that such conduct established that the Viterra Parties fraudulently caused Cargill's loss for the purposes of section 137B of the *Competition and Consumer Act*. As such, the Cargill Parties submitted that section 137B had no application.

4385 In the alternative, if section 137B did apply, the Cargill Parties submitted that Cargill's loss was not caused by a failure to take reasonable care of its own interests. Further, even if Cargill ought to have taken more care, the comparative culpability of the parties was such that there ought to be no reduction to Cargill's recoverable loss pursuant to section 137B.

X.80.3.1 Submissions that there was no failure to take reasonable care

4386 The Cargill Parties submitted that the question of whether or not Cargill failed to take reasonable care should be assessed against the standard of care of a reasonable and sophisticated purchaser of a business. It was submitted Cargill met this standard for a number of reasons.[3686]

4387 *First,* it was submitted that Cargill did not fail to take reasonable care in relying on the

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3684 *Reinhold v New South Wales Lotteries Corporation (No 2)* (2008) 82 NSWLR 762, 778 [58] (Barrett J), citing *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463, [97] (Palmer J).

3685 The Cargill Parties' submissions referred to "pre-completion and post-completion representations", but this was plainly an error as there were no post-completion representations alleged to have been made.

3686 The submissions also referred to conduct relating to the Co-Operative Bulk Agreement, which is unnecessary to set out: see issues 61-64, 67-68 above.

Viterra Parties' representations before entering into the Acquisition Agreement. This was because Cargill was invited to participate in a sale process in which the information provided failed to disclose the existence of the Viterra Practices which underpinned the Joe White Business. The Cargill Parties submitted that in that environment Cargill diligently and conscientiously undertook the Due Diligence, which amounted to at least reasonable care, noting the following:[3687]

(1) Cargill's decision-making structure required careful and reasoned assessment by senior people within Cargill of the materials provided.

(2) Upon analysing the Data Room Documentation, Cargill identified a question about Joe White's limited storage and systematically pursued that question through the Management Presentation and discussions with senior people in the Joe White Business, and had the minutes of those discussions annexed to the Acquisition Agreement.

(3) The relevant risks identified in the Due Diligence were pursued to a satisfactory end, within the limits of the interrogation allowed due to strictures imposed by Glencore on the Due Diligence.

(4) De Samblanx, as the person in charge of operations, carried out a thorough and diligent assessment of Joe White's operations, which assessment was considered by the Due Diligence team.

4388 The Cargill Parties submitted that there was no occasion to ask for the Viterra Policies. De Samblanx's evidence was that he did not ask any questions about any policy or procedures because it did not occur to him that there would be an organised system of the kind he discovered subsequently and because he knew the Joe White employees were required to sign a code of conduct requiring they be truthful with customers.[3688] Further, the Cargill Parties referred to evidence that Cargill was ultimately going to implement its own Certificate of Analysis policy if it acquired Joe White.

3687 The Cargill Parties referred to their submissions in relation to issue 20 above.

3688 See par 1134 above.

4389 Furthermore, it was submitted that the fact that the Viterra Policies were concealed from auditors and not disclosed by the Viterra Parties in October 2013 suggested that there was no reason to believe that they would have been disclosed to Cargill if Cargill had asked whether such policies existed.

4390 *Secondly,* it was submitted that Cargill did not fail to take reasonable care in relying on the Viterra Parties' representations in October 2013 and deciding to complete the Acquisition. This was put on the basis that Cargill sought information directly from Glencore, obtained legal advice and did all it reasonably could do to protect its interests in the circumstances.

4391 *Thirdly,* referring to their submissions set out in issues 39 to 47 above, the Cargill Parties submitted that there was no failure to take care in securing warranties as the Warranties incorporated into the Acquisition Agreement were comprehensive and sufficient to respond to the existence and non-disclosure of the Viterra Practices.

4392 *Fourthly,* the Cargill Parties submitted that Cargill did not fail to take reasonable care by relying on the Equal to or Better Bids Representation to pay $15 million more to acquire Joe White. It was submitted that Cargill tested the Other Bidders Representations made by Mahoney in both of the Further Bid Calls and received responses that were false and misleading.[3689] The evidence showed Cargill debated whether Mahoney was bluffing and asked Mahoney again why it had to increase the bid by $15 million on the Second Further Bid Call, to which the Cargill Parties submitted that Mahoney represented again that it was an auction and Cargill was not the highest bidder.

X.80.3.2 Submissions on the Viterra Parties' conduct

4393 The Cargill Parties submitted that due to the comparative culpability of the key parties, having regard to the deliberate nature of their acts and the importance of Glencore and Viterra's conduct in causing the loss, there should be no reduction to Cargill's recoverable loss under section 137B. The Cargill Parties pointed to King's

3689 See issues 57-58 above.

evidence that if a business practice had a material bearing on profitability of the business on an ongoing basis, then that practice should be disclosed by a vendor,[3690] and submitted that the Viterra Parties abjectly failed in that regard. The Cargill Parties made further submissions concerning the Viterra Parties' conduct.

4394 *First,* the Cargill Parties submitted that when Glencore acquired Viterra it planned and elected to retain Joe White rather than engage in a back-to-back sale. They contended that, in choosing to run a competitive auction sale process, Glencore accepted exposure to the risks inherent in that process and in Joe White and its management. Instead of managing the risks it had accepted by virtue of this choice, Glencore failed to take adequate steps and ignored the advice received to conduct a vendor due diligence.

4395 The Cargill Parties referred to when Glencore announced that it would acquire Viterra, and that it told a ratings agency that it planned to retain Joe White and sell it after completing the acquisition of Viterra.[3691] They submitted that if Glencore had sold Joe White on a back-to-back basis or as part of a consortium, it would have avoided providing any representations and warranties and would have left the purchaser to accept it *as is where is* without an opportunity to undertake the ordinary level of due diligence.

4396 It was submitted that King acknowledged that the disadvantage of a back-to-back sale was that the sale price was likely to be lower than that achieved by retaining the asset and conducting a private auction. Further, King understood that his role was to create maximum competitive tension and achieve the best price for Glencore.[3692] Furthermore, the "worldwide managing director" of Glencore, Glasenberg, reiterated to management that he wanted Glencore to create "massive tension" and to be pushing bidders to the US$400 million mark.[3693]

3690 See par 495 above.
3691 See also par 352 and fn 291 above.
3692 See par 110 above.
3693 See par 766 above.

4397 Therefore, in electing to sell Joe White via a competitive auction process, instead of on an *as is where is* basis, it was submitted Glencore accepted exposure to Joe White and its incumbent management, which was a known risk that could be significant.[3694]

4398 It was submitted that the fact that Glencore had limited experience in operating a malting business only increased the risks to which Glencore exposed itself. In reliance on King's evidence, the Cargill Parties submitted that an acquirer of a business who has no or limited experience of that business or its industry faces a "known unknown" of there being practices going on within the business that have not manifested and may involve exposure to regulators or third parties. Further, it was submitted that King accepted that if a vendor did not make its own enquiries, it deprived itself of the opportunity to find out whether there was something going on inside the business that should not be happening.[3695]

4399 Further, they submitted Glencore ignored Merrill Lynch's written advice to conduct a vendor due diligence[3696] and the advice it was contended must have been given in a meeting on 26 February 2013,[3697] which the Cargill Parties submitted was reckless. Furthermore, Merrill Lynch wrote internally that there was a risk that Glencore was "being very naïve".[3698]

4400 Moreover, the Cargill Parties referred to King's acknowledgement that a vendor due diligence would have involved a consideration of the matters the subject of financial data packs containing historical information, would have provided an overview of the industry and would have involved more extensive enquiries of management in

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3694 The Cargill Parties relied on evidence given by King: see par 364 above.

3695 See pars 364, 394 above.

3696 See pars 387-388 above. Further, the Cargill Parties referred to Merrill Lynch's "Targeted 2-Stage Auction" presentation (see pars 372-373 above) which stated that a vendor due diligence "show[ed] the 'real' picture at an early stage" and provided "higher confidence on Business Plan and comparability to historic financials".

3697 The meeting on 26 February 2013 was attended by King and others, and Merrill Lynch had included an agenda item for vendor due diligence: see par 396 above. The Cargill Parties referred to Mattiske's evidence (see par 392 above) that Glencore chose not to undertake vendor due diligence because the potential purchasers were likely to have a much better understanding of the malting industry and the Joe White Business: see also par 398 above.

3698 See par 389 above.

respect of operational matters.[3699] Therefore, it was submitted that a vendor due diligence would have enabled an investigation of practices of which the repeatability was essential for the repeatability of financial performance, which were matters that should have been disclosed to Cargill upfront, particularly if known.[3700]

4401 Finally, the Cargill Parties submitted that King attempted to defend Glencore's decision by explaining that it was inherent in Glencore running the Joe White Business that it conducted a vendor due diligence. They contended that this evidence was based on King's assumption that Glencore's agriculture business in Australia would have undertaken an element of due diligence in running the Joe White Business.[3701] The Cargill Parties pointed to Mattiske's evidence that he only spent a small amount of his time on the Joe White Business given Glencore's intention to sell it.[3702]

4402 Overall, it was submitted that Glencore accepted the risks inherent in Joe White and rejected its adviser's advice to conduct a vendor due diligence, and yet pitched the Joe White Business to the market as a high quality asset, including as a business which met its customers' exact specifications and requirements.

4403 *Secondly,* it was submitted that Glencore incentivised Hughes and Argent to sell Joe White, while failing to interrogate them about risks and accuracy of the representations.[3703] It was submitted that Glencore, largely through King, sought to ensure that the financial projections and information provided put the Joe White Business in the best possible light.[3704] Further, it was contended that in order to obtain the best possible sale price, Glencore allocated and incentivised Hughes and Argent

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3699 The Cargill Parties did not include the fact that King said he would expect a vendor due diligence to cover operational matters at a high level but did not expect that a vendor due diligence would have uncovered the "covert practices that were alluded to": see par 394 above.

3700 See par 497 above.

3701 The Cargill Parties noted that nothing was said to King in 2013 to this effect, referring to Mattiske's evidence of his understanding that it was unnecessary to engage in any form of vendor due diligence (see par 392 above) and to the kick-off meeting notes, which noted that there was management preference not to obtain a vendor due diligence: see par 398 above.

3702 See par 106 above.

3703 See pars 368-369, 1876-1877 above.

3704 See par 493 above.

to perform tasks beyond their ordinary roles.[3705]

4404 With regard to the Information Memorandum, the Cargill Parties submitted that King, Mattiske and Merrill Lynch liaised with Hughes and Argent during its preparation[3706] and that the Information Memorandum sought to sell the Joe White Business to the market by reference to Joe White's proven effective business model.[3707]

4405 The Cargill Parties highlighted the fact that, on 6 April 2013, King sent an email to Merrill Lynch copied to Hughes and Argent, which attached handwritten mark-ups to the Information Memorandum. They referred to King's comment that management's belief that $30 million was an appropriate level of net working capital for the business was "value destructive to the tune of $3.5 [million]!" and that the comment was subsequently removed from the final form of the Information Memorandum.[3708]

4406 Similarly, it was submitted that in an email in March 2013, from King to Merrill Lynch copied to Hughes and Argent, King determined that the dispute concerning the Co-Operative Bulk Agreement should not be included in the Information Memorandum.[3709] The Cargill Parties pointed to other instances in respect of this dispute, submitting that King had at least 3 opportunities to ensure that the dispute was disclosed,[3710] but chose not to do so and thus conveyed to Hughes and Argent that Glencore sought to avoid disclosing information that might negatively affect the purchase price.

4407 Further, the Cargill Parties submitted that King involved himself closely with the

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3705 See par 368 above.

3706 See pars 470, 482 above.

3707 See par 504 above.

3708 See par 436 above.

3709 See par 539 above. The Cargill Parties further submitted that although King suggested in his evidence that information about the dispute in relation to the Co-Operative Bulk Agreement was provided in the Data Room, his email of 21 March 2013 gave no such direction and it did not occur.

3710 These included in July 2013, when (according to an email sent by Argent) King again was involved in discussions about this dispute. In response to an email from Wilson-Smith, Argent noted that the dispute was not considered in the Data Books, and that any impact would be negligible as any payout would be offset by a reduction in operating expenses.

messages to be conveyed by Hughes and Argent, wanting to ensure the messages given to prospective purchasers were positive.[3711] The messages that were conveyed at the Management Presentation included that Joe White's business model was focused on ensuring customers received the highest quality malt to meet their exact specifications and requirements.[3712] It was submitted that the messages Hughes conveyed in the Management Presentation were the messages Glencore wanted to convey. Thus, when asked how Joe White managed malt quality and grades of barley for its customers with such limited storage capacity,[3713] it was submitted Hughes gave a misleading response that Joe White was able to "meet quality and few complaints so system works",[3714] instead of disclosing the Operational Practices.[3715] Therefore, it was submitted that Hughes stayed on message, ensuring value enhancing information was disclosed and value destructive information was not.

4408 Furthermore, the Cargill Parties pointed to King's discussions with Hughes, Argent and Merrill Lynch regarding how to explain to Cargill the uplifts of contracted malt margins based on blending, which resulted in amendments to a footnote. They submitted that this was in order to ensure that the practice of using off-grades was not disclosed.[3716] Having been told that the use of off-grades was generally not disclosed to customers,[3717] they contended King accepted that he faced a dilemma because revealing the margin would involve revealing a practice not known to customers.[3718] The Cargill Parties rejected King's justification for not needing to go into details about the breakdown of margins because it was an inherent industry practice so therefore other maltsters "would understand this". They submitted that this evidence could not be accepted as King admitted industry practices were not referred to in the email chain in question and that he knew they were part of Glencore's defence in this case. They

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3711 See par 699 above.
3712 See par 716 above.
3713 See par 702 above.
3714 See fn 520 above.
3715 Evidence that King reviewed the questions submitted by Cargill before the Management Presentation and stated that the majority of questions were ones management were well prepared for was also referred to: see par 703 above.
3716 See pars 797-816 above.
3717 See par 805 above.
3718 See par 806 above.

also noted that King gave evidence that he was keen to support Glencore's interests in relation to this topic.

4409 Moreover, the Cargill Parties submitted that King's desire was to avoid disclosing information that could negatively affect the view of bidders, confirmed by King's answer to the question of why he did not disclose the off-grade margin. King first explained his approach on the basis that "there's an element of sensitivity associated with individual contracts", but then they contended that he changed his explanation to "it's a very fine line and difficult balance to meet, trying to run a competitive sale process whilst wanting to disclose as much information to potential purchasers around the contracts".

4410 With regard to Argent's edits to the footnote,[3719] it was submitted that although King did not accept the proposition, his silence following the amendment constituted assent to an amendment by which Argent made sure there was no disclosure of the fact that the practice of using off-grade barley was not disclosed to customers. The Cargill Parties submitted that King was shown a form of the final document,[3720] and accepted that nothing on the face of the document related to off-grade barley and that it merely made a comment about other revenue.

4411 In addition, it was submitted that it was in that context that Merrill Lynch informed Hughes that Cargill had requested an operational call between De Samblanx and Youil, and that Merrill Lynch suggested to Hughes that he might also want to be on that call to ensure consistent messaging with what was said in the Management Presentation. Hughes attended the Operations Call and the Cargill Parties submitted that he gave misleading responses to Cargill's questions about quality problems and specifications,[3721] which was again in line with Glencore's messaging and followed the example set by King of disclosing value-enhancing information and not disclosing value-destructive information.

3719 See pars 810-812 above. Argent deleted the reference to "off take" in the description of other revenue.

3720 Being the sales volume analysis disclosed to Cargill in the Data Room: see par 815 above.

3721 See par 884 above.

4412 *Thirdly,* the Cargill Parties submitted that for the purposes of disclosure in the Data Room, Glencore and Viterra failed to take any steps to locate any policies relating to the Joe White Business other than policies relating to safety, health and the environment, despite acknowledging the importance of disclosing relevant policies. Consequently, it was submitted, the Joe White executives were not asked to provide policy documents relating to the way in which the Joe White Business operated, or relating to the technical aspects of malt production, and as a result the Viterra Policies were not placed in the Data Room or disclosed.

4413 The Cargill Parties referred to Fitzgerald asking Bickmore to set up the Data Room,[3722] Bickmore's discussions with Argent, the fact Argent started sending documents to Bickmore and that Bickmore obtained documents from others, including human resources, property, and safety and environment departments within Viterra. They further referred to the meeting between Wilson-Smith, Lindner, Hughes, Argent and Merrill Lynch on 5 June 2013, and the document circulated after the meeting entitled "Data Room Information Log". In particular, they referred to the allocation in that document to Fitzgerald and Wilson-Smith of responsibility for company policies, both in the category of safety, health and environment and the category of "Other".[3723]

4414 It was submitted that Wilson-Smith, who performed the task of locating Joe White company policies, was aware that there were policies but did not know what they were.[3724] Instead of asking for any policies pertaining to the operation of the Joe White Business, it was submitted that Wilson-Smith confined his search to policies relating to safety, health and environment. The Cargill Parties submitted that Wilson-Smith's evidence demonstrated he understood the importance of disclosing any relevant policies and it would have been easy for him to arrange meetings with Joe White executives, but he failed to make enquiries beyond policies relating to safety, health and environment.

4415 Further, the Cargill Parties submitted that Bickmore accepted that policy documents

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3722 See par 663 above.
3723 See pars 615-618 above.
3724 See par 669 above.

that governed the way in which the Joe White Business operated should have been considered for inclusion in the Data Room, but gave no evidence that she asked anyone to locate such policies. Furthermore, they referred to Bickmore's evidence that it did not occur to her that documents relating to technical production or the technical aspects of the production of malt might be relevant.

4416 Therefore, the Cargill Parties submitted that the failure of Wilson-Smith and Bickmore to take steps to locate policies other than those relating to safety, health and environment, and Fitzgerald's failure to discharge his responsibility to ensure such policies were located, constituted a departure from the standard of care of a reasonable vendor.

4417 *Fourthly*, the Cargill Parties submitted that Glencore and Viterra failed to take reasonable care in verifying the Warranties.

4418 The Cargill Parties submitted that Wilson-Smith failed to adequately verify the Warranties for the following reasons:[3725]

(1) Wilson-Smith failed to ask Hughes, Argent, Youil, Stewart or Wicks if they had been asked to verify contractual warranties before.

(2) Wilson-Smith did not advise the executives of the need to take care in verifying the Warranties.[3726]

(3) The meetings Wilson-Smith held with each of the executives were short.[3727]

(4) Wilson-Smith did not provide the executives with a copy or extract of the Acquisition Agreement in advance of the meetings.[3728]

(5) Wilson-Smith did not go through the relevant definitions with the

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3725 The Warranty verification process is considered in detail at issue 125.6 below.
3726 See, for example, par 4992 below.
3727 See pars 4966, 5002, 5016 below.
3728 See par 4969 below.

executives during the meetings and did not have a copy of the definitions with him at the meetings.[3729]

(6) Wilson-Smith did not test or interrogate the answers given, follow up or invite supplementary information,[3730] rather he accepted answers given at rushed, face-to-face meetings.

(7) Wilson-Smith failed to verify whether information raised by Joe White executives had been adequately disclosed to Cargill.[3731]

(8) Wilson-Smith met with Hughes and Argent together and was not able to ascertain which Warranties were verified by whom.[3732]

(9) There were discrepancies between Wilson-Smith's handwritten and typed notes, and he was not in a position to say which was correct.[3733]

(10) Warranty 12 was amended after Wilson-Smith finished the Warranty verification process, but he did not attempt to re-verify the Warranty with any of the executives.[3734]

(11) Wilson-Smith said that with the benefit of hindsight he would have conducted the process differently.[3735]

(12) Wilson-Smith accepted that he could not be satisfied that the Warranties had been properly understood by the executives.[3736]

(13) Wilson-Smith accepted that any opaqueness or lack of clarity that arose out of the Warranty verification process arose directly out of the rushed

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3729 See pars 4970-4982 below.
3730 See par 4995 below.
3731 The Cargill Parties provided the example that Wilson-Smith's notes recorded that Hughes and Argent had identified the dispute with Co-Operative Bulk and indicated they thought it had been disclosed and similarly, Youil thought it had been disclosed.
3732 See par 5005 below.
3733 See pars 5006-5013 below.
3734 See pars 5034(12)-5039 below.
3735 See par 4998 below.
3736 See par 5002 below.

and slipshod way in which that process was conducted.[3737]

4419 The Cargill Parties submitted that the failure to adequately verify the Warranties being given, without appropriate disclosures being made in respect of them, constituted a significant departure from the standard of care of a reasonable vendor. The consequence was that the Warranties were breached and the Warranty Representations were false by reason of the Viterra Practices and that they were not disclosed to Cargill.

4420 *Fifthly*, the Cargill Parties submitted that the Viterra Practices were revealed at the last available moment so far as the Joe White executives were concerned. They submitted that these executives were acting as employees of Viterra Ltd and Viterra Malt, and represented Glencore during the sale process. The Cargill Parties outlined some of the events that occurred after the Acquisition Agreement was entered into and pre-Completion,[3738] noting that on 9 or 10 October 2013 Youil disclosed some details of the Reporting Practice.[3739] Further, it was submitted that at the 15 October Meeting Stewart and Hughes explained the Operational Practices at a high level to De Samblanx and Viers,[3740] but did not explain the significance of the Operational Practices nor how the Joe White Business would be impacted if they were discontinued.[3741] Furthermore, it was submitted that they did not explain the instances or extent of the Operational Practices, which customers were affected, the volumes affected for each customer or the extent to which the profitability of the Joe White Business was underpinned by and dependent on the use of the Operational

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3737 See par 4998 below.

3738 See generally pars 1040-1556 above.

3739 See pars 1086-1088 above.

3740 See pars 1100-1154 above.

3741 The Cargill Parties relied on various matters in support of this proposition, including: (1) De Samblanx's evidence that, in October 2013 because he "was not aware of the extent of these practices, and therefore the size of the problem, [he] was unable to assess what the impact on operations might be of ceasing these practices from day 1"; (2) the email from Hughes instructing Joe White executives not to discuss the content of documents with Cargill (see par 1268 above); (3) the document Stewart presented at the 15 October Meeting (see pars 1102-1117 above); and (4) Youil's statement regarding what was discussed in the 15 October Meeting, as recorded in Lindner's notes, that "Didn't go into customers etc, impact on [Joe White Business]": see par 1289 above.

Practices.[3742] Moreover, it was submitted that they did not provide the Viterra Certificate of Analysis Procedure or explain that it was kept concealed in an obsolete folder.[3743]

4421 *Sixthly,* in terms of Glencore and Viterra's knowledge, the Cargill Parties referred to Cargill's request for information regarding the extent of the Viterra Practices on 22 October 2013[3744] and Mattiske's subsequent investigations.[3745] They referred to the evidence that Mattiske appointed Fitzgerald to direct how the investigation was to be carried out.[3746] They submitted Mallesons was also appointed to carry out this task with Fitzgerald.[3747]

4422 The Cargill Parties submitted that Glencore and Viterra received full and frank disclosure of the Viterra Practices on 22 and 23 October 2013 from Hughes, Youil, Stewart and Wicks,[3748] who disclosed matters including that:

(1) Joe White had been breaching contracts and not telling its customers.[3749]

(2) There was no communication with customers about the Viterra Practices or around the contracts.[3750]

(3) Gordon "said to do it" in or about "Oct/Nov 2011".[3751]

(4) The Viterra Practices were used because Joe White was "[t]rying to make malt as cheap as possible"[3752] and Joe White had done this to make as

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3742 Ibid. The Cargill Parties also relied on evidence given by Stewart: see par 1118 above.
3743 See pars 287-288 above. The Cargill Parties also referred to their submissions for issues 24-29 above regarding the actions taken by some of the Joe White executives and Glencore and Viterra in October to conceal the Reporting Practice from Cargill.
3744 See par 1236 above.
3745 See par 1319 above.
3746 See par 1246 above.
3747 The evidence referred to by the Cargill Parties did not support the submission that Mattiske knew at the time that Mallesons was involved in this process. The evidence directly to the contrary was not referred to in making this submission: see par 1277 above.
3748 The Cargill Parties referred to their submissions at issues 24-29 above.
3749 See par 1299 above.
3750 See pars 1299, 1306, 1307 above.
3751 See par 1299 above, but note fn 793 above.
3752 See par 1299 above.

much profit as possible whilst keeping customers happy.[3753]

(5) The practices were implemented because Joe White had been told to reduce the quality of the product.[3754]

(6) The practices were used because Joe White had been getting bad barley from Glencore which eroded its ability to meet specifications and Glencore did not supply Joe White with required varieties.[3755]

4423 Further, it was submitted that the Joe White executives conveyed further information to Glencore and Viterra, including:

(1) Stewart said that the Reporting Practice ensured that the customer was always right and that Stewart did not know of the legal implications of misreporting.[3756]

(2) Wicks or Hughes stated on 23 October 2013 that Joe White was trying to guess what the customer wanted and act accordingly rather than just telling them,[3757] that Joe White's malt often had specifications outside of contract[3758] and that if Joe White had to supply in accordance with contracts it would be commercial suicide and result in brand decimation.[3759]

(3) Youil noted on 23 October 2013 that the information disclosed in respect of the Operational Practices did not provide details of the customers and impact on business.[3760]

(4) Wicks or Hughes advised that the Cargill 22 October Letter was a fair

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3753 See par 1307 above.
3754 See par 1292 above.
3755 See par 1297 above.
3756 See par 1297 above.
3757 See par 1307 above.
3758 See par 1309 above.
3759 See par 1307 above.
3760 See par 1289 above.

statement of what was said in the 15 October Meeting.[3761]

(5) When Hughes was asked if he felt there had been a misrepresentation he replied, "Yes but I was looking at customer practice."[3762]

(6) While Hughes, Youil and Stewart provided estimates of the impact on the Joe White Business of ceasing the Viterra Practices in meetings on 23 October 2013, Hughes noted that Stewart was pulling together numbers to more accurately identify the financial impact.[3763]

(7) Stewart provided Fitzgerald with copies of the Viterra Certificate of Analysis Procedure which were not shared with Cargill after the interviews conducted on 23 October 2013,[3764] and Stewart also sent additional information analysing the extent of the Operational Practices in a memorandum to Fitzgerald.[3765]

(8) The Customer Review Spreadsheet[3766] identified the Viterra Practices and that Joe White was unable to produce malt within customer specifications without adjusting Certificates of Analysis for any of its customers.[3767]

Furthermore, they submitted Glencore and Viterra had access to copies of Certificates of Analysis and the Laboratory Information System containing information about the instances of the Reporting Practice and Varieties Practice occurring (from which Ryan conducted his analysis).[3768]

4424 The Cargill Parties submitted that on 22 October 2013 both Fitzgerald and Hughes instructed Joe White staff to cease communications with Cargill and not discuss the

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3761 See par 1305 above.
3762 Compare par 1284 above.
3763 See par 1283 above.
3764 See par 1324 above.
3765 See pars 1387-1388 above.
3766 See pars 1211-1232 above.
3767 See par 1226 above.
3768 See par 2313 above.

content of the "Cargill Customer Review" and "Cargill Customer Review Key Recommendations Document".[3769]

4425 Further, it was submitted that despite the disclosure made to Glencore, the 25 October Reply Letter was a misleading response to the Cargill 22 October Letter, which did not disclose the frequency of the Viterra Practices and downplayed Cargill's concerns by suggesting they were unfounded. They submitted that, subsequently the Cargill 29 October Letter identified that the response was inadequate as the impact of the matters remained uncertain and that Cargill sought clarification.[3770] However, they submitted that rather than providing the information sought, Glencore's response maintained that no further access to information would be provided, despite Glencore having access to the Joe White executives, Certificates of Analysis and the Laboratory Information System.[3771]

4426 Furthermore, the Cargill Parties submitted that Glencore made the decision to require Cargill to close the deal rather than provide Cargill with the information it had requested. The Cargill Parties referred to the fact that Walt told King that Glencore's view was to close the sale, and to deal with a potential warranty claim thereafter.[3772] It was submitted that King's question, "whether we can push to close given this?",[3773] was appropriately raised. The Cargill Parties also submitted that Mattiske admitted that he did not want to defer Completion and he did not want to continue having to

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3769 These documents being the Customer Review Spreadsheet and the Key Recommendations Memorandum: see par 1268 above.

3770 Specifically the Cargill Parties referred to the request in the Cargill 29 October Letter for clarification "not only on differences in analysis outcomes that may result from tests undertaken at different times but whether the certificates themselves did not reflect accurately the outcomes of the test on which each certificate reports". Further, the Cargill 29 October Letter asked whether customers had been informed and consented to the Varieties Practice and the Gibberellic Acid Practice. Cargill also requested details of the frequency of occurrence, the percentage of affected contracts, how many customers were affected and the total volume those customers represented: see par 1451 above.

3771 The Cargill Parties also referred to the fact that the 30 October Reply Letter stated that "Certificates of [A]nalysis have been issued in compliance with [Joe White's] ISO accredited quality system and [Joe White's] documented procedures"; "[Joe White] management are currently considering how to manage" a shortage of barley; and "[Joe White] management have taken steps to ensure that going forward no [gibberellic acid] is added to malt where customers require that it not be used in production": see pars 1512, 1524 above.

3772 See par 1454 above.

3773 Ibid.

run Joe White.[3774]

4427 In circumstances where Glencore required Cargill to complete the Acquisition Agreement despite having access to information regarding the extent of the Operational Practices in October 2013, and failed to disclose this information to Cargill before Completion notwithstanding Cargill specifically requesting it, it was submitted that Glencore and Viterra refused to provide Cargill with information that would have enabled Cargill to properly understand its rights and obtain informed legal advice.[3775] In addition, it was submitted they insisted on Cargill completing despite having the knowledge they did, including that Cargill would suffer loss by completing.

4428 For the reasons outlined, the Cargill Parties submitted that Glencore and Viterra were overwhelmingly culpable for the loss suffered by Cargill Australia on Completion. If there was any failure by Cargill to take reasonable care, they submitted that justice and equity required that no reduction be made to the loss suffered by Cargill having regard to the comparative culpability.

X.80.4 Analysis

X.80.4.1 Section 137B of the Competition and Consumer Act

4429 Cargill Australia's claim is not apportionable under section 137B of the *Competition and Consumer Act* as the Viterra Parties intentionally and fraudulently caused the loss Cargill Australia suffered.[3776] Hughes had knowledge of the Viterra Practices and such knowledge was attributable to Viterra.[3777] Hughes was aware of the statements made in the Information Memorandum and the Management Presentation Memorandum because he was directly involved in settling their contents; and he was also aware of the Management Presentation Statements, the Operations Call Statements and the Commercial Call Statements because either he made them himself or he was present when they were made. By reason of these matters, Hughes was

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3774 See further fn 4545 below, and in particular (9).
3775 See issue 31 above.
3776 See par 4370 above.
3777 See pars 2660-2676 above and see issues 11, 22 more generally.

aware of what had been represented by the Viterra Parties to be the financial and operational performance of Joe White. In addition, notwithstanding the Due Diligence, he must have known from the exchanges in the Operations and Commercial Calls that there had been no disclosure of the Viterra Practices,[3778] and thus the manner in which they underpinned the financial and operational performance of Joe White. Further, by reason of Hughes' knowledge of all of the Pre-Execution Statements, Viterra knew that material statements made pertaining to the financial and operational performance of Joe White were false. Further, although the allegations concerning deceit relevantly were confined to Viterra, the position was not materially different with respect to Glencore given Hughes' role and authority.[3779]

4430 Furthermore, despite what was stated in the Sale Process Disclaimers, Glencore and Viterra intended that Cargill Australia would rely on the information provided. This intention was evident from a number of matters, including:

(1) The intention to create maximised or massive competitive tension.[3780]

(2) The intention to omit certain information if it was destructive of perceived value.[3781]

(3) The contents of the Phase 1 Process Letter setting out the basis of any indicative bid.[3782]

(4) The contents of the Information Memorandum (which Hughes relevantly approved) included patently false statements that Joe White ensured its customers received the highest quality malt and met their exact specifications and requirements.[3783]

3778 Hughes also having been fully aware that the Viterra Policies had been archived in a manner to conceal their true status: see pars 90, 287 above. Further, the presentation given at the 15 October Meeting overseen by Hughes, at which the Operational Practices were disclosed to De Samblanx and Viers, was indicative of Hughes' awareness of the lack of previous disclosure: see pars 1102-1142, 3260.

3779 See issues 11, 22 above, esp par 2672 above.

3780 See par 4396 above.

3781 See par 4405 above.

3782 See pars 466, 2926, 3056-3059 above.

3783 See par 504 above. See also par 522 above.

(5) The continuation of the sale process by the Viterra Parties, including the provision of the Phase 2 Process Letter, when they were informed that Cargill was relying on the contents of the Information Memorandum not only for the Cargill Indicative Bid but also in its subsequent appraisal of Joe White together with the more detailed information provided by the Viterra Parties in Phase 2.[3784]

(6) The contents of the Management Presentation Memorandum (which Hughes relevantly approved) included repeating patently false statements that Joe White ensured its customers received the highest quality malt and met their exact specifications and requirements.[3785]

(7) The intention not to disclose anything other than what was asked despite Hughes knowing that material information had been omitted that underpinned the financial and operational performance of Joe White and which would be likely to be directly relevant to assessing its value and the appropriate amount for any bid.

4431 It is clear that the Viterra Parties, given their knowledge of false information provided and their intention for Cargill Australia to rely on it,[3786] intended to induce Cargill to acquire Joe White at a high price and, as things transpired, fraudulently caused the loss suffered.

4432 Equally, to the extent this proceeding relates to the Other Bidders Representations, it has been found that Glencore and Viterra made false representations with the intention of inducing Cargill to agree to pay an additional $15 million.[3787] Such conduct fraudulently caused Cargill Australia to suffer a loss of $15 million (as part of its overall loss).

4433 That said, for completeness, I will proceed to consider, if (contrary to what has been

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3784 See par 623 above.

3785 See par 716 above. See also pars 718, 727 above.

3786 Obviously, this finding does not carry with it that all persons involved on behalf of the Viterra Parties had such knowledge or intention.

3787 See issues 54, 59, 60 above.

found) section 137B had been applicable, whether Cargill Australia's loss was caused in part by its own failure to take reasonable care of its own interests and whether there ought to be a reduction in the amount of damages recoverable.

X.80.4.2 Cargill Australia's conduct

4434 The sale of Joe White was a "Wall Street" deal, which could be expected to attract sophisticated prospective purchasers.[3788] Cargill was such a purchaser, and its conduct must be considered accordingly. For the reasons that follow, Cargill, Inc (and therefore Cargill Australia)[3789] acted with reasonable care in entering into the Acquisition Agreement and completing the Acquisition.

4435 *First,* Cargill did not fail to act with reasonable care as a result of not asking for the Viterra Policies either before it entered into the Acquisition Agreement or before Completion. Despite the Sale Process Disclaimers (including the disclaimers contained in the Data Room Protocol Terms), it could have reasonably been expected that the Viterra Parties would have disclosed material documents, such as the Viterra Policies which underpinned Joe White's performance, as part of the Due Diligence. There were a number of reasons for this. This was a large commercial transaction and there were strict confidentiality protocols (including a limited means by which relevant information could be obtained) which surrounded access to documents in the Data Room and access to information as part of the Q&A Process. As King himself explained,[3790] in such an environment it would be reasonably expected that any significant information or materials, including any policies that underpinned the financial performance of Joe White such as the Viterra Policies, would be disclosed in an information memorandum or, if not an information memorandum, then in a data room or by way of other disclosure as part of a due diligence. So much was reflected in each limb of Warranty 12.[3791]

3788 See pars 3005, 4003 above.

3789 Cargill Australia's case as pleaded was that Cargill, Inc participated in the sale process on its own behalf and on behalf of Cargill Australia at all times from early 2013: see further issue 104 below.

3790 See pars 365, 373, 385, 474, 494-498, 619-620, 659, 943, 974, 1019 above.

3791 See issue 42 above.

4436 Further, Cargill Australia knew that Viterra employees, including those at Joe White, signed an ethical code of conduct.[3792] Therefore, in the absence of notice to the contrary, there were no reasonable grounds to suspect a company policy existed that directly contradicted this code and was implemented such that it underpinned or even materially affected the financial and operational performance of Joe White.

4437 In addition, as part of the Due Diligence Cargill asked a series of questions that, if they were properly answered, ought to have unearthed improper conduct or any inability to perform in accordance with customers' contracts.[3793] In such circumstances, where information was provided that conveyed to Cargill Australia that Joe White was conducted in a particular manner, and having conducted an extensive due diligence and raised queries which did not relevantly disclose anything to the contrary,[3794] there was no reasonable basis for Cargill Australia to distrust the information provided by Glencore or Viterra and to enquire even further about Joe White's operations than it already had, including regarding compliance with the Viterra Code. Furthermore, Cargill had its own policy, so there was no material need to have access to any policies concerning Certificates of Analysis unless there was reason to suspect that such a policy undermined the Viterra Code or formed the basis for any material breaches of customer contracts on the critical matter of malt specifications. In light of the information that was provided there was no reasonable basis for any ongoing suspicion of any material degree.

4438 Finally, in October 2013, Cargill was told, incorrectly and materially so, that Certificates of Analysis were issued in accordance with an International Organisation for Standardisation accredited quality system of Joe White.[3795] There was nothing in this information that suggested an improper and clandestine means of recording testing results and misreporting them was in place.

3792 See par 889 above.

3793 See, for example, pars 873-881, 884-888, 891-909, 911-921, 924-930, 957 above.

3794 Amongst other steps taken, the Data Room was accessed by Cargill representatives 1250 times, and 466 documents were reviewed. Out of a total of 71 persons who had permission to have access, 59 availed themselves of that opportunity.

3795 See par 1405 above.

4439 It is not necessary to consider whether the Viterra Policies would have been provided if Cargill Australia had asked for them, as it was clear on the facts that Cargill Australia acted with reasonable care. As it is unnecessary, in circumstances where many of the relevant witnesses were not called and Mattiske did not know of the Viterra Policies until October 2013, it is not appropriate to make any finding on this issue.

4440 *Secondly*, acting in a sensibly commercial manner, there was little Cargill could have meaningfully done in October 2013 beyond what it did. Having been alerted to the existence of the Operational Practices, Cargill properly sought relevant information from Glencore and the Sellers themselves. Both in the written correspondence and in the discussions between Purser and Mattiske, Cargill made it plain that such practices were unacceptable, and that Cargill considered the ramifications they could have on Joe White's operations and Cargill Australia's rights to be significant.[3796] Given the October 2013 Responses,[3797] and the way in which the Viterra Parties cut off access to any other meaningful source of information,[3798] there was little Cargill could do other than to proceed to Completion (to avoid taking the serious commercial risk of being in material breach of contract for failing to complete).[3799]

4441 *Thirdly*, the Warranties incorporated into the Acquisition Agreement did not fall short of a reasonable standard of care.[3800] The Warranties included Warranties 7.3 (there being no material default of any Material Contract), 9.2 (there being no facts or circumstances to the Share Seller's knowledge that might give rise to a Claim), 12(a) (the Data Room Documentation had been collated and disclosed in good faith and with reasonable care), 12(b) (to the Share Seller's knowledge, no material information had been omitted from the Data Room Documentation), 12(c) (to the Share Seller's knowledge, the Data Room Documentation was true and accurate in all material respects), 13.4 (the Joe White Business had been conducted in the ordinary course in a

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3796 See pars 1234, 1236, 1319-1322, 1372, 1443-1451, 1473 above.
3797 See issue 24 above.
3798 See pars 1235, 1265-1275 above.
3799 See fn 2638 above.
3800 Numerous Warranties were breached as a result of the Viterra Practices. See issues 42 to 45, 47 above.

proper and efficient manner since the Last Balance Sheet Date) and 17(a) (the Joe White Business had been conducted in accordance with applicable Laws in all material respects). Each of these Warranties individually, as well as collectively, provided protection to Cargill Australia in relation to materially misleading information or the omission of material matters.[3801]

4442 *Fourthly*, Cargill Australia did not fail to act with reasonable care in relying on the Other Bidders Representations to complete the Acquisition Agreement. The Other Bidders Representations were made with the intention to induce Cargill Australia to enter into the contract,[3802] and reliance on them was not a consequence of a failure to take reasonable care. On the contrary, the evidence showed that in the narrow timeframe of 2 hours that Glencore gave to Cargill to consider its position, Cargill diligently and assiduously considered the Other Bidders Representations, including the possibility that they may be untrue.[3803]

4443 *Fifthly*, Cargill Australia did not fail to take reasonable care of its own interests because some of Cargill Australia's agents did not have regard to the terms of the Sale Process Disclaimers for at least 2 reasons.

4444 In a commercial transaction of this size, where multiple individuals are involved and responsible for overseeing various parts of the transaction,[3804] it is a commercial reality that not all individuals can sensibly be expected to be across every aspect of the entire transaction. It cannot be the case that on these facts, given a transaction of this scale, there was a need for every person involved to read all the detail of all the documents. As Conway in substance explained,[3805] it is simply not practical to expect every executive in a large organisation to read the minutiae of every document. As all the executives were undoubtedly aware, Cargill Australia had a legal team that was directly responsible for reading and considering any Sale Process Disclaimers, and

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3801 See issues 41-45, 47 above.
3802 See issue 60 above.
3803 See issues 57-58 above.
3804 There were well in excess of 50 persons working on the transaction for Cargill.
3805 See par 4374 above.

advising Cargill Australia and its agents how such terms impacted the transaction.

4445 Further, it was not as if the Sale Process Disclaimers were unusual. The thrust of the evidence on this point was that in a transaction such as this, disclaimers seeking to reduce or extinguish any liability of a seller or its agent were to be expected.[3806]

4446 Furthermore, it was not the case that Engle or other key individuals involved in putting together the Cargill deal model misunderstood Cargill's obligation. Broadly, it was understood by those involved that Cargill was required to take the information provided, to test that information, to input information of its own and to prepare its own valuation. Engle's evidence was that in his experience "the Confidentiality Deed sets up for a requirement that a purchaser is going to need to independently evaluate materials" and that a valuation was built by "independently analys[ing]" and "applying business judgment" to the information provided by the seller. The submission by the Viterra Parties that some Cargill employees did not appreciate the significance of the Confidentiality Deed in relation to the task at hand fell away in light of evidence that, in valuing Joe White, it was done on the basis that Cargill needed to independently analyse the information provided.[3807] The product of this approach was the base case contained in the Cargill deal model, which included things such as a 10 year forecast and a terminal value, and addressed synergies (none of which was contained in the Information Memorandum or the Management Presentation Memorandum). It was the base case that formed the basis of Cargill's assessment.[3808] Further, Cargill primarily used a discounted cash flow analysis in valuing Joe White after independently considering a variety of alternative valuation methods.[3809]

4447 To be clear, there was no question that Cargill Australia read the Sale Process

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3806 See, for example, par 1845 above.

3807 See pars 454-455, 459, 472, 574, 643, 743, 4380 above. See also issue 105 below.

3808 See pars 571, 576, 759, 840, 850, 853, 945, 959-961, 1010, 3971 above.

3809 The uncontested evidence of Hawthorne was that: (1) Cargill considered various methodologies; (2) Cargill also had available to it the Goldman Sachs valuation (in which various methods of valuation were considered in addition to the discounted cash flow); and (3) in the end, Cargill relied on its own valuation.

Disclaimers. Cargill Australia's lawyers were involved from the outset.[3810] The fact that some individuals did not read particular disclaimers did not amount to evidence that Cargill Australia thereby did not read those disclaimers. In the circumstances, it was reasonable for people such as Eden, Le Binh, Sagaert, Jewison, Conway and Engle to leave it to the lawyers, who had direct expertise in dealing with the legal documents, to read and understand the implications of these documents and provide any necessary advice.

4448 *Sixthly,* Cargill Australia did not fail to take reasonable care because of the way in which it read each or any of the Pre-Execution Statements. There was a warning, found in various disclaimers, to the effect that Cargill was required rely on its own investigations. This was the substance of clause 8.3(c) of the Confidentiality Deed, which required Cargill, Inc to "rely solely on its own investigations and analysis in evaluating the Transaction".[3811] It has been found elsewhere that Cargill Australia did not breach clause 8.3(c).[3812] For the reasons outlined,[3813] Cargill did not analyse the information in a way that was not in accordance with clause 8.3(c). This applied to the other instances in which similar warnings were said to be contained in the Sale Process Disclaimers.[3814] There was no suggestion that any of the other disclaimers meant that conduct that was not in breach of clause 8.3(c) of the Confidentiality Deed might somehow still have been contrary to another disclaimer dealing with the same subject matter.

4449 Further, even if the Sale Process Disclaimers imposed obligations as the Viterra Parties alleged, this would not result in Cargill Australia somehow discovering information that was not disclosed, nor be the subject of some form of notice despite reasonable enquiries having been made and the relevant information not being disclosed. In any event, Cargill did undertake extensive investigations and a detailed analysis, and in

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3810 See, for example, pars 455, 471, 485 above.
3811 See par 590 above.
3812 See issue 87 below.
3813 See issue 105 below.
3814 Similar terms were contained in the Phase 1 Process Letter (see par 468 above); the Information Memorandum (see par 475 above); the Phase 2 Process Letter (see par 643 above) and the Management Presentation: see par 712 above.

doing so did not uncover the Viterra Practices or anything of that nature, much less that the Joe White Business was underpinned by improper routine practices that had not been disclosed. In summary, it could not be said that Cargill Australia had failed to take reasonable care of its own interests simply because it did not discover matters that reasonable steps during the Due Diligence did not reveal.

4450 *Seventhly,* Cargill Australia did not fail to take reasonable care as a result of the steps it did and did not take to verify whether each of the Pre-Execution Statements was accurate. The purpose of the Due Diligence was to independently assess the information provided and then conduct independent investigations and analyses in evaluating the Transaction. But the extent to which assessments, investigations and analyses could take place, as a matter of practicality, was necessarily limited. A significant amount of the information provided was not publicly available, and therefore Cargill Australia's only option for verifying the accuracy of such information, as well as investigating matters relevant to it itself, was by making reasonable enquiries of the Viterra Parties. This is what it did.[3815]

4451 Further, when Cargill Australia questioned the accuracy of particular information and the existence of a certain state of affairs, and sought to verify the information provided at the 15 October Meeting, the Viterra Parties responded by providing the October 2013 Responses, which were woefully inadequate and did not come close to addressing the issues that had been raised despite the far more extensive relevant information that was available to the Viterra Parties.[3816] Furthermore, in

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3815 In contending otherwise, the Viterra Parties referred to evidence of persons involved in the Due Diligence (principally Engle and De Samblanx) seeking to identify failures in the process. I will not address the matters raised individually. Much of the evidence relied upon consisted of an inability of a witness to recall specific steps taken in the Due Diligence conducted 5 or so years before the evidence was given, including whether or not particular steps were taken in accordance with a spreadsheet prepared in anticipation of a due diligence being undertaken (see pars 441, 2000, 2054 above). Also much was made of the absence of reports, without referring to the evidence of the weekly calls between workstream leaders or the spreadsheets that were created and repeatedly updated. In particular, it was submitted "most importantly" De Samblanx did not produce an operations due diligence report, but this failed to give due weight to the Operations Spreadsheet, the significant amount of information it contained, its circulation to relevant Project Hawk members and De Samblanx's evidence that he intended the Operations Spreadsheet to stand as his due diligence report: see further pars 755, 771-780, 783-795, 817-821, 825-826, 860-861 above. See also pars 4479-4481 below.

3816 See annexure C to these reasons and issues 24-26 above.

circumstances where the main, if not only, source of information that could have disclosed the inaccuracy of the information provided in the Pre-Execution Statements rested with the Viterra Parties and was not publicly available, Cargill could hardly be criticised for not discovering the hidden business practices comprising the Viterra Practices. In this context it bears repeating that even the Viterra Parties denied knowledge of the Viterra Policies and Viterra Practices up until 22 October 2013,[3817] and, despite everything that was raised, failed to provide any evidence of the Viterra Policies to Cargill Australia in October 2013.

4452 *Eighthly*, Cargill Australia did not fail to take reasonable care because it did not conduct its own independent investigations of the Undisclosed Matters. It was not established that the Alleged Industry Practices were the standard practices in the malting industry,[3818] and beyond that there was nothing to suggest that Cargill Australia had reason to suspect that these practices were a feature of any established, legitimate malting business. Further, the Viterra Parties failed to prove that the Undisclosed Matters were disclosed in the Information Memorandum or during the Due Diligence,[3819] or that Cargill was or ought to have been aware of them despite having the knowledge or state of mind pleaded in paragraph 31A of the Defence.[3820] Therefore, it was not established that before 4 August 2013 Cargill had knowledge about the Joe White Business that objectively would have alerted it to the fact that there was a risk that Joe White was engaging in some or any of the Viterra Practices. As for the position after 4 August 2013 and before Completion, that is addressed above.[3821]

X.80.4.3 The Viterra Parties' conduct

4453 Having regard to the behaviour of the Viterra Parties and Cargill Australia in entering into the Acquisition Agreement, the comparative culpability of the Viterra Parties was grave and deliberate in numerous material respects. Speaking broadly, the Viterra Parties' culpability far outweighed any possible failure by Cargill Australia to take

3817 See issue 11 above.
3818 See issue 13 above.
3819 See issue 12 above.
3820 See issue 21 above.
3821 See pars 3418-3424, 4440, 4451 above.

reasonable care for the reasons outlined below.

4454 *First*, Glencore elected to run the sale process as a competitive auction sale process, instead of on a back-to-back basis.[3822] Had Glencore conducted the sale process differently it could have avoided making representations and providing warranties, and Cargill Australia, or any other purchaser, would have been in a position where it was required to accept Joe White on an *as is where is basis*. By choosing to conduct the sale of Joe White in the manner that it did, so that there was maximum competitive tension, Glencore adopted an increased level of exposure than it otherwise would have had in order to seek to obtain a significantly greater return on the sale of a business it had only acquired 6 months or so before the Information Memorandum was disseminated.

4455 *Secondly*, Glencore did not undertake a vendor due diligence, notwithstanding advice from its financial advisers to do so.[3823] Glencore (in contrast to Viterra) had limited experience in operating a malting business and therefore took on a risk, however remote, that policies or practices within the Joe White Business could have put the business in a position where it was not complying with regulations or contractual obligations.[3824] Having not conducted a vendor due diligence, Glencore elected not to pursue an opportunity to uncover any inappropriate practices relevant to the true value of the Joe White Business, such as the Viterra Practices and Policies, before commencing the sale process.

4456 In this regard, it must be noted that King, not surprisingly, expected a form of due diligence to have been undertaken by the mere fact that Glencore had been in control of the Joe White Business from late 2012.[3825] In circumstances where Glencore had its

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3822 Obviously, it is not being suggested that there was anything untoward per se in choosing an auction process.

3823 Lindner gave evidence that a vendor had options when preparing for a sale from "providing a full due diligence report to be made available to bidders *who are granted reliance on that report*, to the vendor *merely* providing an information memorandum or flyer of some kind and populating a data room" (emphasis added).

3824 See pars 364, 388-391 and fn 342 above.

3825 See par 391 above.

own representative in Australia as a director of Viterra and Joe White from this time, it would be expected that Mattiske, taking a diligent and intelligent interest in company affairs consistent with his duties as a director,[3826] would have had a not insignificant understanding of the Joe White Business. As the 15 October Meeting demonstrated, it would have taken very little effort on the part of Mattiske (or anyone else from Glencore, including the other directors of Joe White)[3827] to have made it clear that the Joe White Business had to be conducted strictly in accordance with the Viterra Code and have explained to him (or the others at Glencore acting as directors) in broad terms how the Joe White Business operated in order to be so satisfied.

4457 In summary, Glencore was in a position of selling a newly acquired business in an industry where it did not have significant experience and in which Mattiske (and the other Joe White directors associated with Glencore) chose to take not much more than a passive role. In consciously choosing not to conduct a vendor due diligence, Glencore knowingly assumed the risk that it would not have a proper understanding of the business it was selling, including the existence of any underlying improper practices within Joe White, while at the same time seeking to achieve a maximum price on the basis that the Joe White Business was being conducted in a proper and efficient manner.

4458 Further, the riskiness of such behaviour was exacerbated due to the fact that Merrill Lynch, who was employed as Glencore's financial adviser in the sale and was a known expert in its field, encouraged Glencore to undertake a vendor due diligence and believed that by electing not to do so Glencore was "being very naïve" and "taking a decent risk in launching".[3828] It expressed these views despite having had the benefit of Glencore's opinion and being told that Mattiske was very comfortable with the Joe White Business. Therefore, regardless of King's views on the lack of any need for a

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3826 See, for example, *Morley v Statewide Tobacco Services Ltd (No 1)* [1993] 1 VR 423, 448.3, 450.7 (Ormiston J). See also *Re Tomi-Sasha Holdings Pty Ltd (receiver and manager appointed) (No 3)* [2021] VSC 17, [42] (Delany J), citing *Elliott v Australian Securities and Investments Commission* (2004) 10 VR 369, 393-395 [103] (Warren CJ, Charles JA and O'Bryan AJA); *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, 298 [16]-[21], 324 [143], 329 [162] (Middleton J).

3827 See fn 298 above.

3828 See par 389 above.

vendor due diligence,[3829] by rejecting Merrill Lynch's advice Glencore consciously decided not to conduct a vendor due diligence and willingly accepted the risks of not doing so.

4459 *Thirdly,* for the reasons discussed in issue 42 above, the Data Room Documentation was not collated or disclosed with reasonable care. No substantive steps were taken regarding company policies material to operations other than those relating to safety, health and environment.[3830] Further, Fitzgerald failed to discharge his responsibility to ensure all operative policies material to the operations of Joe White were located. A simple enquiry of Hughes or Youil (amongst others) would have been sufficient to avoid what became a critical oversight in the sale process. In conjunction with other failings in the Due Diligence, including in response to questions asked by Cargill as part of the Q&A Process, the failure to provide the Viterra Policies meant Cargill was unable to learn of the existence of the Viterra Practices (or at least the Reporting Practice). This had the consequence not only that the Reporting Practice documented in the Viterra Policies was not disclosed, but also Cargill was not alerted to the fact that the Joe White Business was being conducted improperly (which undoubtedly would have led to further enquiries if this had been revealed).[3831]

4460 Objectively, given their contents and the extent to which they were implemented,[3832] any reasonable vendor would have appreciated that the Viterra Policies would have been material to a decision to acquire Joe White. This conclusion is supported by the fact that Hughes, Youil, Wicks and Stewart felt it necessary to draw the Operational Practices to the attention of Cargill before Completion so that Cargill had a better appreciation of how the Joe White Business operated (although, despite some

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3829 See pars 388, 391 above.

3830 In making this observation, it is not being suggested that Wilson-Smith or Bickmore were personally at fault. They were not involved in the day-to-day conduct of the Joe White Business and there was nothing to suggest that they ought to have known that documents like the Viterra Policies would have been likely to have been in existence. Further, there were a considerable number of policies included in the Data Room: see par 669 above.

3831 See pars 905-906 above.

3832 Which was largely apparent on the face of the documents.

impressions,[3833] they chose not to be completely transparent by failing to disclose the prevalence of the Operational Practices or the existence of the Viterra Policies themselves). It is also borne out by Purser's communications with Mattiske upon learning of the possible implementation of the Operational Practices in October 2013. Purser told Mattiske that the issues that had been raised were very serious.[3834] This was also abundantly clear from the contents of the Cargill 22 and 29 October Letters.

4461 Accordingly, in the highly unlikely event that it was not apparent to the Viterra Parties already (by reason of Hughes' knowledge), by late October 2013 the Viterra Parties must have fully appreciated that Cargill would have treated the matters pertaining to the implementation and scope of material operational policies such as the Viterra Policies very seriously had they been pointed out.

4462 Thus, upon senior executives of Viterra, including Fitzgerald, learning of the Viterra Policies in the context of the enquiries that had been made by Cargill, the failure to take proper steps to disclose the Viterra Policies to Cargill increased their culpability and deprived Cargill of the opportunity of being properly informed about the Joe White Business. This meant that Cargill was equally deprived of the ability to get meaningful legal advice and make a properly informed decision about whether to proceed with the Acquisition.

4463 *Fourthly,* the verification process for the Warranties, as outlined below,[3835] was wholly inadequate, for reasons including:

(1) The process was unduly rushed because it commenced on Thursday 1 August 2013, a short period of time before the Acquisition Agreement was entered into, and was required to be completed within a day (albeit the process was not entirely completed within the time allocated).[3836]

(2) The task of conducting the verification process was assigned to a

3833 See par 1140 above.
3834 See par 1234 above.
3835 See issue 125.6 below.
3836 See pars 4956-4964 below.

relatively junior lawyer who had never conducted a warranty verification process before.[3837]

(3) No one with the requisite level of experience, including either Mallesons or Fitzgerald, properly oversaw the verification process. The most elementary questions of Wilson-Smith would have exposed the inadequacy of what had taken place.

(4) Overall, the process was conducted poorly, was deficient in a number of ways and lacked the care that was required.[3838]

4464 Further, after the Warranty verification process was completed by Wilson-Smith, he advised Mattiske, Fitzgerald, Rees and Mann of the "need" for these individuals to make reasonable enquiries in relation to the subject matter of the Warranties.[3839] There was no evidence that any of Mattiske, Fitzgerald or Rees ever did. Although Mann did take steps in light of this advice, his responsibilities were limited to safety, health and environment.[3840]

4465 *Fifthly*, in October 2013 there were substantial discussions with the Joe White executives regarding the Viterra Practices that should have raised concerns for Glencore and Viterra. This was in addition to Purser having made clear to Mattiske that Cargill appreciated that if its concerns were well-founded, they were serious.[3841] The failure to follow up or properly investigate relevant matters[3842] amounted to a failure to take reasonable care. Once the level of information was as disclosed on 23 October 2013 by Hughes, Youil, Wicks and Stewart, the culpability of the Viterra Parties became greater for their failure to disclose material information to Cargill. Further, the information that Stewart and others were able to put together in only a few days[3843] demonstrated that, if proper investigations had been carried out after

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3837 See pars 4957-4959 below.
3838 See pars 4966-5000 below for problems that pertained generally to the process adopted.
3839 Compare par 3528 above.
3840 See pars 996-1001 above.
3841 See par 1372 above.
3842 See, for example, pars 1339, 1342, 1485, 1544 above.
3843 See pars 1210-1211, 1387 above.

receipt of the Cargill 22 October Letter, there would have been plenty of time to obtain the information that was necessary to properly understand how the Joe White Business was conducted. In other words, not only was this failure a substantive oversight as a matter of process, but it also had the substantive consequence of Cargill not being properly informed in response to its enquiries when there was ample opportunity for the Viterra Parties to do so.

4466 *Sixthly,* given the matters of which the Viterra Parties were aware in October 2013, and notwithstanding requests for disclosure of the extent of the Operational Practices from Cargill, not only did the Viterra Parties not disclose information which went to the core of the queries raised, including the existence of the Viterra Policies and the prevalence of the Viterra Practices, but instead they decided not to properly investigate the issues and proceed to Completion as scheduled.[3844] This was done when Mattiske was cognisant that he did not know all the relevant facts and was a conscious decision to take the risk that nothing too significant would flow from such a course.[3845]

4467 For completeness, the Cargill Parties' submission that Glencore and Viterra had the opportunity to interrogate Hughes and Argent did not advance the Cargill Parties' case in any material way. The Viterra Parties, mainly through King and Merrill Lynch,[3846] instructed Hughes and Argent to present Joe White in a positive light. However, it would not have been immediately apparent that there would have been a need to interrogate Hughes or Argent when they formally verified the Information Memorandum to the extent that they did,[3847] and when they collectively approved of the terms of the Management Presentation Memorandum. Equally, there was nothing improper about the arrangements which incentivised Hughes and Argent. By agreeing to assist, both Hughes and Argent were committing to perform substantial

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3844 For completeness, there was no explanation given as to why, late on 22 October 2013, Hughes (if not at the direction, then with the knowledge and presumably the consent, of Fitzgerald) instructed Youil, Wicks, Stewart and other Joe White executives to cease work on the Customer Review Spreadsheet and the Key Recommendation Memorandum despite that work going to the heart of the queries that had been raised by Cargill: see par 1265 above.

3845 See, for example, par 1467 above.

3846 See, for example, par 367 above.

3847 See pars 446-452 above and pars 4811-4812, 4822 below.

tasks beyond their usual duties for which they might have reasonably expected to receive some remuneration. Further, there was nothing wrong in seeking to align their interests with a successful sale; such a position could reasonably be entirely consistent with a sale that occurred without any misleading or deceptive conduct.

4468 Notwithstanding it was not unreasonable to incentivise Hughes and Argent and not to interrogate them, Glencore plainly had a substantial influence over how the Joe White Business was presented, including by Hughes and Argent. For example, with regard to the Information Memorandum, Hughes and Argent were copied to an email from King which prompted Glencore to remove a comment from the Information Memorandum concerning management's belief that $30 million was an appropriate level of net working capital for the Joe White Business.[3848] Further, Hughes and Argent were copied to an email that determined the Co-Operative Bulk dispute should not be included in the Information Memorandum.[3849] These examples were used by the Cargill Parties to seek to demonstrate a failure by Glencore and Viterra to take reasonable care in how they engaged Hughes and Argent in the sale. Whether or not the conduct amounted to a lack of reasonable care, it certainly sent a message to Hughes and Argent as to how the presentation of the Joe White Business was to be approached.

4469 There were additional examples which demonstrated the guidance Hughes and Argent received from Merrill Lynch and King for the Management Presentation,[3850] correspondence between Hughes, Argent, King and Merrill Lynch about how to deal with margin uplifts to avoid revealing the margin gained by the use of off-grades,[3851] and the fact that Hughes was invited by Merrill Lynch to attend the Operations Call to ensure consistent messaging with what was said at the Management Presentation.[3852] From these examples, it was clear that Glencore and Viterra encouraged Hughes and Argent to convey value enhancing information and not to

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3848 See par 436 above.
3849 See par 539 above.
3850 See pars 699-700 above.
3851 See pars 796-814 above, but also see par 926 above.
3852 See par 872 above.

disclose value destructive information.

4470 So there is no misunderstanding, there was no evidence that Argent knew anything represented was inaccurate or that he was on notice that anything in the Information Memorandum or the Management Presentation Memorandum was wrong. Therefore, had Glencore taken further steps to question Argent on the financial matters (in contradistinction to operational matters), it seemed unlikely this would have revealed anything more. In a similar vein, there was no evidence that King knew anything represented in the Information Memorandum or the Management Presentation Memorandum was wrong (as opposed to optimistic).

4471 On the other hand, Hughes must have known what was contained in the Information Memorandum and the Management Presentation Memorandum, and, in the context of what had preceded them, what was conveyed on the Operations Call and the Commercial Call was wrong (and in some respects patently so).[3853] Even assuming that Hughes did not get caught up in the fact that this was a sale being driven to get the maximum price, it was clear he was willing for things to be put inaccurately.[3854] Further, Hughes knew that others more senior than him in the Glencore and Viterra organisations, as well as a senior Viterra lawyer, Fitzgerald, were also involved in approving the information, so presumably thought what was being presented carried their approval (particularly in October 2013, after Mallesons and Fitzgerald had been told directly about the Operational Practices). Whatever be Hughes' rationale for the dishonest way he behaved in approving statements that were plainly and unequivocally false, he was acting for Glencore and Viterra in doing so.

4472 Again so there can be no misunderstanding, this finding concerning Hughes' conduct does not mean that, in putting together the Information Memorandum, the Management Presentation Memorandum and the Management Presentation, and facilitating the Operations Call and the Commercial Call, others at Glencore were

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3853 See, for example, par 3278 above.

3854 Hughes' knowledge was the knowledge of the Viterra Parties and therefore to the extent that Hughes was acting dishonestly, so were the Viterra Parties: see issues 11, 22 above. As to the likely reason Hughes adopted the position he did, see pars 3279-3280 above.

somehow complicit in Hughes' conduct insofar as it involved dishonesty. There was nothing in the evidence to suggest Merrill Lynch, King, Mattiske or anyone else from or acting for Glencore or Viterra, including Argent, had any knowledge of the operational matters before 22 October 2013 that meant that they knew many of the statements made completely misrepresented the operations of the Joe White Business.

4473 In summary, although it could be argued that Glencore might have done more to interrogate the information provided by Hughes and Argent or to satisfy itself of the accuracy of the Information Memorandum and other materials that were disseminated as a result, up until the events in October 2013 there was no reason for others involved in the sale objectively to suspect Hughes had been materially misrepresenting the financial and operational performance of Joe White.[3855] Further, the steps that Glencore did take in requiring Hughes and Argent to verify the pages in the Information Memorandum provided it with assurances that the information was substantially accurate. These were reasonable steps to have taken. Given the manner in which it was done, it did not call for an interrogation above and beyond the verification that occurred.

X.80.5 Conclusion

4474 The amount that Cargill Australia can recover under section 236 because of contraventions of section 18 of the Australian Consumer Law will not be reduced. Principally, this was because section 137B(d) applied and excluded the statutorily prescribed basis upon which any reduction might have been determined. Even if that provision did not apply, there was no basis to reduce the amount awarded for Cargill Australia's loss as it was not partly due to its own failure to take reasonable care.

4475 Also on the assumption that section 137B(d) did not apply (contrary to what has been found), the conclusion that no reduction should be made was buttressed by the Viterra Parties' culpability during the sale process. The Viterra Parties on numerous occasions acted recklessly, and failed to take reasonable care. As a result of the extent of their

3855 This finding does not diminish other findings made concerning the risks that Glencore chose to take as part of the sale process: see pars 4454-4458 above.

behaviour and consistent failures, the Viterra Parties had a high level of culpability for their misleading conduct.

4476 Each of the Viterra Practices, being routinely and secretly engaging in the Reporting Practice, the Varieties Practice and the Gibberellic Acid Practice, went to the heart of the operations of the Joe White Business. The Viterra Practices were seriously reprehensible and were plainly something that was material to any decision about whether to acquire Joe White. There could have been no question that they ought to have been disclosed to Cargill.

4477 At numerous stages throughout the sale process, the Viterra Parties' actions either carelessly, recklessly or deliberately resulted in the non-disclosure of the Viterra Practices. This included the way in which Glencore and Viterra conducted the sale, the absence of a vendor due diligence, the collation of Data Room Documentation, the Warranty verification process, non-disclosure of the Viterra Practices and the Viterra Policies in October 2013, failures to properly investigate the disclosures made by Joe White executives in October 2013, and their responses to Cargill's requests for disclosure. The causal potency of the Viterra Parties' conduct was far greater than that of Cargill Australia for any possible inadequacy of Cargill in investigating, assessing and analysing the Joe White Business as part of the decision-making process to acquire Joe White and then to proceed with Completion.

4478 In short, the Viterra Parties' culpability far outweighed any shortcomings in Cargill Australia's conduct, such that Cargill Australia should not be apportioned any proportion of the loss suffered.

X.80.6 Some further remarks

4479 It is necessary to point to a tension between the Viterra Parties' submissions in relation to this issue and their approach to loss taken in issue 73 above.

4480 As part of their approach to valuing loss, the Viterra Parties called a chartered

accountant and valuation expert, Potter,[3856] to give evidence on the value of Joe White.[3857] Potter conducted his analysis using the assumptions set out in Cargill's deal model on the basis that he had reviewed it and he considered the deal model was professionally prepared after a period of extensive due diligence. Having considered its contents, Potter also thought that the forecasts Cargill prepared represented an informed assessment of the prospects of Joe White. Most importantly, Potter expressed the view that he considered it was reasonable to assume that a hypothetical purchaser would have undertaken similar work to Cargill and formed similar views to those formed and reflected in Cargill's deal model. Equally, the Viterra Parties submitted that Potter's use of Cargill's deal model was a reasonable approach given the extensive due diligence conducted by Cargill in order to prepare the forecast contained in the deal model.[3858]

4481 Accordingly, the submissions by the Viterra Parties considered above must be read in light of the fact that both Potter, in his expert opinion, and the Viterra Parties, in making submissions on loss, considered that the Due Diligence as actually undertaken by Cargill and reflected in Cargill's deal model was appropriate for the purposes of valuing Joe White.[3859]

4482 Finally, the reasons given in addressing issue 80 are not intended to be exhaustive. Many of the matters raised have been addressed in more detail in other issues the subject of these reasons. Accordingly, the reasons above concerning section 137B need to be read in conjunction with the more extensive reasons given on the various topics discussed.

X.81 If Cargill Australia has suffered loss or damage as a result of any wrongs by Glencore and/or Viterra, has Cargill Australia suffered that loss or damage partly as a result of its failure to take reasonable care, and ought Cargill Australia's damages be reduced under section 26(1) of the *Wrongs*

3856 See fn 3303 above.
3857 See issue 73 above, and in particular par 3971 above.
3858 See, for example, par 4051 above. See also fnn 525, 2371 above.
3859 No inferences will be drawn from the Cargill Parties' decision not to call Hermus or Christianson as witnesses: see pars 2043-2073, 2094-2100 above.

Act 1958 **(Vic)?**

4483 To the extent this issue arose in light of Cargill Australia's remaining claims, for the reasons discussed in issue 80 above, the answer is no.

X.82 Are Cargill Australia's claims for contravention of section 18 of the Australian Consumer Law apportionable claims within the meaning of section 87CB(1) of the *Competition and Consumer Act*? If so, are Joe White, Hughes, Youil and/or Cargill, Inc concurrent wrongdoers? If so, what proportion of the damage or loss claimed by Cargill Australia does the court consider just for the defendants to bear?

4484 Both the Cargill Parties and the Viterra Parties agreed that claims for contraventions of section 18 of the Australian Consumer Law were apportionable claims within the meaning of section 87CB(1) of the *Competition and Consumer Act*. Section 87CB(1) falls within Part VIA of the *Competition and Consumer Act* and provides that "apportionable claims" are claims for damages made under section 236 of the Australian Consumer Law for "economic loss" or "damage to property" caused by conduct that was done in contravention of section 18 of the Australian Consumer Law. Under section 87CB(2), there is a single apportionable claim in proceedings in respect of the same loss or damage, even if a claim for the loss or damage is based on more than 1 cause of action (whether of the same or a different kind).

4485 Proportionate liability for an apportionable claim is established by section 87CD of the *Competition and Consumer Act*. Pursuant to section 87CD(1), each concurrent wrongdoer's liability is limited to the proportion of damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss.[3860] The approach is to consider first the loss or damage that is the subject of the claim, and second, whether there is a person other than the defendant

[3860] A concurrent wrongdoer is defined in the *Competition and Consumer Act*, s 87CB(3), as a person who is 1 of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

or defendants whose acts or omissions contributed to the loss or damage.[3861]

4486 However, Cargill Australia relied upon section 87CC which provides that if a concurrent wrongdoer intentionally or fraudulently caused the loss then they are excluded under this apportionment regime and their liability is to be determined in accordance with the legal rules (if any) that are relevant apart from Part VIA of the Act.

4487 Cargill Australia has established that each of the Viterra Parties contravened section 18 of the *Competition and Consumer Act*. Therefore, prima facie, Cargill Australia's claims for damages under section 236 of the *Competition and Consumer Act* are apportionable within the meaning of 87CB(1) of the *Competition and Consumer Act*.

4488 Proceeding for the moment on the basis that section 87CB was applicable, for reasons discussed elsewhere there would be no basis to find that any of Joe White,[3862] Youil[3863] or Cargill, Inc[3864] had any responsibility for the loss suffered by Cargill Australia. Accordingly, if section 87CB had any applicability, it could have only related to Hughes' conduct. However, as it has been found that the Viterra Parties and each of them acted with intent in making the Financial and Operational Performance Representations and that that conduct was fraudulent and caused Cargill Australia's loss, section 87CB cannot apply because each of the Viterra Parties was an "excluded concurrent wrongdoer" within the meaning of section 87CC(1). The same observations are equally applicable in relation to the making of the Other Bidders Representations.

4489 In light of these findings, the entirety of Cargill's Australia's loss is recoverable without being affected by the operation of section 87CB. Accordingly, it is unnecessary to consider the position concerning other claims made by Cargill Australia where a contravention of section 18 has been established.

3861 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 627 [19] (French CJ, Hayne and Kiefel JJ).

3862 See issue 124 below.

3863 See issue 2 above and issue 125.2 below.

3864 See issue 80, and in particular 80.6, above.

X.83 Are Cargill Australia's Negligence Claims (as defined in the Defence at paragraph 116(a)) apportionable claims within the meaning of section 24AE of the *Wrongs Act*? If so, are Joe White, Hughes, Youil and/or Cargill, Inc concurrent wrongdoers? If so, what proportion of the damage or loss claimed by Cargill Australia does the Court consider just for the defendants to bear?

4490 This issue did not arise in light of the relevant claims not being pressed by the Cargill Parties in closing submissions.

X.84 What is the effect of the Deed of Release dated 31 October 2013?

4491 This issue was confined to the proper construction of the Deed of Release and its operation with respect to the Confidentiality Deed. Related issues concerning the enforceability of the Confidentiality Deed and whether breaches of the Confidentiality Deed occurred (and, if so, whether any right, obligation, Claim or liability arising from its enforceability or any such breach was affected by the Deed of Release) are discussed below.[3865]

4492 Clause 2 of the Deed of Release provided that, on and from Completion and subject to clause 3, Glencore released Cargill, Inc from all "Claims and obligations"[3866] under the Confidentiality Deed.[3867] Clause 3(a) provided that the rights and obligations of any party arising under or in relation to the Acquisition Agreement were unaffected and not prejudiced by the Deed of Release. There was no dispute concerning this clause. Essentially, this issue turned on the meaning of clause 3(b) of the Deed of Release which stated: "Nothing in [the Deed of Release] affects or otherwise prejudices … any accrued rights, obligations, Claims or liabilities arising under or in connection with the [Confidentiality Deed] before Completion which the parties may have against each other".

3865 See issues 86, 87, 100, 101, 102, 105, 108 below.

3866 "Claims" was a defined term, whereas "obligations" was not.

3867 For the terms of the Confidentiality Deed and the Deed of Release, see pars 585-590, 1553 above respectively.

X.84.1 Legal principles

4493 A release discharges or extinguishes an existing obligation or right.[3868] Commonly, they are effected by deed or by agreement for valuable consideration.[3869] A release may be granted before,[3870] or after,[3871] a breach of contract or any other facts giving rise to a dispute,[3872] and can be absolute or conditional.[3873] Conceptually, a release is different from a covenant not to sue.[3874] However, functionally in some circumstances the practical difference between the effect of these types of arrangements (which often may sit side-by-side in an agreement or deed)[3875] may be more apparent than real. Indeed, an unconditional covenant not to sue may effectively operate so as to be equivalent to a release.[3876] Conversely, a release may impliedly give rise to an obligation not to sue.[3877] Whether or not it does so is a question of the proper construction of the release in question.[3878]

4494 At common law, an obligation that was created other than by deed could be released

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3868 *Commissioner of Taxation v Orica Ltd* (1998) 194 CLR 500, 544 [114] (Gummow J). See also *Sarina v Fairfax Media Publications Pty Ltd* [2018] FCAFC 190, [18] (Rares, Markovic and Bromwich JJ); *Scaffidi v Perpetual Trustees Victoria Ltd* (2011) 42 WAR 59, 65 [14], [18] (Newnes and Murphy JJA and Mazza J).

3869 LexisNexis, *Halsbury's Laws of England,* vol 22 (2019), Contract, "5 Discharge by Subsequent Agreement", [405].

3870 See, for example, *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* (2010) 31 VR 575, 582 [21]-[24] (Warren CJ), 592-596 [70]-[85] (Buchanan and Nettle JJA).

3871 See, for example, *Tetley v Wanless* (1867) LR 2 Exch 275, 279.8-280.5 (Willes J, on behalf of the Exchequer Chamber).

3872 That is, there need not be a dispute on foot at the time a release is granted.

3873 LexisNexis, *Halsbury's Laws of England,* vol 22 (2019), Contract, "5 Discharge by Subsequent Agreement", [405].

3874 See, for example, *Lavin v Toppi* (2015) 254 CLR 459, 470 [37] (French CJ, Kiefel, Bell, Gageler and Keane JJ); *James v Surf Road Nominees Pty Ltd* [2004] NSWCA 475, [41]-[44] (Beazley, Tobias and McColl JA).

3875 Compare the agreement in cl 10.2 and the release in cl 10.3 of the Confidentiality Deed: see par 590 above.

3876 However, a covenant not to sue for a defined period or a covenant which was not meant to release joint and several promisors will not amount to a release: LexisNexis, *Halsbury's Laws of England,* vol 22 (2019), Contract, "5 Discharge by Subsequent Agreement", [406]; *Lavin v Toppi* (2015) 254 CLR 459, 470 [37]. See also *Butler v Fairclough* (1917) 23 CLR 78, 96.1 (Isaacs J). The distinction is a question of construction: *James v Surf Road Nominees Pty Ltd* [2004] NSWCA 475, [41].

3877 *Rectron Australia BV v Lu* [2014] NSWSC 1367, [53]-[54] (Lindsay J), noting that in that case the proceeding found to be the subject of the implied obligation not to sue was already on foot at the time the release was granted as part of a settlement of another proceeding: see [6], [10], [51]-[52].

3878 Ibid, [55].

by agreement for valuable consideration, or under seal.[3879] In *McDermott v Black*,[3880] Dixon J accepted that obligations created by deed and released not under seal could be enforced in equity if the release was given for consideration.[3881] That type of release, an accord and satisfaction, is a form of conditional agreement by which a plaintiff accepts some form of consideration in place of a cause of action.[3882] Until whatever is agreed to be provided is provided and accepted, the cause of action remains alive and unimpaired.[3883] This stands in contrast to a release by deed, where consideration is not necessary.[3884]

4495 A release effected by deed is commonly used to resolve a dispute between parties or to bring an end to an agreement. In *Angas Securities Ltd v Small Business Consortium Lloyds Consortium No 9056*,[3885] Leeming JA explained that the point of a deed of release is "to draw a line under the parties' pre-existing contractual rights, which are ordinarily the subject of a dispute, so that thereafter the parties may look exclusively to the rights in the deed".[3886]

4496 The scope and effect of a deed of release will depend on its terms, as to which the ordinary principles of contractual construction apply.[3887] A release must therefore be construed objectively to determine the common intention of the parties, with reference to the context and surrounding circumstances, in order to give effect to the object and

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3879 *McDermott v Black* (1940) 63 CLR 161, 187.5 (Dixon J). See also *Scaffidi v Perpetual Trustees Victoria Ltd* (2011) 42 WAR 59, 65 [19] (Newnes and Murphy JJA and Mazza J); *Commissioner of Taxation v Orica Ltd* (1998) 194 CLR 500, 544 [114] (Gummow J); *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 610.7 (Gummow J).

3880 (1940) 63 CLR 161.

3881 Ibid, 187.5. See also *Scaffidi v Perpetual Trustees Victoria Ltd* (2011) 42 WAR 59, 65 [20] (Newnes and Murphy JJA and Mazza J).

3882 *McDermott v Black* (1940) 63 CLR 161, 183.9 (leaving aside any issue of estoppel). See also *Commissioner of Taxation v Orica Ltd* (1998) 194 CLR 500, 544 [116] (Gummow J); *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 610.6 (Gummow J).

3883 *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93, 113.9 (Dixon CJ and Fullagar J); *McDermott v Black* (1940) 63 CLR 161, 184.1.

3884 *Howard F Hudson Pty Ltd v Ronayne* (1972) 126 CLR 449, 462.3 (Walsh J); *Leonard v Booth* (1954) 91 CLR 452, 474.5 (Webb J).

3885 [2016] NSWCA 182.

3886 Ibid, [14].

3887 See also ibid, [99]–[101] (Sackville AJA, with whom McColl and Leeming JJA agreed); *Snowy Mountains Organic Dairy Products Pty Ltd v Wholefoods Pty Ltd* (2008) 21 VR 43, 52-53 [30]-[32] (Beach J). See also *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, 259 [8] (Lord Bingham, with whom Lord Browne-Wilkinson agreed), 268-269 [37] (Lord Hoffman, dissenting).

purpose of the document.[3888] As such, the effect of a deed of release on any claims, rights or obligations, whether pre-existing or prospective, will largely turn on its language, considered in light of the surrounding facts and circumstances.

4497 Subject always to the proper construction of the terms of the release, a number of common law and equitable principles guide the construction of a deed of release.[3889] *First*, general or sweeping words of release may be curtailed or controlled by the context and recitals of an instrument.[3890] *Secondly*, general words in a release may often be read down or restricted by reference to the dispute which existed between the parties at the time the deed of release was executed, and not construed as encompassing facts or circumstances that were not in the contemplation of the parties at that time.[3891] *Thirdly*, a closely related principle of equity prevents "unconscientious reliance upon the general words of a release" by restricting those words to matters that were specially contemplated by the parties at the time the release was given.[3892] However, a party may agree to release claims of which it is unaware and could not have been aware, if clear language is used to make such an intention plain.[3893] If very

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3888 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116-117 [46]-[52] (French CJ, Nettle and Gordon JJ); *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-657 [35] (French CJ, Hayne, Crennan and Kiefel JJ).

3889 See generally, *Karafotias v Karafotias* (2003) 84 SASR 578, 583-584 [25] (Bleby J), quoting *Karam v ANZ Banking Group Ltd* [2001] NSWSC 709, [406] (Santow J).

3890 *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112, 123.3, 131.2-132.2 (Dixon CJ, Fullagar, Kitto and Taylor JJ). See also *Burness v Hill* [2019] VSCA 94, [71] (Kaye, McLeish and Hargrave JJA); *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, 264-265 [23] (Lord Nicholls).

3891 *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112, 123.9-124.8 (Dixon CJ, Fullagar, Kitto and Taylor JJ). See also *Burness v Hill* [2019] VSCA 94, [72] (Kaye, McLeish and Hargrave JJA); *Snowy Mountains Organic Dairy Products Pty Ltd v Wholefoods Pty Ltd* (2008) 21 VR 43, 53 [33] (Beach J); *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, 259-262 [9]-[15], 264 [19] (Lord Bingham, with whom Lord Browne-Wilkinson agreed); *Torrens Aloha Pty Ltd v Citibank NA* (1997) 144 ALR 89, 105.7-106.6 (Sackville J, with whom Foster and Lehane JJ agreed); *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26, 29B (Gleeson CJ and Handley JA).

3892 *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112, 125.4-126.3, 129.9-130.1 (Dixon CJ, Fullagar, Kitto and Taylor JJ). See also *Burness v Hill* [2019] VSCA 94, [73]-[74] (Kaye, McLeish and Hargrave JJA); *Torrens Aloha Pty Ltd v Citibank NA* (1997) 144 ALR 89, 105.7-106.6 (Sackville J, with whom Foster and Lehane JJ agreed); *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26, 43B-44E (Kirby P); *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 818C (McLelland J).

3893 *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112, 129.3 (Dixon CJ, Fullagar, Kitto and Taylor JJ). See also *Doggett v Commonwealth Bank of Australia* (2015) 47 VR 302, 319 [63] (Whelan JA, with whom Garde AJA agreed and McLeish JA relevantly agreed); *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, 259-260 [8]-[9] (Lord Bingham, with whom Lord Browne-Wilkinson agreed), 265-266 [24]-[29] (Lord Nicholls), 277-280 [63]-[73] (Lord Hoffman, dissenting), 282-284 [80]-[87] (Lord Clyde).

broad language is used in a manner which objectively reflects the common intention, then the release will operate with respect to unknown claims, unless the subject matter of the unknown claim was something that could not have been contemplated and was unrelated to the unknown matters or possibilities being addressed in the release.[3894]

X.84.2 The allegations

4498 In the Defence, in response to the allegations in the Statement of Claim generally, the Viterra Parties referred to clause 10.3 of the Confidentiality Deed in pleading that Cargill Australia had unconditionally and irrevocably released Glencore and Viterra from any liability which may have arisen, whether directly or indirectly, in relation to, in connection with, or as a result of the provision of Confidential Information, or any reliance placed by any person on any Confidential Information or the non-disclosure of any information, including any liability resulting from any negligence, default or lack of care on the part of Glencore or Viterra or from misrepresentation or any other cause.

4499 In the Reply, Cargill Australia denied this allegation. Further, Cargill Australia alleged that if it was bound by the release in clause 10.3 as a result of Cargill, Inc executing the Confidentiality Deed,[3895] then all obligations under the Confidentiality Deed (including those under clause 10.3) were released by the Deed of Release.[3896]

4500 Further, in the defence of Cargill, Inc and Joe White to the Third Party Claim in responding to an allegation that Cargill, Inc had breached any and all of clauses 3.3, 10.2(b) and 10.3 of the Confidentiality Deed by causing or permitting Cargill Australia to commence this proceeding, similar allegations were made to those made by Cargill

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3894 Ibid.

3895 See fn 3638 above.

3896 In the Reply, Cargill Australia also alleged that clause 10.3 did not apply to: the Information Memorandum because the Confidentiality Deed was not executed by Glencore before the Information Memorandum was provided to Cargill, Inc; and the October 2013 Responses or the Pre-Completion Representations because the Approved Purpose did not extend beyond the point at which the Acquisition Agreement was entered into. Both these matters have been addressed elsewhere and have been rejected: see issues 5 above and 105 below respectively. (Allegations were also made in relation to section 18 of the Australian Consumer Law and public policy. Like allegations were made in relation to fraudulent conduct. In addition, it was alleged that the release did not extend to claims made for breaches of obligations, Warranties or misrepresentations under the Acquisition Agreement. These further allegations are not relevant to the questions of construction addressed in this issue.)

Australia referred to in the preceding paragraph. In this context, Cargill, Inc alleged that any obligations under clauses 3.3, 10.2(b) and 10.3 had been released by operation of the Deed of Release.

4501 In the Viterra Parties' reply to this third party defence, after pleading the relevant terms of the Deed of Release and alleging that by reason of those terms the Deed of Release did not apply to clauses 3.3, 10.2(b) and 10.3, they denied Cargill, Inc's allegations. Further, the Viterra Parties alleged each of the agreement and acknowledgement recorded in clauses 8.3(a) and 8.3(c) was an accrued right, obligation, Claim or liability arising under or in connection with the Confidentiality Deed before Completion, and accordingly the Deed of Release had no application in relation to those clauses.

4502 To reiterate briefly,[3897] by clause 3.3 Cargill, Inc undertook to procure that its Representatives would not do anything that, if done by Cargill, Inc, would be a breach of the Confidentiality Deed. By clause 8.3(a), Cargill, Inc agreed it was required to make its own assessment of all Confidential Information. By clause 8.3(c), Cargill, Inc agreed to rely solely on its own investigations and analysis in evaluating the Transaction. Clause 10.2 stated that, absent Glencore's fraudulent or wilful misconduct, Cargill, Inc would not bring proceedings against Glencore or its Representatives, and agreed to procure that its Representatives would not do so. Clause 10.3 provided that Cargill, Inc unconditionally and irrevocably released Glencore and its Representatives from any liability in connection with the Confidential Information, including liability resulting from Glencore's negligence. Both clauses 10.2 and 10.3 were expressly subject to clause 10.4.[3898]

X.84.3 The submissions

4503 The Cargill Parties contended that clause 2 of the Deed of Release had the effect of

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3897 See pars 585-590 above for the terms of the Confidentiality Deed.

3898 Clause 10.4 provided that, notwithstanding anything in the Confidentiality Deed, Glencore and its Representatives would be responsible for representations or obligations set forth in separate written agreements. As a result, clauses 10.2 and 10.3 had no operation in respect of the Warranty Representations as set forth in the Acquisition Agreement.

releasing Cargill, Inc from any obligations imposed under clauses 3.3, 8.3(a), 8.3(c), 10.2 and 10.3 of the Confidentiality Deed. Further, they submitted that none of Glencore's or Viterra's Claims under these clauses had accrued before Completion. With respect to the release in clause 10.3, it was submitted it did not operate when the Confidentiality Deed was entered into as there was nothing to release at that time. It was contended that on the proper construction of clause 10.3, it created a prospective obligation or a prospective release and that nothing accrued until entry into the Acquisition Agreement. When it was pointed out that this occurred well before Completion and the Deed of Release being executed, this part of the Cargill Parties' submission was withdrawn.

4504 The Cargill Parties further contended that any cause of action in relation to any breach of clauses 10.2 and 10.3 of the Confidentiality Deed could have accrued only when Cargill instituted this proceeding, which occurred after Completion; that is, until this proceeding commenced there could be no breach of contract as nothing had been done contrary to clause 10.2(b) or inconsistent with clause 10.3. Therefore, it was submitted the claims for breach of the Confidentiality Deed advanced by the Viterra Parties were not preserved by clause 3(b) of the Deed of Release.

4505 The Viterra Parties referred to the broadness of the definition of "Claim" in the Deed of Release. They submitted that the rights under clauses 10.2 and 10.3 were all accrued before Completion. With respect to the alleged breaches of clauses 3.3, 8.3(a), 8.3(c) and 10.2, the Viterra Parties referred to the fact that this proceeding concerned events which occurred before Completion. In short, they contended that the events before 31 October 2013 were caught by the Confidentiality Deed but not by the Deed of Release. Thus, it was submitted the Deed of Release had no effect upon these issues because any rights in relation to them also arose before Completion. It was submitted that such rights were rights "arising under or in connection with" the Confidentiality Deed.

4506 In referring to both clauses 8 and 10, the Viterra Parties submitted that objectively it was highly implausible that it was the common intention of the parties that Cargill,

Inc ought to be relieved from its obligations under those clauses. This was put on the basis that it was implausible for Glencore to have gone to great lengths to agree upon a regime where the potential purchaser was required to make its own enquiries and not to rely upon anything that Glencore said as part of the sale process, only for the actual purchaser to be free to make claims about the process. It was submitted that such a construction would defeat the whole purpose of the foundation of the transaction.

4507 Specifically in relation to clause 8.3, it was submitted that Cargill was required to make its own assessment of the Confidential Information and rely solely on its own investigations and analysis in evaluating the Transaction, which necessarily occurred before Completion. For "similar reasons", it was submitted that under clause 3.3 Cargill, Inc was responsible for its Representative's (being Cargill Australia's) conduct up to Completion and that Glencore's right to rely upon this clause was unaffected by the Deed of Release.

4508 In relation to clause 10.3, the Viterra Parties submitted the release had operative effect as soon as the Confidentiality Deed was entered into. The Viterra Parties contrasted clause 10.3 with clause 3.1. They submitted that by clause 3.1 Cargill, Inc had agreed to do various things in the future, whereas clause 10.3 operated immediately. Further, they contended that once the release in clause 10.3 had been given it was given for all time and was unaffected by a subsequent release of obligations where accrued rights were preserved. Accordingly, it was submitted, if this proceeding had been commenced before Completion the release in clause 10.3 could have been pleaded as "a bar". It was submitted that it followed from this that clause 2 of the Deed of Release did not apply to a "claim for breach" of clause 10.3 of the Confidentiality Deed, whether made before or after Completion.[3899]

[3899] Curiously, the Viterra Parties also submitted that once the release under clause 10.3 was effective then clause 10.2 of the Confidentiality Deed had "no more room to operate in the sense that how can you bring an action when you've released the other party from all liability in respect of it". This submission did not appear to depend upon the Deed of Release because the Viterra Parties contended that the release in clause 10.3 was operative from the moment the Confidentiality Deed was executed. However, it appeared to conflate the concepts of a release and a covenant not to sue and not to recognise the differing consequences which may arise from these agreements: see further issue 86 below.

4509 In addressing this issue (and other issues concerned with the Deed of Release), neither the Cargill Parties nor the Viterra Parties referred to any authority concerning the nature or effect of releases, or how a deed of release ought to be construed.

X.84.4 Analysis

4510 There was no real issue between the parties as to the proper interpretation of clauses 2 and 3 of the Deed of Release. The parties agreed that to the extent a right, obligation, Claim or liability *accrued* in relation to the Confidentiality Deed and before Completion, the Deed of Release was of no effect. Equally all other rights, obligations, Claims or liabilities were released on and from Completion, at which point the Confidentiality Deed was no longer enforceable against Cargill, Inc.

4511 In order to determine the effect the Deed of Release had on the Confidentiality Deed, both documents need to be considered in their entirety, in the context of the purpose and object of the transaction more broadly.

4512 As its recitals recorded, the Deed of Release was concerned with Glencore agreeing to release Cargill, Inc "from any further liability under the [Confidentiality Deed]".[3900] Thus, consistent with clauses 2 and 3, Cargill, Inc was to have no liability at all under the Confidentiality Deed unless a right, obligation, Claim or liability had actually accrued under or in connection with the Confidentiality Deed before Completion. In interpreting the meaning of the word "accrued" in clause 3(b) of the Deed of Release, it is necessary to identify a meaning which is consistent with that intention.

4513 Turning to the scope of the Confidentiality Deed, its terms were confined to governing the position between the parties to facilitate the Approved Purpose and not to give rise to any form of agreement to sell. This was expressly agreed under clause 9.3 and implicitly acknowledged in clause 10.4. Thus, it was contemplated that Cargill, Inc, as a potential purchaser, would obtain the Confidential Information for the Approved Purpose and either reach an agreement with Glencore and its Representatives (that is,

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[3900] Liability in this context was used in a broad sense, as the operative clause (clause 2) released "Claims and obligations".

Viterra) to acquire the Joe White Business or no agreement would be reached. In the latter scenario, the provisions concerned with maintaining confidentiality would continue to operate (in accordance with their terms)[3901] to protect the confidentiality of the Confidential Information. However, if Cargill, Inc and its Representative (that is, Cargill Australia) agreed to acquire the Joe White Business then it would plainly have been contemplated that such an acquisition would be accompanied by access to and use of the information pertaining to the ongoing operation of the Joe White Business once acquired without all the strictness and limitations of the Confidentiality Deed.

4514 In relation to the terms of the Confidentiality Deed, it contained clauses that gave rise to various types of rights or obligations (which had the potential to give rise to a Claim or liability). Significantly for present purposes, and consistent with its scope referred to above, the Confidentiality Deed contained a number of clauses that were not simply directed towards what was permitted to be done specifically as part of the assessment of the Confidential Information for the purpose of evaluating the Joe White Business.[3902] Pursuant to these more general clauses, Cargill, Inc agreed to certain matters on an ongoing basis. These included an agreement to: (1) maintain the confidential nature of the Confidential Information;[3903] (2) not disclose or otherwise provide any Confidential Information (including the existence or terms of the Confidentiality Deed itself) to any person other than in accordance with the Confidentiality Deed;[3904] (3) not use, disclose or reproduce any Confidential Information for any purpose other than the Approved Purpose;[3905] (4) establish and maintain effective security measures to safeguard the Confidential Information;[3906] (5) immediately notify Glencore of any potential, suspected or actual breach of the

3901 There were time limitations on the duration of the requirement to maintain confidentiality in cl 12. It is unnecessary to refer to the detail.
3902 Such as cll 8.1, 8.2, 8.3.
3903 Clause 3.1(a).
3904 Clause 3.1(b).
3905 Clause 3.1(c).
3906 Clause 3.1(d).

Confidentiality Deed;[3907] (6) ensure that each Representative was made fully aware of the confidential nature of all Confidential Information and the terms of the Confidentiality Deed;[3908] (7) only disclose the Confidential Information to its Representatives on a need-to-know basis;[3909] (8) procure that Cargill, Inc's Representatives would not do or omit to do anything which if done or omitted to be done by Cargill, Inc would be a breach of Cargill, Inc's obligations under the Confidentiality Deed;[3910] (9) procure that Cargill, Inc's Representatives did not do or omit to do anything which if done or omitted to be done by Cargill, Inc would be a breach of Cargill, Inc's obligation of confidence owed to Glencore or to any of Glencore's Representatives;[3911] (10) give Glencore all reasonable assistance it required to take any action or bring proceedings in relation to any act or omission which gave rise to a breach of the Confidentiality Deed or an obligation of confidence owed to Glencore;[3912] (11) not enter, and keep the Confidential Information out of, any computer, database, or other electronic means of data or information storage unless it was exclusively controlled by Cargill, Inc or its Representatives to whom the Confidential Information had been disclosed in accordance with clause 3.2 of the Confidentiality Deed;[3913] (12) before Cargill, Inc disclosed any Confidential Information as required by law, Cargill, Inc would provide Glencore with notice and assist Glencore to the extent Glencore considered necessary to prevent or minimise the disclosure of the Confidential Information;[3914] (13) comply with, amongst other things, any privacy code or policy adopted by Glencore with respect to Personal Information (as that term was defined in the Confidentiality Deed);[3915] (14) promptly notify Glencore of any complaint or investigation under any law, code or policy concerning Personal Information and cooperate with Glencore in the resolution of any

3907 Clause 3.1(e).
3908 Clause 3.2(a).
3909 Clause 3.2(b).
3910 Clause 3.3.
3911 Ibid.
3912 Clause 3.4.
3913 Clause 3.5.
3914 Clause 4.3.
3915 Clause 5(b).

such complaint or investigation;[3916] (15) return, at Cargill, Inc's expense, by delivering to Glencore, all documents and other materials in any medium which contained or referred to any Confidential Information on the written demand of Glencore or when the documents and other materials were no longer required for the Approved Purpose (whichever occurred earlier);[3917] (16) delete any Confidential Information that had been entered into a computer, database or other electronic means of data or information storage by Cargill, Inc or any of its Representatives on the written demand of Glencore or when the documents and other materials were no longer required for the Approved Purpose (whichever occurred earlier);[3918] (17) where Cargill, Inc was unable to return, destroy or delete any Confidential Information, to take other prescribed steps;[3919] (18) not be released from Cargill, Inc's and its Representatives' obligations under the Confidentiality Deed as a result of returning, deleting or destroying any documents, other materials or information;[3920] (19) on completion of the return, destruction or deletion of documents, materials and information, promptly notify Glencore of compliance with the Confidentiality Deed;[3921] (20) not disclose to any person without the prior consent of Glencore, or except as permitted by the Confidentiality Deed or as might have been required by law, the existence and contents of the Confidentiality Deed and the contents of any discussions between the parties relating to the Approved Purpose or the Transaction;[3922] (21) not bring or institute any legal proceedings against Glencore or its Representatives in respect of the Confidential Information;[3923] (22) procure that Cargill, Inc's Representatives did not bring or institute any proceedings of the kind specified in clause 10.2(a) of the Confidentiality Deed.[3924]

4515 Although a little lengthy, I have referred to each of the matters to which Cargill, Inc specifically agreed on an ongoing basis under the Confidentiality Deed to

3916 Clause 5(c), (d).
3917 Clause 6.1 (a), (c), (d).
3918 Clause 6.1 (b), (c), (d).
3919 Clause 6.3 (a), (b), (c), (d).
3920 Clause 6.4.
3921 Clause 6.5.
3922 Clause 9.1.
3923 Clause 10.2(a).
3924 Clause 10.2(b).

demonstrate that it was abundantly clear (and no submission was made otherwise) that each of the first 20 of the 22 matters agreed to by Cargill, Inc as set out above was not intended to continue beyond Completion. Further, there was nothing in the language of the Deed of Release to single out or distinguish clause 10.2 from the other clauses of the Confidentiality Deed that Cargill, Inc had agreed to accept obligations in respect of on an ongoing basis.[3925]

4516 Further, in this context "accrued" rights and obligations under the Deed of Release could not sensibly be interpreted to mean all obligations under the Confidentiality Deed which were in effect at the time the Deed of Release became operational. If that were the meaning, other obligations, including Cargill, Inc's extensive obligations referred to above, would not be encompassed by the release in clause 2 of the Deed of Release, and Cargill would remain bound by obligations to, for example, maintain the confidential nature of the Confidential Information. Clearly, this could not have been the parties' intention. Applying the same approach, the obligations placed on Cargill, Inc by clause 10.2 could not be considered to have accrued merely because they were imposed and operative prior to the execution of the Deed of Release.

4517 In relation to the Viterra Parties' submission that it was implausible that the parties had a common intention to include clause 10.2 under the umbrella of the Deed of Release because the regime created by Glencore to protect it from litigation would effectively be undermined, that consequence (if it were the fact) could equally have been said to have arisen because Glencore (and Viterra) did not seek to maintain the position created under clause 10.2 pursuant to the separate written agreements subsequently agreed to (which agreements had been expressly contemplated under clause 10.4 of the Confidentiality Deed). Further, the submission that the "whole purpose of the foundation of the transaction" would be thwarted conflated the different stages of the sale process. The purpose of the initial stage the subject of the

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[3925] For completeness, to the extent that it might have been contemplated that cl 8.3 potentially related to conduct after Completion, plainly it was not intended that Cargill (as the direct and indirect owners upon Completion) would have been restricted in any further assessment, investigation, analysis or evaluation of the information pertaining to the Joe White Business. Thus, subject to cl 3, this clause would have also been covered by cl 2 of the Deed of Release in relation to any conduct after Completion that would otherwise have been a breach of the clause.

Confidentiality Deed was to allow the Joe White Business to be evaluated in order for Cargill, Inc to decide if and, if so, for how much it was willing to bid for the Joe White Business and on what terms. The second stage, which was not covered by the Confidentiality Deed (except to the extent that the Approved Purpose remained relevant and operative after the Acquisition Agreement was executed and before Completion), was always contemplated to be dealt with in a separate agreement, being the agreement to acquire the Joe White Business. Furthermore, the submission that the same considerations applied to both stages for the purpose of discerning the common intention of the parties ignored the fact that in the first stage Glencore and its Representatives were making the Confidential Information available for the Approved Purpose at no cost to the potential purchaser, and in the second stage Cargill was agreeing to pay a significant sum to complete the Acquisition and to become the owner of Information the subject of the Confidentiality Deed. Moreover, as clause 10.4 expressly contemplated, if separate written agreements were entered into subsequent to the Confidentiality Deed, then Glencore and its Representatives would be responsible for representations and obligations set forth in those agreements. The Acquisition Agreement expressly dealt with the manner in which the parties to that agreement were to be held responsible. Although Glencore was not a party to the Acquisition Agreement, both Cargill, Inc and Cargill Australia were, and they were both subject to the limitations contained in the terms of the Acquisition Agreement (whatever they might have been). In other words, at the time that the Deed of Release was executed, another legal regime had already been put in place (as had been expressly contemplated under the Confidentiality Agreement). Accordingly, it could not be said that a lacuna would have been created, or an obvious error or omission in clause 3(b) of the Deed of Release would have existed, if clause 10.2 was contemplated to be part of the subject matter that was being released by the Deed of Release. As referred to in the introduction to this issue, the rights and obligations in existence because the Acquisition Agreement had been entered into were unaffected and not prejudiced by the Deed of Release.

4518 Further, it was common ground that no legal proceeding had been commenced by

Cargill, Inc or any of its Representatives at any time on or before 31 October 2013. Thus, clause 10.2 had not been breached before Completion. Hypothetically, if a proceeding had been commenced before Completion, Glencore would have had an accrued right under clause 10.2 (subject to any questions about enforceability of that clause), which would have fallen squarely within clause 3(b) of the Deed of Release. However, that possibility did not eventuate. The fact that there had been a mere possibility that such a step could have been taken but was not, did not give rise to any accrued right, obligation, Claim or liability as no breach of the clause had been committed. Accordingly, no rights, obligations, Claims or liabilities could have arisen under that clause (so as to be caught by clause 3(b) of the Deed of Release) simply because Cargill Australia decided to commence a proceeding after Completion. It did not matter that such a proceeding concerned events that occurred before Completion as this fact alone did not bring the act of commencing the proceeding within clause 10.2 before it was the subject of the release in the Deed of Release.

4519 This position was markedly different to that under clause 8.3, where (if there had been a failure to comply with the obligations stipulated during the course of the evaluation and before Completion),[3926] a breach would have occurred and certain rights would have accrued. By extension, the position under clause 3.3 was also different to that under 10.2. If there had been a breach of clause 8.3(a) or 8.3(c) by Cargill Australia before Completion, then Cargill, Inc would have also breached clause 3.3 by failing to procure that Cargill Australia not engage in such conduct; and rights would have accrued to Glencore for the purposes of clause 3(b) of the Deed of Release.

4520 Also, for different reasons, the position was distinct from that under clause 10.3. Pursuant to that clause, the release was given by Cargill, Inc at the time the Confidentiality Deed was executed.[3927] Even if, contrary this finding, the Cargill Parties' submission that clause 10.3 did not give rise to any release at the time the Confidentiality Deed was executed and delivered by Cargill, Inc were accepted, there could have been no question that causes of action accrued in favour of Cargill at the

3926 See issue 105 below.

3927 This is discussed in more detail in issue 100 below.

time the Acquisition Agreement was entered into. Obviously, this occurred months before Completion and before the Deed of Release was executed. Any Claims based on such causes of action would have necessarily been subject to the Viterra Parties' accrued right to rely on the release granted pursuant to clause 10.3 of the Confidentiality Deed (again, subject to any issues concerning the enforceability of that release).

4521 In summary, to the extent that the Confidentiality Deed may have been breached by Cargill up until Completion, then rights in relation to any such breaches would have accrued. Therefore, those rights and related obligations, Claims or liabilities, would have been the subject of clause 3(b) of the Deed of Release. Further, leaving aside questions of the subject matter and enforceability of clause 10.3, the Deed of Release had no effect on the release given pursuant to clause 10.3 as that release had already been given before the time of Completion. However, unless a breach had occurred by Completion in relation to clauses containing ongoing obligations on the part of Cargill, Inc, then they were caught by the Deed of Release inasmuch as they were the subject of the release in clause 2. For the reasons explained above, clause 10.2 fell into this category.

X.85 Is the Confidentiality Deed enforceable by Glencore and/or Viterra against Cargill Australia?

4522 As a prelude to addressing this issue, there were numerous matters concerning the enforceability of the Confidentiality Deed which were raised in issues as identified below. Consideration of this issue as framed will be confined to the question of whether Cargill Australia, not being a party to the Confidentiality Deed, was nevertheless bound by its terms such that, relevantly,[3928] they could be enforced by Glencore or Viterra, or both. Accordingly, the conclusion reached on this question is subject to the other matters addressed below concerning the enforceability of the Confidentiality Deed.

3928 Some terms were solely directed towards imposing obligations on Cargill, Inc.

4523 The Confidentiality Deed, both as executed by Cargill, Inc on 13 May 2013 and as executed subsequently, provided that Cargill, Inc gave the undertakings in the Confidentiality Deed on behalf of itself and also on behalf of its Representatives.[3929] Cargill Australia, as a related body corporate, was incontrovertibly a Representative of Cargill, Inc. So much was not in dispute.

X.85.1 Submissions

4524 The Cargill Parties contended that clause 2.1 did not have the effect of binding Cargill Australia to Cargill, Inc's obligations under the Confidentiality Deed. They submitted that the Confidentiality Agreement was only enforceable against Cargill Australia on the basis that Cargill, Inc was contractually responsible for Cargill Australia's conduct by operation of clause 3.3 of the Confidentiality Deed, but not otherwise.

4525 The Viterra Parties submitted that Cargill Australia was bound by the Confidentiality Deed on 2 bases. *First*, they submitted that the Confidentiality Deed provided benefits to the Representatives of both Glencore and Cargill, Inc and in those circumstances rules concerning privity of contract did not prevent the application of the Confidentiality Deed being enforced.[3930] *Secondly*, they relied upon the doctrine of agency. They submitted that there was "an agency relationship between the respective parties to the Confidentiality Deed and the Representatives for whom they were acting *as agents*" (emphasis added); that is, Glencore was Viterra's agent and Cargill, Inc was Cargill Australia's agent.

X.85.2 Analysis

4526 The pleaded case of Cargill Australia was that from early 2013 Cargill, Inc participated in the sale process on its own behalf and on behalf of Cargill Australia. In the Defence, the Viterra Parties admitted Cargill Australia was a subsidiary of Cargill, Inc and that from 14 May 2013 Cargill, Inc participated in the sale process on its own behalf.

3929 Clause 2.1: see par 590 above.

3930 Relying on *Benson v Rational Entertainment Enterprises Ltd* (2018) 355 ALR 671, 691-693 [112]-[124] (Leeming JA, with whom Beazley P and Emmett AJA agreed); *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 (Mason CJ, Wilson, Toohey and Gaudron JJ, Brennan, Deane and Dawson JJ dissenting).

Otherwise, they denied the allegation concerning a relationship of agency between Cargill, Inc and Cargill Australia. However, later in the Defence after pleading the terms of the Confidentiality Deed including clause 2.1, the Viterra Parties alleged Cargill Australia was a Representative of Cargill, Inc at all material times after about 22 May 2013.[3931] In the Reply, this allegation was admitted. Cargill Australia also admitted that at all material times Cargill Australia was aware of the terms of the Confidentiality Deed.

4527 Accordingly, it is necessary to make a finding as to whether or not Cargill, Inc was acting as agent for Cargill Australia on and from 13 May 2013, when it first executed the Confidentiality Deed. In circumstances where it was Cargill Australia's pleaded case that Cargill, Inc was so acting,[3932] and the Viterra Parties' closing submissions also contended that that was the position, it would appear that there could be little controversy about the matter. In any event, the evidence indicated that at all times it was contemplated that Cargill, Inc was not the intended purchaser and that it was participating in the sale process so that it might facilitate the purchase of Joe White by Cargill Australia.[3933] Thus, at least by 13 May 2013, Cargill, Inc was acting both in its own right and as an agent for Cargill Australia. Clause 2.1 of the Confidentiality Deed as executed by Cargill, Inc both on 13 May 2013 and 22 May 2013 was entirely consistent with this position.

4528 In circumstances where there was an established relationship of principal and agent between Cargill Australia and Cargill, Inc in order that Cargill Australia might have been able to acquire Joe White, there could be no real issue that, in Cargill, Inc executing the Confidentiality Deed (both on 13 May 2013 and 22 May 2013) in terms that included clause 2.1, Cargill, Inc was binding its principal in this agency relationship, Cargill Australia, to the Confidentiality Deed. Contrary to the Cargill

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3931 It would appear the reason that the date of 22 May 2013 was alleged in the Defence was because this was the date upon which Cargill, Inc executed the later version of the Confidentiality Deed. However, the Defence also alleged that the Confidentiality Deed as executed by Cargill, Inc on 13 May 2013 was binding from that date. Clause 2.1 was identical in each version of the Confidentiality Deed.

3932 See also par 4635 below.

3933 See, for example, par 622 above.

Parties' submissions, the fact that the Confidentiality Deed contained terms that imposed obligations upon Cargill, Inc alone, such as clause 3.3 which directly required Cargill, Inc to ensure that its Representatives complied with the Confidentiality Deed,[3934] did not detract from the fact that Cargill, Inc as a duly authorised agent of Cargill Australia was also acting in that capacity in binding its principal.

4529 In light of this conclusion, it is unnecessary to consider the Viterra Parties' alternate submission based on *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*.[3935] As that decision is the subject of considerable uncertainty in relation to the extent of its application to contract law,[3936] it would be more appropriate that that matter be considered in a case where the issue needs to be decided.

X.85.3 Conclusion

4530 Subject to other issues concerning the question of enforceability of the particular aspects of the Confidentiality Deed, by operation of clause 2.1 the Confidentiality Deed was enforceable by both Glencore and Viterra against Cargill Australia.

X.86 Has Cargill Australia breached clauses 10.2 and 10.3 of the Confidentiality Deed by instituting this legal proceeding against Glencore and Viterra?

4531 The Viterra Parties alleged that because Cargill Australia agreed to be bound by the Confidentiality Deed and the undertakings given by Cargill, Inc on its behalf, by instituting this proceeding against each of the Viterra Parties Cargill Australia breached subclauses (a) and (b) of clause 10.2, and clause 10.3.

4532 Clauses 10.2 and 10.3 have already been considered in issue 76 above. It is unnecessary to repeat what is said there.

4533 For the reasons already explained, there could be no issue of Cargill Australia

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3934 By way of another example, cl 10.2(b): see par 590 above.

3935 (1988) 165 CLR 107 (Mason CJ, Wilson, Toohey and Gaudron JJ, Brennan, Deane and Dawson JJ dissenting).

3936 The majority did not decide the case on the same basis, with Gaudron J agreeing with the minority that the respondent could not recover under contract because of lack of privity: (1988) 165 CLR 107, 173.5-174.3.

breaching clause 10.2 in circumstances where fraud and wilful misconduct on the part of the Viterra Parties have both been established. In these circumstances, clause 10.2 did not provide any bar to Cargill Australia commencing this proceeding.[3937] Further, and in any event, this proceeding was commenced after Completion so that any obligations under clause 10.2 had been released at the time the proceeding commenced.[3938]

4534 In relation to clause 10.3, it was subject to clause 10.4 which meant that there could be no breach of clause 10.3 to the extent that Cargill Australia's claims related to holding the Viterra Parties responsible for representations or obligations set forth in the Acquisition Agreement. With respect to claims that went beyond this, the making of such claims in this proceeding did not breach clause 10.3. In short, in contrast to clause 10.2, clause 10.3 said nothing about Cargill Australia's right to commence or maintain a proceeding. Clause 10.3 contained a release in favour of the Viterra Parties which (if relied upon) might or might not have been effective in relation to defeating any claims made by Cargill Australia. However, even if it were ultimately determined that the release was effective in providing a complete defence to any claim made,[3939] Cargill Australia simply making such claim would not in itself be in breach of clause 10.3.[3940]

4535 For completeness, the Defence did not contain any allegation to the effect that clause 10.3 implied by its terms that Cargill, Inc also covenanted not to sue any of the Viterra Parties.[3941] Any such allegation would have been bound to fail in circumstances where the entitlement or otherwise of Cargill, Inc or its Representatives was expressly dealt with in clause 10.2 and the restrictions imposed were more confined than the subject of the release in clause 10.3. Thus any implied term based on the wording in clause 10.3 would have contradicted the express agreement contained in clause 10.2.[3942]

3937 See also the discussion concerning the applicability of clause 10.4: see par 4345 above.
3938 See par 4518 above.
3939 See further par 4629 below.
3940 See further issue 102 below.
3941 Compare fn 3899 above.
3942 See par 4493 above. See also *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283.2 (Lords Simon, Dilhorne and Keith).

X.87 Has Cargill Australia breached clauses 8.3(a) and 8.3(c) of the Confidentiality Deed by relying upon the Financial and Operational Performance Representations, the Warranty Representations, the Pre-Completion Representations, the Other Bidders Representations and/or the Co-Operative Bulk Representations?

4536 The question of whether or not Cargill Australia breached these clauses of the Confidentiality Deed also arose on the pleadings in the context of addressing whether or not Cargill, Inc breached the Confidentiality Deed. It is convenient to deal with these issues together. They are addressed in issue 105 below. For the reasons stated there, the answer is no.[3943]

X.88 To what relief, if any, is Glencore and/or Viterra entitled as a consequence?

4537 This issue does not arise. See issues 105 and 106 below.

X.89 Did Cargill Australia convey the Confidentiality Deed Representations as pleaded in paragraph 120C of the Viterra Parties' counterclaim?

4538 The Viterra Parties alleged in their counterclaim in the Defence that Cargill Australia conveyed 2 representations to Glencore or Viterra, or both, arising out of the execution of the Confidentiality Deed.[3944] These allegations mirrored allegations made against Cargill, Inc and were alleged to have been made by reason of Cargill, Inc entering into the Confidentiality Deed and giving certain undertakings on behalf of its Representatives, including Cargill Australia. Accordingly, the allegations against Cargill Australia can rise no higher than the allegations made by the Viterra Parties directly against Cargill, Inc.

4539 In circumstances where it has been found that Cargill, Inc did not make the equivalent representations such that it engaged in misleading or deceptive conduct in trade or

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3943 No decision has been made in relation to the Co-Operative Bulk Representations: see issues 61 to 64 above.

3944 See par 4730 below.

commerce,[3945] it is unnecessary to consider this issue separately.

X.90 Were the Confidentiality Deed Representations made in trade or commerce within the meaning of section 18 of the Australian Consumer Law?

4540 It was accepted by the Cargill Parties that if the Confidentiality Deed Representations were made by Cargill Australia, they were made in trade or commerce.

X.91 Did Viterra rely on the Confidentiality Deed Representations in entering into the Acquisition Agreement?

4541 The answer to this issue is not straightforward. See issue 112 below.

X.92 If the Confidentiality Deed Representations were representations as to future matters, did Cargill Australia have reasonable grounds for making them?

4542 Yes. See issue 113 below.

X.93 Were the Confidentiality Deed Representations misleading or deceptive or likely to mislead or deceive and did Cargill Australia thereby engage in misleading or deceptive conduct in contravention of section 18 of the Australian Consumer Law?

4543 No. See issue 114 below.

X.94 What, if any, damages or other relief is Glencore and/or Viterra entitled to as a consequence?

4544 This issue does not arise.

X.95 Did Cargill Australia convey the No Reliance Representations as alleged in paragraph 121 of the Defence and paragraph 38 of the Third Party Claim?

3945 See issues 110 to 114 below.

X.95.1 Allegations

4545 Relying upon the terms of clause 13.4(a) and (d) of the Acquisition Agreement,[3946] the Viterra Parties counterclaimed that in early August 2013, Cargill Australia represented to Viterra that Cargill Australia:

(1) In entering into the Transaction Documents and in proceeding to Completion, did not rely on any statement, representation, warranty, condition, promise, forecast or other conduct which may have been made by or on behalf of Viterra, except the Warranties.

(2) Irrespective of whether or not the Due Diligence was as full or exhaustive as Cargill Australia would have wished, had nevertheless independently and without the benefit of any inducement, representations or warranty (other than the Warranties) from Viterra or any Representatives of Viterra, determined to enter into the Transaction Documents.

(Collectively, the "No Reliance Representations".)

4546 In its defence to this part of the Viterra Parties' counterclaim, Cargill Australia acknowledged the terms of clause 13.4(a) and (d), and referred to clause 13.7(b) in alleging that the matters agreed to by Cargill Australia in clause 13.4 did not give Viterra a cause of action against Cargill Australia.[3947] Further, Cargill Australia referred to other allegations in the Statement of Claim and alleged that the Warranties given under the Acquisition Agreement in respect of "Records" were given in relation to the Information Memorandum and the Financial and Operational Information.[3948] Furthermore, amongst other things, they referred to the terms of the Phase 1 Process Letter, the Confidentiality Deed, the Cargill Indicative Bid, the Phase 2 Process Letter and the First Final Bid in alleging that Cargill relied upon the accuracy of the Financial and Operational Information. Moreover, they alleged that, to the extent that the Sale

3946 See par 1029 above.
3947 Ibid.
3948 With respect to the Warranties dealing with Records, the relevant Warranty was Warranty 4.2.

Process Disclaimers or the Acquisition Agreement Liability Terms purported to entitle Glencore or Viterra to engage in misleading or deceptive conduct in contravention of section 18 of the Australian Consumer Law, they were void and unenforceable.

X.95.2 Submissions

4547 The Viterra Parties submitted that Cargill Australia conveyed the No Reliance Representations to Viterra by entering into the Transaction Documents, particularly the Acquisition Agreement, and by agreeing to the Acquisition Agreement's key terms, particularly clause 13.4(a) and (d).

4548 The Cargill Parties' submissions for the purposes of issue 95 were directed at the interpretation that should be given to the No Reliance Representations, had they been made. These submissions are addressed below, in the context of the Viterra Parties' claim that the No Reliance Representations were misleading or deceptive.[3949]

X.95.3 Analysis

4549 By way of general observation, when construing a contract or deed, the role of the court is to construe the relevant clauses objectively to determine the common intention of the parties by reference to what a reasonable businessperson placed in their position would have understood them to mean, in the context of the terms of the contract as a whole, the known surrounding circumstances and the purpose or objects to be secured. To understand the purpose or objects, the court must take into account the genesis of the transaction, the background and context, including the market in which the parties operated.[3950]

4550 While the court is always confined by the words used in determining the meaning, the court should avoid construing a clause in a manner that would give rise to a

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3949 See issue 98 below.

3950 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-657 [35] (French CJ, Hayne, Crennan and Kiefel JJ). See also *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, 551 [17]-[18] (Kiefel, Bell and Gordon JJ), 571 [73] (Nettle J); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116-117 [46]-[52] (French CJ, Nettle and Gordon JJ).

commercial absurdity or nonsense.[3951] Further, if more than 1 meaning is open, then a construction that avoids a capricious, unreasonable, inconvenient or unjust outcome must be preferred.[3952]

4551 Neither the Cargill Parties nor the Viterra Parties referred to any authority in their written submissions on this point. As has been noted above,[3953] the question of whether contractual promises can form representations for the purposes of the Australian Consumer Law remains "a matter of controversy". Where a representation is said to appear in a contract, "it will be necessary to examine all the terms of the contract to see if the allegation that there is a representation is made good".[3954]

4552 Clause 13.4 began with the phrase "[Cargill Australia] acknowledges and agrees". Clause 13.4(a) and (d) then contained statements of factual circumstances that related to Cargill Australia's actions or state of mind, the accuracy of which was known by Cargill Australia and not known by Viterra.[3955] Clause 13.4(a) related to Cargill Australia's non-reliance on statements and other communications, and clause 13.4(d) related to Cargill Australia's independent determination to enter into the Transaction Documents. For the reasons that follow, by Cargill Australia agreeing to clause 13.4(a) and (d) representations were made by Cargill Australia in the same terms at the time it entered into the Acquisition Agreement.

4553 *First,* it must be presumed the words "acknowledges and" were intended to add additional meaning to the word "agrees". If it were intended that no more than an agreement was being documented then the words "acknowledges and" would have

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3951 Ibid; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530, 559 [82] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ).

3952 *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99, 109.4-110.1 (Gibbs J, dissenting). See also *XL Insurance Co SE v BNY Trust Company of Australia Limited* [2019] NSWCA 215, [90] (Gleeson JA, with whom Bell P and Emmett AJA agreed); *Zhang v ROC Services (NSW) Pty Ltd* (2016) 93 NSWLR 561, 589 [127]-[129] (Leeming JA, with whom Macfarlan JA and Sackville AJA agreed); *Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd* [2015] VSCA 190, [83] (Santamaria, Kyrou and McLeish JJA).

3953 See par 3770 above, referring to *RCR Energy Pty Ltd v WTE Co-Generation Pty Ltd* [2017] VSCA 50, [62] (Weinberg, Whelan and Santamaria JJA).

3954 Ibid, [64].

3955 These subclauses may be contrasted with other subclauses that purported to record the position of the Sellers or their Representatives.

been superfluous.

4554 *Secondly*, neither subclause (a) or (d) of clause 13.4 was a "Warranty".[3956] Warranties as defined were confined to those set out in schedule 4 to the Acquisition Agreement. However, that fact did not preclude it from being a warranty in the ordinary sense. On the contrary, giving such an acknowledgement fell squarely within what a warranty is generally understood to encapsulate, namely a contractual affirmation of a fact or promise, if not a representation of fact, the truth of which is a condition of entering into the contract.[3957] Reading clause 13.4 alone, it would seem clear that a warranty was given in the form of each of the subclauses in that clause.

4555 However, in determining the correct interpretation of clause 13.4, it was necessary to consider the contract as a whole, including clause 13.7(b). By this subclause it was stated that each Seller acknowledged that "the matters agreed by [Cargill Australia] in clause 13.4 do not give that Seller a cause of Action against [Cargill Australia] and may only be raised by that Seller as a defence to any Claim by [Cargill Australia]".[3958] Plainly, if clause 13.7(b) were to operate according to its terms, then the remedies that would ordinarily be available for breach of warranty would not be available. Nonetheless, this fact did not alter the proper characterisation of clause 13.4 as a warranty. The fact that another clause may limit the remedies available did not mean that the meaning of clause 13.4 was somehow relevantly altered.

4556 *Thirdly*, a factor which weighed in favour of an interpretation that clause 13.4 was not intended to amount to a representation was that the wording "acknowledges and agrees" in clause 13.4 may be contrasted with "represent and warrant" in clause 13.1.[3959] The wording in clause 13.1, and the fact that the definition of Warranties in the Acquisition Agreement included "the warranties *and representations* set out in

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3956 This is confirmed by cl 13.7(b) and the text and context of cl 13.4.

3957 *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, 504.8-505.2 (Lockhart and Gummow JJ).

3958 For completeness, it is noted that this subclause referred to matters that had been "agreed", rather than matters that had been "acknowledged and agreed" and therefore did not fully reflect the wording used in cl 13.4. No submission was made suggesting anything turned on this.

3959 See par 3730 above.

Schedule 4", were relevant to the finding that Viterra both gave the Warranties and made the Warranty Representations as a consequence of clause 13.1 of the Acquisition Agreement.[3960]

4557 It was open for the parties to have used the word "represents" in clause 13.4; this word was plainly in the contemplation of the parties given its use in clause 13.1.[3961] The choice by the parties to use different wording between clause 13.1 and clause 13.4 may have suggested that the operation of these clauses was intended to differ.[3962] The same may be said by reason of clause 13.7(b) having been included.

4558 However, the fact that the word "represent" had been used in the contract, or in the lengthy and detailed clause 13, did not necessarily mean that, in the remainder of the contract or clause, only statements explicitly referred to as being "represented" were intended to amount to representations. Each part of the contract or clause must be interpreted according to its text, context and purpose, in light of the contract as a whole.[3963]

4559 Further, clause 13.1 and clause 13.4 had quite different purposes. Clause 13.1 related to obligations and assurances of Viterra as Sellers, while clause 13.4 related to Cargill Australia's position as Buyer. Further, in clause 13.1 Viterra gave the Warranties. If the word "represent" had not been used in clause 13.1, there may have been some ambiguity about whether the clause was intended to constitute a representation in addition to its clear purpose of the giving of the Warranties.[3964] The reference to "represent" was presumably introduced to ensure no such ambiguity existed. In clause 13.4 there was no comparable issue.

3960 See issue 48 above.

3961 By way of further example, by cl 16.1 of the Acquisition Agreement it was provided that each of Cargill Australia and Cargill, Inc "represents and warrants to the Sellers" that certain statements were correct.

3962 It was somewhat difficult to reconcile the Viterra Parties' submission to the effect that the words "acknowledges and agrees" conveyed a representation in addition to a contractual promise, with their submission for the purposes of issue 48 above that the words "represent and warrant" conveyed a contractual promise only without also conveying a representation.

3963 See pars 4549-4550 above.

3964 See issue 48 above.

4560 *Fourthly* and in any event, little turns on the use of the classification as a "representation". The question for the purpose of section 18 was not whether a representation was made, but rather whether conduct was engaged in.[3965] Even if the making of the acknowledgements in clause 13.4(a) and (d) were not strictly representations as that term was to be understood in the context of the Acquisition Agreement or otherwise, the giving of the acknowledgements was more than merely entering into an agreement to perform obligations and was separate conduct in trade or commerce.[3966]

4561 For these reasons, by not only agreeing but also acknowledging the matters set out in clause 13.4(a) and (d), Cargill Australia engaged in conduct for the purposes of section 18 of the Australian Consumer Law by giving the assurances that it did. The No Reliance Representations therefore were made.

X.96 Were the No Reliance Representations made in trade or commerce within the meaning of section 18 of the Australian Consumer Law?

4562 Cargill Australia conceded that, if the No Reliance Representations were made, they were made in trade or commerce.

X.97 Did Viterra rely on the No Reliance Representations in entering into the Acquisition Agreement?

X.97.1 Submissions

4563 The Viterra Parties submitted that Viterra entered into the Acquisition Agreement in reliance on the No Reliance Representations. The Viterra Parties submitted that the court could infer that a party relied on certain conduct in order to enter into a contract in circumstances where the conduct in question took the form of a representation which by its nature was calculated to induce the representee to contract.

4564 The Viterra Parties submitted that the Acquisition Agreement was the product of

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3965 See par 5046 below. See also par 3769 above.

3966 See in particular *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* (2010) 31 VR 575, 598 [92] (Buchanan and Nettle JJA).

detailed negotiations between well advised and exceptionally well resourced corporate groups, and was prepared in the context of the parties engaging with each other pursuant to the Sale Process Disclaimers. The Acquisition Agreement, the Viterra Parties submitted, was a commercial agreement and clearly delineated the parties' respective rights and obligations, including by setting out the Warranties that were provided and relied upon, and expressly recording that no other representations were made or relied upon by Cargill Australia. The Viterra Parties submitted that Viterra was entitled to rely upon the terms of the Acquisition Agreement.

4565 The Viterra Parties submitted that it was evident from the terms of the Acquisition Agreement itself that Viterra would not have entered into the Acquisition Agreement if it could not rely upon the No Reliance Representations.

4566 The Cargill Parties submitted that the Viterra Parties had adduced no evidence to support Viterra's reliance on the No Reliance Representations in entering into the Acquisition, either through lay witness statements or through the Viterra Parties' oral evidence, and that as a result the Viterra Parties had not discharged the evidential burden of establishing that they relied upon the No Reliance Representations.[3967]

X.97.2 Analysis

4567 The legal principles for determining reliance, or more accurately causation, have been set out above.[3968] In this case, the circumstances of Viterra's entry into the Acquisition Agreement were sufficient to give rise to a fair inference that Viterra relied on the No Reliance Representations. The Viterra Parties' submissions concerning the parties being well resourced and well advised corporate groups, and the fact that the terms of the Acquisition Agreement were the subject of detailed negotiations, were uncontroversial. On the facts, there could be no basis to find anything other than all

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3967 The Cargill Parties' written submissions on this point referred to the Confidentiality Deed Representations, rather than the No Reliance Representations. It was clear from the context and from the pleadings that this was an error, and the submissions were intended to refer to the No Reliance Representations.

3968 See issue 20.2 above.

the parties to the Acquisition Agreement fully understood the terms they agreed to enter into.

4568 Further, given what had occurred during the sale process, the terms of clause 13.4(a) and (d) were material. The sale process had involved the Due Diligence and the Viterra Parties providing a considerable amount of information and making numerous representations. In these circumstances, it was objectively highly likely that the Sellers would have been induced to enter into the Acquisition Agreement by reason of the acknowledgements given to the extent that they had the relevant causative effect.[3969] In light of the terms of the Acquisition Agreement and the circumstances in which it was entered into, the absence of direct evidence of actual reliance did not alter the appropriateness of such an inference being drawn.[3970]

4569 A question thus arises as to whether the inference of reliance was rebutted, on the basis that Viterra knew the true facts in advance of the claimed reliance.[3971] The Cargill Parties have referred to evidence of communications between Cargill and Viterra in advance and at the time of Cargill making the First Final Bid, which expressly conveyed that Cargill Australia was relying on the accuracy of the Financial and Operational Information.[3972] However, this evidence was not inconsistent with the claimed reliance by the Viterra Parties. The simple fact was that, whatever had been stated in the lead up to the parties reaching an agreement, Cargill Australia solemnly and unambiguously disavowed relying on any representations made by or on behalf of Viterra, except the Warranties, in entering into the Acquisition Agreement and in proceeding to Completion. There was no evidence to suggest Viterra was aware that at the time of entry by Cargill Australia into the Acquisition Agreement, contrary to the clear wording of clause 13.4(a) and (d), such a cessation of reliance had not

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3969 See, for example, *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* (2010) 31 VR 575, 599-603 [96]-[106] (Buchanan and Nettle JJA).

3970 Ibid.

3971 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 321 [31] (French CJ), 348 [130] (Gummow, Hayne, Heydon and Kiefel JJ).

3972 See pars 623-624, 976-977 above. See also issue 107 below.

occurred for the purposes expressly stated. The inference of reliance was thus not rebutted.

4570 It follows that the Viterra Parties have established that Viterra relied on the No Reliance Representations.

X.98 Were the No Reliance Representations misleading or deceptive or likely to mislead or deceive and did Cargill Australia thereby engage in misleading or deceptive conduct in contravention of section 18 of the Australian Consumer Law?

X.98.1 Submissions

4571 The Viterra Parties submitted that, if Cargill Australia was found to have relied on the Warranty Representations, the Financial and Operational Performance Representations or the Other Bidders Representations, it would follow that Cargill Australia had relied on matters expressly excluded by clause 13.4 of the Acquisition Agreement. Thus, it was contended as a consequence the No Reliance Representations would have been misleading or deceptive.

4572 The Cargill Parties denied that Cargill Australia made the No Reliance Representations based on 3 contentions directed towards the construction of clause 13.4(a) and (d).

4573 *First*, the Cargill Parties submitted that, properly construed, clause 13.4(a) and (d) were to the effect that Cargill Australia could rely on its own assessment of the information provided.

4574 *Secondly*, the Cargill Parties submitted that it had been expressly conveyed to the Viterra Parties that Cargill Australia was relying on the accuracy of the Financial and Operational Information in the sale process and during the Due Diligence. The Cargill Parties referred to the following in support of this submission:

(1) The Phase 1 Process Letter required Cargill, Inc to submit an indicative

bid by 7 June 2013 "based on the 31 January 2013 balance sheet in Section 5 of the Information Memorandum" and setting out where the key assumptions underpinning the bid varied from the information disclosed in the Information Memorandum.[3973]

(2) Clauses 1.3, 3, 6, and 9.1 of the Confidentiality Deed restricted Cargill, Inc's ability to use, disclose or conduct independent investigations into the accuracy of the Financial and Operational Information provided by Glencore or Viterra, or both.[3974]

(3) The Cargill Indicative Bid expressly stated that:[3975]

(a) It was based on Cargill's "review of the information contained within the Information Memorandum" and the "information and forecasts contained within the [Information Memorandum] and the [Phase 1 Process Letter]".

(b) Cargill, Inc's valuation would be refined "based on more detailed information provided in Phase 2".

(c) Cargill "assume[d] that the information provided by Glencore, Joe White and Merrill Lynch [was] true and accurate and supported by due diligence findings".

(d) Cargill, Inc assumed that "Joe White [was] being acquired on a going concern, steady state basis without issues such as contingent liabilities, unusual terms and conditions in key contracts, outstanding litigation, or any other matters that could result in a material adverse change to Joe White's business or significantly affect the value of Joe

3973 See par 466 above.
3974 See pars 585-590 above.
3975 See par 623 above.

White".

(4) It was contended the Phase 2 Process Letter was premised on the basis that Cargill, Inc would be able to make a final bid based upon the Financial and Operational Information provided by Glencore or Viterra, or both, during the Due Diligence. The Phase 2 Process Letter also imposed restrictions on Cargill, Inc's ability to independently investigate the accuracy of the Financial and Operational Information.[3976]

(5) The First Final Bid expressly stated that:[3977]

(a) "Based on the due diligence that [Cargill, Inc had] undertaken and discussions with Joe White management, [Cargill, Inc had] confirmed [its] view that Joe White [was] an impressive business with a portfolio of top-tier assets and a strong strategic fit with Cargill."

(b) Cargill, Inc had "conducted its due diligence based on the information provided to date in the process. This include[d] a review of the information provided in the Information Memorandum, management presentations, site visits, the… [Data Room] (including responses provided through [the Q&A Process]) and some public registers."

4575 *Thirdly*, the Cargill Parties submitted that clause 13.4(a) and (d) of the Acquisition Agreement expressly acknowledged that Cargill Australia was entitled to rely upon the Warranties, and it was submitted this included its own assessment of the information the subject of the Warranties such as the Information Memorandum and

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3976 See pars 639-644 above. In their submissions, the Cargill Parties relied on pars 1(a)-(d), 2, 6, 8 and appendix B pars 2(b) and (c) of the Phase 2 Process Letter.

3977 See pars 976-977 above.

the Data Room Documentation, and all of the Financial and Operational Performance Representations.[3978]

X.98.2 Analysis

4576 To determine the meaning of the No Reliance Representations, it was necessary to consider the words of subclauses (a) and (d) of clause 13.4, together with the effect of the Acquisition Agreement and the context and background to its execution.[3979]

4577 It was apparent from the plain words of the No Reliance Representations that they were not inconsistent with reliance by Cargill Australia on the Warranty Representations. Reliance on the Warranty Representations was expressly permitted by the No Reliance Representations, because the definition of "Warranties" in the Acquisition Agreement included "the warranties *and representations* set out in Schedule 4 …".[3980]

4578 By the same token, on the face of the plain words of the No Reliance Representations, the making of them was inconsistent with reliance on the Financial and Operational Performance Representations and the Other Bidders Representations,[3981] and indeed with any reliance on any "statement, representation, warranty, condition, promise, forecast or other conduct which may have been made by or on behalf of Viterra, except the Warranties".[3982] In essence, the Cargill Parties' submissions consisted of arguments for departing from this natural meaning of the No Reliance

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3978 They further contended that those clauses were not intended to, and did not, have any operation in relation to the provision of misleading information involving fraud or wilful misconduct by the Viterra Parties. These submissions are addressed at par 4593 below.

3979 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 319-310 [26]-[27] (French CJ), 341-342 [102] (Gummow, Hayne, Heydon and Kiefel JJ), the plurality citing *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 625 [109] (McHugh J).

3980 See par 3749 above.

3981 The claim by the Viterra Parties also referred to reliance by Cargill Australia on the Pre-Completion Representations. As it has been found that Cargill Australia did not rely on the Pre-Completion Representations (see issue 30 above), it is not necessary to consider those representations for the purposes of this claim.

3982 See par 4545 above. Naturally, to the extent the Warranty Representations might have been said to overlap with the Financial and Operational Performance Representations or the Other Bidders Representations, no inconsistency would have arisen; but these representations were far broader than the subject matter of the Warranty Representations.

Representations.

4579 *First*, in relation to the Cargill Parties' submission that the No Reliance Representations were to the effect that Cargill Australia could rely on its own assessment of the information it was provided, this appeared to be drawn from clause 8.3(a) of the Confidentiality Deed[3983] and like phrases in other documents created during the sale process.[3984] It was of limited utility in considering the meaning of the No Reliance Representations. The controversy did not concern whether Cargill Australia was entitled to rely on its own assessment, nor whether Cargill had breached the Confidentiality Deed or any other document it might have agreed to be bound by, but rather whether it was entitled to rely on representations made by or on behalf of Viterra other than the Warranties (which included the Warranty Representations).

4580 *Secondly*, in relation to the correspondence which indicated that Cargill was relying on the Financial and Operational Information,[3985] Cargill stating how it carried out its assessments, investigations and analyses in evaluating the Joe White Business before any binding agreement was entered into did not preclude the parties from subsequently contractually agreeing on a more narrow basis upon which they were willing to enter into the Acquisition Agreement or to proceed to Completion. In any event, while this correspondence formed part of the context by reference to which the No Reliance Representations must be interpreted, it could not displace the plain words of clause 13.4(a) and (d).

4581 *Thirdly*, with respect to Cargill Australia being expressly permitted to rely upon the Warranties and its own assessment of the information the subject of the Warranties, again, whether or not Cargill Australia was entitled to rely on its own assessment was not to the point. Even if the Cargill Parties' submissions were considered to be responsive to the issue, it would not follow that the Financial and Operational Performance Representations or the Other Bidders Representations fell outside the

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3983 See par 590 above.

3984 For example, the Information Memorandum, the Phase 1 and 2 Process Letters and the Management Presentation Memorandum: see pars 468, 475, 643, 712 above.

3985 See par 4574 above. See also issue 107 below.

category of any "statement, representation, warranty, condition, promise, forecast or other conduct which may have been made by or on behalf of Viterra, except the Warranties". To the extent that the subject matter of either of these sets of representations did not fall within the Warranty Representations,[3986] reliance upon them would thus remain directly inconsistent with the No Reliance Representations.

4582 None of Cargill Australia's submissions provided a compelling reason to interpret clause 13.4(a) and (d) other than in accordance with their plain words or to diminish the effect of the No Reliance Representations.[3987] As such, the No Reliance Representations were inconsistent with and directly contrary to reliance by Cargill Australia on the Financial and Operational Performance Representations and the Other Bidders Representations. It has also been found, and formed part of the case advanced by Cargill Australia, that Cargill Australia did in fact rely on the Financial and Operational Performance Representations and the Other Bidders Representations.[3988] From these 2 findings, it necessarily follows that the No Reliance Representations were misleading and deceptive or likely to mislead or deceive. In short, Cargill Australia represented it was not doing precisely what it had done and was continuing to do at the time it entered into the Acquisition Agreement. To the extent that the No Reliance Representations related to matters in the future, there could be no suggestion that the No Reliance Representations were reasonably based. No such argument was put by the Cargill Parties. Indeed, such a contention would have run contrary to their case.

X.99 What, if any, damages or other relief is Glencore and/or Viterra entitled to as a consequence of the matters in issues 95 to 98 above?

X.99.1 Submissions

4583 The loss claimed by the Viterra Parties was pleaded to comprise any liability for damages or costs which Viterra was held to have to pay to Cargill Australia, together

3986 See also fn 3982 above.
3987 See also par 3206 above.
3988 See issues 20, 58 above.

with Viterra's costs of this proceeding.

4584 The Viterra Parties submitted that if Cargill Australia's primary claims based on misleading or deceptive conduct succeeded, they suffered loss and were entitled to damages pursuant to section 236, or alternatively to orders under section 237, of the Australian Consumer Law compensating them for the loss or damage. They also referred to their submissions made in relation to issue 88 above without further specificity in submitting the Viterra Parties' loss would include compensation for the losses referred to.

4585 The Cargill Parties submitted that the loss claimed by the Viterra Parties did not arise from Cargill Australia's representations in the Acquisition Agreement at clause 13.4(a) or (d),[3989] but rather from the Viterra Parties' own conduct. [3990]

X.99.2 Analysis

4586 Insofar as the Viterra Parties referred to their submissions under issue 88 above, plainly, to the extent those submissions were concerned with alleged breaches of the Confidentiality Deed, they need not be considered here. As best as I could discern from the submissions, the permanent injunction sought to restrain Cargill Australia from continuing this proceeding in respect of Confidential Information and the non-disclosure of Information had no applicability to claims made with respect to the No Reliance Representations. If that is incorrect, in any event, the matters raised above gave no basis for the permanent injunction sought.

4587 The remaining submissions were concerned with the liability of the Viterra Parties that would arise in respect of Cargill Australia's claims if Cargill Australia was successful, namely liability in damages to Cargill Australia as well as liability in

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3989 The reference in this part of Cargill's submission referred to cl 13.4(b) rather than 13.4(d), but was presumably a typographical error.

3990 The Cargill Parties also made submissions, citing *Venerdi Pty Ltd v Anthony Moreton Group Funds Management Ltd* [2015] 1 Qd R 214, 223 [45]-[47] (Jackson J), that the claim by the Viterra Parties must fail because it sought to "extinguish" Cargill Australia's statutory right to compensation. Given the other findings made, it is not necessary to consider this issue here. For consideration of similar arguments on public policy and the Australian Consumer Law, see issue 144 below.

relation to any award for Cargill Australia's costs of this proceeding. In essence, the Viterra Parties sought to obtain relief to set-off any liability they had to Cargill Australia by reason of Cargill Australia's claims, together with their own costs.

4588 As noted above,[3991] in assessing a claim for loss under section 236 of the Australian Consumer Law, the question for the court is whether the plaintiff has established that it suffered loss or damage because of the contravening conduct.[3992] In answering this question, the court is not constrained to principles of common law relevant to assessing damages in contract or tort.[3993] However, in many cases the measure for damages in tort, where damages are awarded with the object of placing the plaintiff in the position they would have been had the tort not been committed, [3994] has been considered appropriate for assessing damages in claims made under the Australian Consumer Law.[3995]

4589 The claim by the Viterra Parties under this issue was that they entered into the Acquisition Agreement in reliance on the No Reliance Representations and would not have done so if those representations had not been made. In essence, the Viterra Parties contend that the position they would have been in had they not relied upon the No Reliance Representations was that they would not have been exposed to Cargill Australia's claims. However, this was an overly simplistic and entirely artificial measure by which to assess any alleged loss.

4590 The relief as sought by the Viterra Parties, if granted, would put Viterra in the position

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3991 See pars 3913-3914 above.

3992 *Henville v Walker* (2001) 206 CLR 459, 501-502 [130]-[132] (McHugh J, with whom Gummow J agreed); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 512-513 [42] (McHugh, Hayne and Callinan JJ).

3993 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 403 [31] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 503-504 [17] (Gaudron J), 510 [38], 512 [40]-[41] (McHugh, Hayne and Callinan JJ), 529 [102]-[103] (Gummow J); *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 526.2 (Mason CJ, Dawson, Gaudron and McHugh JJ); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 14.8 (Mason, Wilson and Dawson JJ).

3994 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 12.2 (Mason, Wilson and Dawson JJ). See also *Gould v Vaggelas* (1984) 157 CLR 215, 265.5 (Dawson J); *Toteff v Antonas* (1952) 87 CLR 647, 650.5 (Dixon J).

3995 See, for example, *Henville v Walker* (2001) 206 CLR 459, 470 [18] (Gleeson CJ); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 6.8-7.1 (Gibbs CJ), 14.8 (Mason, Wilson and Dawson JJ). See also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 348.6 (Mason CJ, Dawson, Toohey and Gaudron JJ).

it would have been in if the Acquisition had proceeded, but Cargill Australia had never brought this proceeding. This may have been the position, subject to the Cargill Parties' other claims, that Viterra would have been in had the No Reliance Representations been true at the time the Acquisition Agreement was entered into; but this scenario was not the correct counterfactual. On the case as put by the Viterra Parties, had they known the No Reliance Representations were misleading, Viterra would not have entered into the Acquisition Agreement.

4591 If Viterra had never entered into the Acquisition Agreement, it would never have received the purchase price paid by Cargill Australia, and its position would have been materially different than the position into which it sought to be put. In short, Viterra would have still owned the Joe White Business; a business it did not want to continue to own and operate and for which the next highest bid, which was presumably also based on the misleading information in the Information Memorandum that had been disseminated as part of the sale process, was $335 million.[3996] The Viterra Parties' position would have borne no resemblance whatsoever to the basis upon which they claimed Viterra was entitled to damages; namely, on the basis that it would have sold Joe White for $420 million (being an amount well in excess of its true value)[3997] with no exposure for the misleading conduct in which *the Viterra Parties* engaged.

4592 In their submissions on the loss claimed by Cargill Australia, the Viterra Parties submitted that, since Cargill Australia had chosen to adopt only 1 measure of damages, if the approach Cargill Australia adopted was not the appropriate means of calculating the amount of loss, it would necessarily follow that Cargill Australia's claims for compensation must fail.[3998] The same reasoning applied here. No alternate measure of damages was claimed. Since the compensation claimed by the Viterra Parties was not available on the basis they adopted, and since the suggested counterfactual bore no resemblance to the circumstances that would have arisen if

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3996 See par 983 above. There was no meaningful and reliable evidence to indicate on what basis the 2 other final bids were made, and no finding is made in that regard.

3997 See issue 73 above.

3998 See fn 3292 above for the relevant authorities.

Cargill Australia had not engaged in misleading or deceptive conduct, the Viterra Parties' claim cannot succeed.

X.99.3 Further observations

4593 In light of this conclusion, for the purposes of issues 95 to 98 above it is unnecessary to consider the Cargill Parties' submissions based on fraud or wilful misconduct.[3999] However, the authorities are clear that, broadly speaking, if a person is induced to enter into a contract by reason of fraud, then the fraudster cannot avoid liability by relying on a provision in a contract which would not have been entered into if the fraudulent conduct had not occurred.[4000] Further, it must be noted that in limiting the liability of each Seller or any of its Representatives except under the Warranties, clause 13.4(f)(ii) had an express carve-out in relation to fraud.[4001]

4594 Equally, it is unnecessary to consider the Viterra Parties' submission that Cargill ought not be able to rely upon clause 13.7(b) to deny the cause of action against Cargill based upon clause 13.4. The Viterra Parties submitted that the effect the court gave to clause 13.7(b) "in seeking to abrogate a statutory cause of action" should be determined consistently with similar issues that arose elsewhere. They submitted that if the court were to find against the Viterra Parties elsewhere, the principles underlying those findings should be applied consistently in relation to clause 13.7(b). It suffices to say that there was no apparent reason why such principles ought not equally be applicable to clause 13.7(b).[4002]

4595 On another matter, although Glencore was not a party to the Acquisition Agreement, if, as has been found, the making of the No Reliance Representations was misleading or deceptive, this circumstance may also have provided a basis for Glencore to make a claim for contravention of section 18 if that conduct also caused it loss.[4003] Naturally,

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3999 See fn 3978 above.

4000 *Rise Home Loans Pty Ltd v Dickinson (No 2)* [2010] VSC 29, [57] (Robson J), citing *Jennings v Zilahi-Kiss* (1972) 2 SASR 493, 510.4 (Bray CJ). See also fn 3642 above.

4001 See par 1029 above.

4002 See issue 144 below.

4003 *Australian Competition and Consumer Commission v Valve Corp (No 3)* (2016) 337 ALR 647, 691-692 [222] (Edelman J), citing *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR

issues of causation as they related to Glencore would need to be considered afresh given the lack of privity of contract. However, as the issue did not arise because of the way in which compensation was claimed, it will not be considered further.

4596 Finally, it is worthwhile to comment on the findings above in relation to the making of the No Reliance Representations. Although clearly relevant, the fact that the No Reliance Representations were made was not determinative of questions relating to whether the Viterra Parties engaged in misleading or deceptive conduct in trade or commerce that caused Cargill Australia to suffer loss. As explained elsewhere,[4004] whether section 18 of the Australian Consumer Law had been contravened was a question of fact to be considered in light of all the relevant circumstances, including the terms of any contract entered into.

X.100 Is the Confidentiality Deed enforceable by Glencore and/or Viterra against Cargill, Inc?

X.100.1 Introduction

4597 On the pleadings, this issue arose in the context of the operation and enforceability of clauses 3.3, 10.2 and 10.3 of the Confidentiality Deed. The Viterra Parties alleged in the Third Party Claim that, by causing or permitting Cargill Australia to institute this proceeding against Glencore and Viterra in respect of Confidential Information and the alleged non-disclosure of Information,[4005] Cargill, Inc breached each of these clauses.[4006] In addition to denying this allegation generally and raising a construction issue in relation to clause 3.3, Cargill, Inc pleaded that by operation of the Deed of

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470, 506.7 (Lockhart and Gummow JJ). See *RCR Energy Pty Ltd v WTE Co-Generation Pty Ltd* [2017] VSCA 50, [62]-[63] (Weinberg, Whelan and Santamaria JJA).

4004 See issue 15 above.

4005 In the context of the Confidentiality Deed, the meanings of "Confidential Information" and "Information" are set out at par 586 above.

4006 In addition, in their defence to the Third Party Claim, Cargill, Inc alleged Glencore and Viterra were estopped from maintaining a claim under clauses 8.3(a) and 8.3(c) of the Confidentiality Deed. In the Viterra Parties' reply to Cargill, Inc's third party defence, they denied any estoppel arose and also relied, amongst other things, on the release in cl 10.3 of the Confidentiality Deed. As the Cargill Parties made no submissions with respect to this issue based on this allegation of estoppel it will not be considered here; but see issue 107 below.

Release any claims based on clauses 3.3, 10.2 and 10.3 had been released.

4598 The clauses are set out in full above.[4007] To reiterate briefly, by clause 3.3 Cargill, Inc undertook to procure that its Representatives would not do anything that, if done by Cargill, Inc, would be a breach of the Confidentiality Deed. Clause 10.2 stipulated that, absent Glencore's fraudulent or wilful misconduct, Cargill, Inc would not bring proceedings against Glencore (or its Representatives) and agreed to procure that its Representatives would not do so. Clause 10.3 provided that Cargill, Inc[4008] unconditionally and irrevocably released Glencore (and its Representatives) from any liability, including liability resulting from Glencore's negligence, default or lack of care or from any misrepresentation or any other cause. Both clauses were expressly subject to clause 10.4.

4599 The first issue to be addressed is whether the Confidentiality Deed, at a broader level, was enforceable by Glencore *and* Viterra as against Cargill, Inc. This has already been touched upon in issue 85 above. For similar reasons to those discussed there, generally speaking, each of Glencore (as a named party) and Viterra (each of the 3 as a Representative of Glencore) was entitled to enforce the Confidentiality Deed.[4009]

4600 Thus what remains to be addressed are the alleged breaches and the enforceability of clauses 3.3, 10.2 and 10.3 (noting that the effect of the Deed of Release on these clauses has already been considered).[4010]

X.100.2 The Viterra Parties' submissions

4601 The Viterra Parties repeated their submission that the Deed of Release did not apply to Glencore's and Viterra's rights under clauses 3.3, 10.2 and 10.3 of the Confidentiality Deed.

4602 Further, the Viterra Parties submitted neither clause 10.2 nor 10.3 made a "direct attempt" to exclude or modify section 18 of the Australian Consumer Law. In relation

4007 See par 590 above.
4008 This undertaking was also given on behalf of Cargill Australia: see par 4351 above.
4009 See also clause 11: see par 590 above.
4010 See issue 84 above.

to clauses 3.3 and 10.2(b), the Viterra Parties submitted that issues of public policy did not arise because the making of a promise that someone else would not sue in relation to particular causes of action was not a promise that had to be made and it did not stop that other person from commencing a proceeding to pursue those causes of action. In relation to clause 10.3, it was submitted that the unconditional and irrevocable release of Glencore and its Representatives from any liability did not expressly seek to exclude or modify section 18.[4011]

X.100.3 The Cargill Parties' submissions

4603 In addition to submitting there had been no breach of clause 10.2 or 10.3 (and therefore no breach of clause 3.3),[4012] or if there had been a breach the Viterra Parties suffered no loss,[4013] the Cargill Parties made 2 overarching submissions.

4604 *First*, noting the exception for fraud or wilful misconduct in clause 10.2, the Cargill Parties submitted that to the extent it might still be said that clause 10.2 or 10.3 of the Confidentiality Deed purported to prevent Cargill from pursuing a claim for fraud, deceit or for contravention of section 18 of the Australian Consumer Law, these were unenforceable by virtue of being contrary to public policy.

4605 *Secondly*, it was submitted that if, contrary to the first submission, clause 10.2 or 10.3 were found to be enforceable, all obligations under these clauses were released by the Deed of Release.[4014]

X.100.4 Analysis

X.100.4.1 Has there been a breach of the Confidentiality Deed?

4606 For the reasons explained in issue 76 above, there was no breach of clause 10.2 of the Confidentiality Deed because of the fact that Cargill Australia commenced this proceeding. Not only were some of Cargill Australia's claims within clause 10.4, but there was no absence of fraud or wilful misconduct. Thus, clause 10.2 was not

4011 See further par 5274 below.
4012 See issues 76, 84 above and issue 102 below.
4013 See issues 103, 106 below.
4014 See issue 84 above.

enlivened and accordingly no real issue arose with respect to the effect of the Deed of Release on this clause.

4607 In relation to clause 10.3, as discussed in issues 76 and 86 above, the giving of a release by Cargill, Inc (and its Representatives) did not create any bar to Cargill Australia commencing this proceeding. Accordingly, doing so was not in breach of clause 10.3.

4608 It follows from the absence of any breach of clause 10.2 or 10.3 that Cargill, Inc was not in breach of clause 3.3 as it had not failed to procure that Cargill Australia did not do or omit to do anything which if done by Cargill, Inc would have been a breach of its obligations. In short, neither clause 10.2 nor 10.3 would have been breached if Cargill, Inc itself had commenced a proceeding which alleged fraud or wilful misconduct by the Viterra Parties or sought to hold them responsible for representations or obligations set forth in the Acquisition Agreement (assuming it had any proper basis to do so).

4609 Accordingly, based on these findings, it is unnecessary to consider the broader issues raised. However, it is appropriate that they are addressed in case I am incorrect with respect to the findings in relation to any of clauses 3.3, 10.2 and 10.3.

X.100.4.2 Unenforceable as a matter of public policy

4610 Generally speaking, as a matter of public policy, liability for fraud, deceit or contravention of section 18 of the Australian Consumer Law cannot be excluded by a provision of a contract.[4015] Naturally, it is a question of fact as to whether a person has engaged in misleading or deceptive conduct or in deceit and the existence of a release may be directly relevant to this ultimate factual question. However, requiring a counterparty to enter into a release at the commencement of commercial dealings

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4015 In relation to liability for an action under the Australian Consumer Law, see, for example, *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd* (2018) 56 VR 557, 598-600 [113]-[116], 600-601 [118]-[120] (Riordan J); *Secure Parking Pty Ltd v Woollahra Municipal Council* [2016] NSWCA 154, [112] (Meagher JA, with whom Beazley P and Ward JA agreed); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 561.1 (Lockhart J, with whom Burchett J agreed and Foster J relevantly agreed), in relation to s 52 of the *Trade Practices Act*, the predecessor of s 18 of the Australian Consumer Law. In relation to liability for an action in deceit, see, for example, *Commercial Banking Co of Sydney Ltd v R H Brown & Co* (1972) 126 CLR 337, 344.7 (Menzies J, with whom Barwick CJ, McTiernan and Gibbs JJ agreed).

cannot provide a mechanism for the released party to then be absolved absolutely from subsequently engaging in misleading or deceptive conduct in trade or commerce contrary to the Australian Consumer Law. This is discussed in issue 144 below, and will not be considered further here. Leaving aside the causes of action not based on these grounds, as it has been found as a matter of fact that the Viterra Parties did engage in misleading or deceptive conduct and Viterra did act in deceit of Cargill Australia, neither clause 10.2 or 10.3 of the Confidentiality Deed was enforceable against Cargill, Inc (or Cargill Australia) in relation to such matters. The necessary consequence of this is that if any clause was breached as alleged, that was no bar to Cargill Australia instituting this proceeding.

4611 Further, leaving aside the fact that the Viterra Parties contended that Cargill Australia itself was bound by the terms of the Confidentiality Deed, there were still a number of problems with the Viterra Parties' submission concerning clauses 3.3 and 10.2(b) not being contrary to public policy.

4612 *First*, clause 10.2 was not confined to Cargill, Inc procuring that its Representatives not bring or institute any proceedings. It also purported to prevent Cargill, Inc itself from doing so.[4016]

4613 *Secondly,* the Viterra Parties' submission was made on the basis of someone making a promise to "stop the man next door" from suing. That position is not analogous to the relationship between a holding company and its subsidiary.

4614 *Thirdly,* and in any event, the consequence of permitting such a clause to be enforceable in the circumstances of this case would be that Glencore and Viterra would be able to seek damages for breach which, they contended, would equate to any amounts recoverable by Cargill Australia against them or any of them. The Viterra Parties claimed that damages arising from their liability with respect to Cargill Australia's claims should be "off-set by the liability of Cargill, Inc arising from breach of the clauses of the Confidentiality Deed". In short, if clauses 3.3 and 10.2(b) were

4016 There was nothing in the Confidentiality Deed to suggest Cargill, Inc's obligations in cl 10.2 were severable.

enforceable in this regard, the Viterra Parties (although still having some exposure by reason of the requirement to recover from Cargill, Inc) effectively would be enabled to thwart the public policy that underlies section 18 of the Australian Consumer Law by obtaining damages and thereby effectively being fully indemnified for their loss arising out of having to pay damages to Cargill Australia as a consequence of engaging in the contravening conduct. It might be envisaged that in some cases a contractual provision of this nature may not be in breach of or offend public policy. However, when such a clause was sought to be imposed in relation to the very transaction that was the subject of the claims for misleading or deceptive conduct and by the subsidiary utilised to effect the transaction, allowing clauses 3.3 and 10.2(b) to operate according to their terms would effectively allow the Viterra Parties to circumvent the consequences of contravening section 18. Such a result would undermine the public policy of prohibiting persons from engaging in misleading or deceptive conduct in trade or commerce.

X.100.4.3 Whether clauses unenforceable because of the Deed of Release

4615 It has been found that from Completion, clause 2 of the Deed of Release operated to release Cargill, Inc and Cargill Australia from all obligations under clause 10.2 of the Confidentiality Deed. However, it has also been determined that the Deed of Release did not affect the release given pursuant to clause 10.3 of the Confidentiality Deed.[4017] (This finding concerning clause 10.3 does not affect the conclusion that clause 10.3 was unenforceable as a matter of public policy to the extent it operated contrary to the Australian Consumer Law.)

4616 As the Viterra Parties correctly submitted, the release given pursuant to this clause had an operative effect as soon as the Confidentiality Deed was entered into. Similar to the submission made with respect to clause 10.2, the Viterra Parties observed that if a proceeding had been commenced before Completion, the release contained in clause 10.3 could have been pleaded as a bar to the claim.

4617 The Cargill Parties relied upon the broad definition of "Claims", and the fact that all

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4017 In relation to both of these matters, see issue 84 above.

Claims and obligations were released, subject to clause 3. It was submitted that the claims now made by Glencore and Viterra were not preserved by clause 3(b) because those claims had not, and could not have, accrued before Completion because no breach had occurred up to this time. It was further submitted that any cause of action in relation to any breach of clause 10.2 or 10.3 only accrued when Cargill, Inc or its Representative filed the writ to institute this proceeding.

4618 The difficulty with the Cargill Parties' submission was that it focused upon the timing of when a cause of action might accrue, rather than addressing whether or not Glencore and Viterra had an accrued right before Completion. Upon the execution of the Confidentiality Deed, Glencore accrued an unconditional and irrevocable right of release which remained extant from that time on. In my view, there was nothing in the language of the Deed of Release, which was concerned with releasing Cargill, Inc from *any further liability* under the Confidentiality Deed,[4018] which indicated that it was intended to undo what had been done by way of granting a release in favour of Glencore and its Representatives. In short, and in contrast to the position under clause 10.2, a pre-existing release in favour of Glencore did not amount to an ongoing Claim against, or obligation upon, Cargill, Inc.

4619 Even if this construction was incorrect, the Cargill Parties' submission was no answer to the accrued rights that must have arisen before Completion under clause 10.3. Part of Cargill Australia's case was that it suffered loss because it entered into the Acquisition Agreement. Further, any claims based on breach of contract accrued at the time of the breach, which Cargill Australia alleged included breaches on 4 August 2013. Therefore, even if the Cargill Parties' submission had some force, the causes of action as pleaded irrefutably accrued before Completion and were affected by the terms of the Confidentiality Deed then on foot.[4019]

X.100.5 Conclusion

4620 In summary, no breach of the Confidentiality Deed has been established. That

4018 See fn 3900 above.
4019 See par 4520 above.

conclusion addresses the issue as pleaded. In any event, neither clause 10.2 nor clause 10.3 was enforceable against Cargill, Inc as a matter of public policy insofar as they would operate to prevent Cargill Australia bringing claims for fraud, deceit or for contravention of section 18 of the Australian Consumer Law. (For completeness, in relation to other causes of action of Cargill Australia,[4020] neither Glencore nor Viterra has any right to enforce clause 10.2(b) of the Confidentiality Deed by reason of the release given under clause 2 of the Deed of Release. However, with respect to those other causes of action, the release given by Cargill, Inc pursuant to clause 10.3 of the Confidentiality Deed enures and its operation was not affected by the Deed of Release.)

X.101 Did Cargill, Inc cause or permit Cargill Australia to institute this proceeding in respect of Confidential Information and the alleged non-disclosure of Information?

X.101.1 Submissions

4621 There was a paucity of evidence on this issue and the submissions were very brief. No witness gave any evidence directed to the issue of how Cargill Australia decided to commence this proceeding. In this context, the Cargill Parties' submissions were confined to the simple point that Cargill, Inc and Cargill Australia were separate legal entities.[4021]

4622 The issue of whether Cargill, Inc was involved in the decision to commence this proceeding arose from an allegation in the Third Party Claim against Cargill, Inc, in which it was pleaded that the alleged conduct of Cargill, Inc was in breach of clauses 3.3, 10.2(b) and 10.3 of the Confidentiality Deed. In its defence to this claim, Cargill, Inc pleaded that Cargill Australia instituted the proceeding and otherwise denied the allegation. As a result of the matters pleaded, the onus was squarely upon the Viterra Parties to establish the conduct alleged was in breach of contract.

4020 That is, other than fraud, deceit or for contravention of section 18 of the Australian Consumer Law.

4021 *Lee v Lee's Air Farming Ltd* [1961] AC 12, 27.1 (Lord Morris, on behalf of the Privy Council); *Salomon v Salomon* [1897] AC 22, 30.8-31.3 (Lord Halsbury LC).

4623 The Viterra Parties submitted that the evidence supported the overwhelming inference that Cargill, Inc caused or permitted its indirect subsidiary, Cargill Australia, to institute this proceeding. The evidence relied upon was not directed to events concerning the decision-making processes leading to the commencement of this proceeding, but rather to those leading up to the Acquisition. In so doing, the Viterra Parties focused on the uncontroversial fact that it was Cargill, Inc that drove that transaction,[4022] and was involved in the key decisions made in late October 2013.[4023] Reference was also made to certain allegations in the Statement of Claim to demonstrate the role Cargill, Inc played.

4624 It was then submitted that there was nothing to indicate that, having driven the transaction resulting in the Acquisition, Cargill, Inc was not involved in the decision to initiate this proceeding. In seeking to have the court draw the suggested inference, reliance was also placed upon the fact that Cargill, Inc and Cargill Australia had the same legal representation and that a large number of current and former Cargill, Inc employees were called as witnesses in support of Cargill Australia's claim.[4024]

4625 In addition, the Viterra Parties referred to Purser. They submitted she was 1 of the few Cargill Australia witnesses to give evidence and that she gave evidence that she was not a decision-maker within the Project Hawk team. They also referred to her dual role, which included being Cargill, Inc's country representative for Australia. However, there was no suggestion that she, or anyone else, gave any evidence which shed any light on who actually made the decision to sue the Viterra Parties or how that decision came about.

X.101.2 Analysis

4626 Remarkable as it may seem in a case of this size and with the resources at hand, there was simply no documentation or any other evidence that actually showed how it was

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4022 See, for example, pars 622, 705, 843-854, 976 above.

4023 See, for example, pars 1204-1206, 1409-1415, 1422, 1424 above.

4024 For completeness, reference was also made to the fact that Savona, being in-house counsel for Cargill Australia, was not called to give evidence. Her absence from the trial has been addressed: see pars 2101-2108 above.

decided that Cargill Australia instituted this proceeding. Hence, the Viterra Parties' invitation to the court to draw an inference.

4627 In my view, there was no proper basis for the inference the Viterra Parties submitted the court ought to draw. The circumstances leading up to the Acquisition (which was funded by, and could only be approved by the board of, Cargill, Inc) were fundamentally different to any decision made with respect to the commencement of this proceeding. There was simply nothing to indicate that, before or as part of the decision made by Cargill Australia to commence this proceeding, Cargill, Inc somehow caused or permitted its indirect subsidiary to act as it did. Further, there was no evidence to suggest that Cargill Australia, as a separate legal entity, was anything other than capable of making the decision itself. Although no finding is made that that was what occurred, there was no basis to find that that was not the position and accordingly the Viterra Parties' allegation was not made out.

X.102 Did that constitute a breach of clauses 3.3, 10.2(b) and/or 10.3 of the Confidentiality Deed?

4628 In light of the previous answer, this question does not arise.[4025] If it had arisen and a breach had been established, similar issues concerning enforceability would have also arisen (as discussed in issue 100 above). Equally, it does not arise to the extent that it has been found that clauses 10.2(b) and 10.3 are unenforceable.[4026]

4629 Furthermore, for completeness, even if clause 10.3 was not unenforceable for the reasons stated, it did not follow that, by reason that Cargill Australia commenced a proceeding, there had been a *breach* of clause 10.3 of the Confidentiality Deed. Speaking generally, in response to a proceeding against it, a defendant with the benefit of a release may or may not choose to rely upon that release as a defence to the claim. If the release were a complete answer to the claim made and the release is pleaded as

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4025 In relation to the construction and operation of cll 10.2 and 10.3, see issue 86 above. In their submissions on this issue, the Cargill Parties made no submission on the proper construction of cl 3.3, and simply submitted that because there were no breaches of cl 10.2 or cl 10.3, there was thus no breach of cl 3.3.

4026 Also see issue 100 above and issue 144 below.

a defence, then the claim will fail and judgment would be entered for the defendant (either summarily or after a trial depending on the approach taken and the level of complexity of the issues involved).[4027] However, it does not follow from the mere existence of a release without more (such as an undertaking not to sue, either express or implied)[4028] that a person will be in breach of agreement by suing on a claim that is the subject of a release. The release remains unaffected by the mere fact that a proceeding has been commenced.

X.103 What, if any, damages or other relief is Glencore and/or Viterra entitled to as a consequence?

4630 In relation to the Viterra Parties' allegations concerning breaches of clauses 10.2 and 10.3, a permanent injunction was sought requiring Cargill, Inc to procure that Cargill Australia not continue this proceeding. Further or alternatively, if the Viterra Parties were liable to pay damages and costs to Cargill Australia, any amounts payable by reason of those liabilities were claimed as losses suffered by the Viterra Parties on the basis that they were caused by either Cargill Australia's breach, or alternatively Cargill, Inc's breach of any or all of clauses 8.3(a), 8.3(c), 10.2 and 10.3.

4631 However, as a result of the answers given above, the questions raised by this issue do not arise.

X.104 Did Cargill, Inc cause or permit Cargill Australia to rely on any of the Financial and Operational Performance Representations, the Warranty Representations, the Pre-Completion Representations, the Other Bidders Representations or the Co-Operative Bulk Representations?[4029]

4632 It has been found that the Financial and Operational Performance Representations,[4030] the Warranty Representations,[4031] the Pre-Completion Representations,[4032] and the

4027 See issue 84 above.
4028 See pars 4493, 4535 above.
4029 The Co-Operative Bulk Representations were not pressed: see issues 61-64 above.
4030 See issue 15 above.
4031 See issue 48 above.
4032 See issue 25 above.

Other Bidders Representations[4033] were made.

X.104.1 Submissions

4633 The Viterra Parties alleged that, contrary to the Viterra Parties' primary case, if these representations were made and Cargill Australia relied on them, then this was because Cargill, Inc caused or permitted such reliance. In response, the Cargill Parties denied this allegation. The Cargill Parties confined their submissions very simply to the doctrine of separate legal entities;[4034] and the Viterra Parties relied on their submissions made for issue 101 above, which in essence relied upon the evidence of Cargill, Inc's substantial involvement in driving the Acquisition.

X.104.2 Analysis

4634 For the reasons that follow, Cargill, Inc did cause or permit Cargill Australia to rely on each of the representations that Cargill Australia relied upon.

4635 *First*, the Cargill Parties, by way of an explanation of their general approach in their closing submissions, stated that "[t]here is no meaningful difference between [Cargill, Inc and Cargill Australia] for the purposes of engagement with the facts in 2013". They explained that "Cargill, [Inc] … conducted the [D]ue [D]iligence and made the offers to purchase the [Joe White Business]. Cargill Australia … bought the [Joe White Business]". This position was consistent with the case pleaded by Cargill Australia.[4035] No doubt, this position was adopted because in 2013, when the events leading to the Acquisition took place, employees of Cargill, Inc took on the role of performing the enquiries, assessments, the Due Diligence and negotiations and all other substantive steps in the presale process for and on behalf of both Cargill, Inc and Cargill

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4033 See issue 54 above.

4034 See issue 101 above, in relation to whether Cargill, Inc caused or permitted Cargill Australia to commence this proceeding.

4035 The Statement of Claim contained an allegation that from early 2013 Cargill, Inc participated in the sale process on its own behalf and on behalf of Cargill Australia. It was also alleged by Cargill Australia that Cargill, Inc made the Cargill Indicative Bid and the First Final Bid, and used the information provided by the Viterra Parties, on behalf of Cargill Australia.

Australia.[4036]

4636 *Secondly,* and as an extension of the first point, there was simply no evidence that any of the key decisions involved in the Acquisition were made by Cargill Australia employees.[4037] In fact, it was uncontroverted that Cargill, Inc drove, funded and approved the transaction.[4038] The only Cargill Australia employee called to give evidence was Purser,[4039] who gave evidence that she was not a decision-maker for the purposes of the Acquisition. The inference that Cargill, Inc caused or permitted Cargill Australia to rely on the representations necessarily followed from the fact that those with the knowledge of the representations were the key decision-makers and all employees of Cargill, Inc.

4637 *Thirdly*, in their submissions for issues 20, 23, 30, 36, 38, 49 and 58, which were framed in respect of Cargill Australia, the Cargill Parties did not draw any real distinction between Cargill, Inc and Cargill Australia as separate legal entities. Rather, the submissions were put by using the unifying term "Cargill", thereby identifying the 2 entities for the issues related to reliance without distinguishing between them.

4638 *Fourthly,* in issue 60 above, the Cargill Parties made the submission that "[i]t can further be inferred that Glencore made the [Other Bidders Representations] with the intent that Cargill should rely on them to raise its bid by [$15 million] and that Cargill Australia should rely on them by entering into the Acquisition Agreement". This submission reflected the reality that it was Cargill, Inc and its employees that were conducting the sale process for Cargill Australia. It also ran counter to the proposition that Cargill, Inc did not cause or permit Cargill Australia to rely on the representations.

4639 To elaborate on this last point, the acknowledgement that Cargill Australia entered

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4036 This can be distinguished from issue 101 above, on the basis that the particular conduct referred to in that issue was the commencement of this proceeding, which occurred in late 2014 and well after Completion. Further, as noted above, the circumstances leading up to the Acquisition were wholly different and separate to any decision made to commence this proceeding.

4037 See, for example, pars 1204-1206, 1409-1415, 1424 above.

4038 See, for example, pars 622, 705, 843-854, 976 above.

4039 Who also had a role as country representative in Australia for Cargill, Inc.

into the Acquisition Agreement on the basis of the Other Bidders Representations (which were made to, and only considered by, Cargill, Inc employees in a 2 hour period on 2 August 2013), demonstrated that the impugned conduct was engaged in with Cargill, Inc, who then caused or permitted Cargill Australia to rely on the relevant conduct. This admission in the context of issue 60 above could not simply be side-stepped when dealing with another related issue.

4640 Similarly, shortly before the Acquisition when the Pre-Completion Representations had been made, a number of Cargill, Inc employees had the ability to decide that the transaction should not proceed.[4040] However, each of them permitted the steps to be taken so that Completion could occur. Leaving aside any formal decision-making process of Cargill Australia itself (about which there was no evidence), the only means by which Cargill Australia could have relied on the representations in entering into the Acquisition Agreement and completing the Acquisition, was to act upon the decisions that had been made by Cargill, Inc employees, including the decision to proceed with the Acquisition.

4641 Thus, Cargill, Inc caused or permitted Cargill Australia to rely on the representations in the manner that Cargill Australia did.

X.105 Did that constitute a breach by Cargill, Inc of clauses 3.3 and/or 8.3(a) and/or (c) of the Confidentiality Deed?

4642 The Viterra Parties alleged that by causing or permitting Cargill Australia to rely on the various representations pleaded in the Statement of Claim,[4041] Cargill, Inc breached any or all of clauses 3.3, 8.3(a) and 8.3(c) of the Confidentiality Deed.

4643 The Confidentiality Deed clauses are set out in detail above.[4042] Although the relevant clauses must be construed as part of the Confidentiality Deed as a whole, for convenience the relevant clauses are reproduced here:

4040 See par 3394 above.
4041 See, relevantly, par 4632 above.
4042 See par 590 above.

3.3 [Cargill, Inc]'s responsibility for Representatives' conduct

[Cargill, Inc] must procure that its Representatives do not do or omit to do anything which if done or omitted to be done by [Cargill, Inc], would be a breach of [Cargill, Inc]'s obligations under this deed or an obligation of confidence owed to [Glencore] or any of its Representatives.

…

8.3 [Cargill, Inc] to make its own assessment

[Cargill, Inc] agrees and acknowledges that:

(a) it must make its own assessment of all Confidential Information and satisfy itself as to the accuracy, content, legality and completeness of the information;

…

(c) it will rely solely on its own investigations and analysis in evaluating the Transaction.

X.105.1 The Viterra Parties' submissions

4644 The Viterra Parties relied on their submissions regarding issue 87 above, by which they submitted that, to the extent Cargill Australia was found to have relied upon the Financial and Operational Performance Representations, the Warranty Representations, the Pre-Completion Representations and the Other Bidders Representations, Cargill Australia had failed to adequately make its own assessment of the Confidential Information, or failed to rely solely on its own investigations and analysis in evaluating the Transaction, in breach of clauses 8.3(a) and 8.3(c) respectively. The Viterra Parties submitted that, if Cargill Australia so relied, by causing or permitting Cargill Australia to do so, Cargill, Inc was also in breach of clause 3.3, in addition to clauses 8.3(a) or 8.3(c), or both. The Viterra Parties also referred to their submissions concerning issues 101 and 104 above.

4645 Further, they contended that the Approved Purpose (as defined in the Confidentiality Deed)[4043] had not been completed by entry into the Acquisition Agreement, but continued to Completion. Therefore, it was submitted that the terms of the Confidentiality Deed operated in relation to any representations alleged to have been

[4043] See par 586 above.

made up until Completion.

4646 Furthermore, it was submitted that the Deed of Release had no effect on the obligations pleaded by the Viterra Parties as applying to Cargill, Inc under clauses 8.3(a) and 8.3(c). The Viterra Parties repeated their submissions to the effect that, because this proceeding concerned facts which occurred before Completion, the Deed of Release had no effect upon the Viterra Parties' rights to rely upon clauses 3.3 and 8.3 of the Confidentiality Deed. This was put on the basis that the release the subject of the Deed of Release did not affect accrued rights, obligations, Claims or liabilities in connection with the Confidentiality Deed.[4044]

X.105.2 The Cargill Parties' submissions

4647 *First,* it was submitted Cargill, Inc did not breach clause 8.3(a) or 8.3(c) for the following reasons:

(1) The clauses were not promissory, but were "representations as to future intention". The Cargill Parties referred to case law to the effect that whether a statement is promissory is to be determined by reference to the whole of the relevant circumstances,[4045] and by answering the question of what a reasonable person in the position of the parties would necessarily have understood to have been intended.[4046]

(2) Clause 8.3 did not cover Confidential Information that Glencore and Viterra knew, or ought to have known, was inaccurate or incomplete because that would defeat the purpose of the Confidentiality Deed.[4047]

(3) In any event, Cargill Australia did make its own assessment of the Confidential Information; it undertook its own investigations by

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4044 See issue 84 above.

4045 *Emu Brewery Mezzanine Ltd (in liq) v ASIC* (2006) 32 WAR 204, 211 [20] (McLure JA).

4046 The Cargill Parties relied on *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1, 12 [22] (French CJ, Kiefel and Bell JJ), in which the High Court considered whether a representation made in the course of negotiations amounted to a collateral agreement or gave rise to an estoppel.

4047 The submission made no reference to fraud and appeared to make this contention purely as a matter of the proper construction of the Confidentiality Deed.

requesting further information and sought to satisfy itself that the information was accurate. The Cargill Parties submitted that the evidence demonstrated that Cargill Australia entered into the Acquisition Agreement off the back of its own investigations and analysis of the material supplied to it by Glencore and Viterra. It was submitted that it did not follow from the fact that the material that was disclosed by Glencore and Viterra was misleading or deceptive, Cargill Australia did not make its own assessment of that material and its accuracy and did not rely upon its own analysis of the material.

4648 *Secondly,* it was submitted the Confidentiality Deed did not apply to the Pre-Completion Representations and the Other Bidders Representations on the premise that they did not fall within the scope of the Confidentiality Deed. This was put in relation to the Pre-Completion Representations because they post-dated the Acquisition Agreement. Further, it was submitted that the Other Bidders Representations were not provided under or pursuant to the Confidentiality Deed as that information was not disclosed to Cargill, Inc for the purposes of Cargill, Inc's evaluation, as Cargill had already submitted its final bid and completed its evaluation. The Cargill Parties contended the defined terms "Confidential Information", "Transaction" and "Approved Purpose" as used in clause 8.3 of the Confidentiality Deed, meant that clause 8.3 did not include information that was not provided for, or in connection with, Cargill, Inc's evaluation of whether to acquire Joe White.

4649 *Thirdly,* it was submitted Cargill was released from the obligations under clauses 8.3(a) and 8.3(c) of the Confidentiality Deed by the Deed of Release for the same reasons it was released from the obligations in clauses 10.1 and 10.2.[4048] Whilst the Deed of Release preserved accrued rights, obligations, Claims or liabilities arising under the Confidentiality Deed,[4049] they submitted the Viterra Parties' claims under clauses 3.3, 8.3(a) and 8.3(c) of the Confidentiality Deed had not accrued prior to Completion.

4048 See issue 84 above.

4049 See the Deed of Release, cl 3(b), which is set out at par 1553 above.

X.105.3 Analysis

X.105.3.1 Contractual construction and operation of the Confidentiality Deed

4650 The principles relevant to the interpretation of a commercial contract are set out above.[4050]

4651 In issue 104 above, it was determined that Cargill, Inc caused or permitted Cargill Australia to rely on the relevant representations. It must follow that clause 3.3 of the Confidentiality Deed would have been breached if Cargill Australia's reliance on the representations amounted to a breach of clause 8.3(a) or 8.3(c). Thus, it was the operation of these 2 clauses that was critical.

4652 Dealing with the Cargill Parties' general submissions in paragraph 4647(1) and 4647(2) above, the submission that the sub-clauses in question were not promissory was not on point. The cases relied upon were concerned with whether statements made were a mere representation or an opinion in relation to a future matter, or whether they were promissory such that they could be characterised as contractual. Obviously, the "undertakings"[4051] in clauses 8.3(a) and 8.3(c) were contractual and binding.

4653 Further, on its face, each subclause was a promise; the Recipient "agrees … that it must make its own assessment" and "agrees … that it will rely solely on its own investigations". Thus, Cargill, Inc agreed to undertake, or not undertake, specific acts in a legally binding deed, the purpose of which was for the Recipient of the Confidential Information immediately to take on certain obligations. Furthermore, the same wording was used in a primary obligation in the Confidentiality Deed, clause 9.1, in which Cargill, Inc "agree[d] not to disclose" the Confidential Information; which was plainly an ongoing obligation that arose immediately upon the Confidentiality Deed becoming operative. There were no additional words or other factors to indicate that clause 8.3(a) or 8.3(c) was distinct, or contrary to the position under clause 9, did not impose an obligation on Cargill, Inc. The objective intention

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4050 See pars 4549-4550 above.

4051 See Confidentiality Deed, cll 2.1, 11: par 590 above.

of the parties was plain. The undertakings in clauses 8.3(a) and 8.3(c) were immediate in operation[4052] and promissory in nature.[4053]

4654 In relation to the Cargill Parties' submission that clause 8.3 did not cover Confidential Information that Glencore and Viterra knew, *or ought to have known*, was inaccurate or incomplete, leaving aside the question of fraud, this must also be rejected. As a matter of construction clause 8.3 operated to protect Glencore from potential liability as a consequence of Cargill, Inc relying on Confidential Information that might have been inaccurate or might have formed the basis of some representation by, or warranty of, Glencore. Again subject to the question of fraud, to accept this submission of the Cargill Parties would be to ignore the express language of clauses 8.1, 8.2 and 8.3(a).[4054]

4655 Turning from these more general submissions, in order to determine if Cargill Australia's reliance on the representations amounted to a breach of clause 8.3(a) or 8.3(c), it was necessary to consider what representations were captured by the operation of the Confidentiality Deed. This required a determination of whether each representation alleged was included within the meaning of Confidential Information in clause 8.3(a) and whether the representations were part of Cargill Australia's evaluation of the Transaction for the purposes of clause 8.3(c).

4656 The definitions of Confidential Information and Approved Purpose are set out above.[4055] To paraphrase, Confidential Information was all Information[4056] made available by Glencore or its Representative for or in connection with the Approved Purpose and all Information created by Cargill, Inc in the course of carrying out the Approved Purpose. Approved Purpose was defined as Cargill, Inc's evaluation of whether to acquire Joe White.

4052 The existence of the terms of the Confidentiality Deed itself were confidential: cl 3.1(b), see par 590 above.

4053 See *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1, 12 [22] (French CJ, Kiefel and Bell JJ).

4054 See par 590 above.

4055 See par 586 above.

4056 The definition of Information included all information, regardless of its form, relating to the Approved Purpose: see par 586 above.

4657 Thus, the Financial and Operational Performance Representations having been made before, and alleged to have been relied upon in deciding to enter into, the Acquisition Agreement necessarily came within the definition of Confidential Information. Equally, the Warranty Representations were of the same character, being made and relied upon respectively upon entry into the Acquisition Agreement.[4057] As for the Other Bidders Representations, they also were Confidential Information. That was because, in determining whether to increase its bid, Cargill was required to re-evaluate if it was willing to acquire Joe White at the significantly higher price of $420 million. As part of the decision to proceed on this basis, a number of Cargill executives considered whether to acquire Joe White at the higher price[4058] and a revised analysis of the valuation model was performed by Cargill.[4059] Notwithstanding Cargill had presumably believed it was likely it had completed its evaluation when the First Final Bid was submitted,[4060] when the Other Bidders Representations were made, they (along with the remaining contents of the Further Bid Calls) consisted of Information disclosed to Cargill for the purpose of Cargill further evaluating whether to acquire Joe White. So much was demonstrated by the fact that Cargill actually conducted a re-evaluation on a number of levels based on the further information provided.[4061]

4658 The Pre-Completion Representations, which involved representations made by the provision of the October 2013 Reponses,[4062] occurred after entry into the Acquisition Agreement. Thus, in order to determine whether or not the Pre-Completion Representations amounted to Confidential Information, it is necessary to determine the meaning of Approved Purpose.

4659 This question centred around the meaning of "acquire" and, in objectively viewing the terms of the Confidentiality Deed, determining when it would have been intended that a Recipient's evaluation of any acquisition would be complete. The question of

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4057 See issue 49 above, in which it has been found that the Warranty Representations were made at the time the Acquisition Agreement was entered into.

4058 See pars 3783-3799 above.

4059 See par 1010 above.

4060 But also see pars 950, 964 above.

4061 See par 1010 above.

4062 See issues 24, 25 above.

when a Recipient might have acquired Joe White would not necessarily be determined by when an agreement for sale might have been entered into. Naturally, any sale agreement might provide for immediate transfer of ownership, or alternatively for the transfer of ownership upon settlement of the agreement for sale after all necessary steps for the transfer had been taken (the latter objectively presumed to have been contemplated as more likely in the case of a sale for a going-concern business to a foreign Recipient). Leaving aside what actually occurred in this case (which was the latter), the simple point is that a Recipient would not acquire Joe White until it had taken ownership of the issued shares held by Viterra Malt in Joe White and any related assets utilised by Joe White.[4063]

4660 Turning to the facts, the Acquisition Agreement did not provide for the transfer of ownership until Completion.[4064] Cargill Australia had not acquired the Joe White Business at the time the Acquisition Agreement was entered into, but had only entered into an agreement to acquire Joe White. The Acquisition did not occur until 31 October 2013.

4661 The remaining question of the proper construction of Approved Purpose was whether, in May 2013, it would have been contemplated that if Cargill was the successful bidder and if it were to enter into an agreement to purchase with provision for a later settlement of the transfer of ownership, Cargill would have continued to evaluate whether or not to acquire the Joe White Business until the transfer of ownership.

4662 Viewed objectively and as a matter of commercial common sense, the question must be answered in the affirmative. This conclusion applied although it would have been understood that the position of Cargill after any purchase agreement had been entered into would have been fundamentally different to the position that preceded its execution. Obviously, the freedom of Cargill to be able to choose whether or not to acquire the Joe White Business would have been contemplated to have been materially

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4063 The precise means by which ownership might have been contemplated to have been taken need not be considered.

4064 See cl 2.1: par 1023 above.

fettered by the terms of any acquisition agreement being entered into, but objectively it must have been presumed that it would also have been contemplated that Cargill might have had legal rights available to it not to proceed with any acquisition in certain circumstances or to seek other remedies based on any further evaluation of the Joe White Business.

4663 Further, although subsequent facts are not relevant to this question of construction,[4065] it has already been noted that as a matter of fact Cargill did engage in an evaluation as to whether or not to proceed with the Acquisition upon learning of the matters disclosed on or about 15 October 2013 and as a result of the October 2013 Responses.[4066] The Cargill 22 and 29 October Letters raised queries directly relevant to Cargill's ability to evaluate the operations and value of the Joe White Business.[4067]

4664 Accordingly, as the Confidentiality Deed remained on foot until 31 October 2013 and the Approved Purpose of the Confidentiality Deed remained operative up until that time, the Pre-Completion Representations formed part of the Confidential Information and were governed by the Confidentiality Deed.

X.105.3.2 Alleged breaches

4665 Commencing with matters that were uncontroversial, the recitals to the Confidentiality Deed recorded that the Confidential Information was to be provided to Cargill, Inc so that Cargill, Inc could make an evaluation of whether to acquire the Joe White Business. Further, as previously noted, the Viterra Parties accepted that the Information Memorandum was a starting point, in that its contents could be relied upon for the purposes of an indicative offer.[4068] That is, it was accepted that there was nothing in the terms of the Confidentiality Deed which prevented Cargill, Inc from relying on the information contained in the Information Memorandum for the purposes of Phase 1 and that, if it did so, it would not be acting in breach.

4065 See, for example, *FAI Traders Insurance Company Ltd v Savoy Plaza Pty Ltd* [1993] 2 VR 343, 350.5 (Brooking J), 353.3 (Nathan J).

4066 See issue 31 above.

4067 Which was also reflected in Viers' attempt to carry out a further evaluation of what the repercussions were upon learning of the Operational Practices: see pars 1419-1421 above.

4068 See par 2926 above. For the avoidance of doubt, the concession was plainly correct. A contrary position would have been entirely inconsistent with the Phase 1 Process Letter.

Furthermore, Cargill, Inc made it clear in early June 2013 that it did carry out its own assessment based on a review of the information in the Information Memorandum in formulating and proffering the Cargill Indicative Bid as part of Phase 1. Moreover, in late July 2013 Cargill reported, as was the fact, that it had conducted its own due diligence, and that the Due Diligence included a review of the information in the Information Memorandum, the "management presentations", the site visits, the Data Room and the responses in the Q&A Process. Although far from determinative, it was noteworthy that there was no suggestion from the Viterra Parties in 2013 that, in Cargill doing so, any breach of the Confidentiality Deed had been committed.

4666 As to whether there was a breach of clause 8.3(a), any reliance on the relevant representations by Cargill Australia did not preclude or impair Cargill from undertaking its own assessment of the Confidential Information and satisfying itself as to its accuracy, content, legality and completeness. In other words, whether Cargill complied with clause 8.3(a) was a question of fact which was not necessarily determined in the negative simply because Cargill relied on the relevant representations.

4667 It was clear that Cargill, Inc, in its own right and also for and on behalf of Cargill Australia, undertook its own assessment of the Confidential Information in order to value Joe White for the purpose of evaluating whether to acquire Joe White. Further, Cargill did take steps to satisfy itself as to the accuracy, content, legality and completeness of the Confidential Information.[4069] For example, Cargill created the Cargill deal model (which contained both information from the Information Memorandum and some of Cargill's own assumptions and inputs),[4070] asked questions during the Management Presentation, attended during a number of site

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4069 As Engle explained under cross-examination in rejecting various propositions put to him, such a process did not involve verifying the truth of every piece of information that was provided, or having to prove all information was true. As a matter of fact, such an approach would not have been possible given that Cargill did not have access to much of the underlying information that would have been necessary to verify whether every piece of information was proven to be true: see also par 4446 above. (The fact that Engle did not read the exact wording of the Sale Process Disclaimers did not undermine the cogency of this evidence.)

4070 See, for example, pars 546, 556, 574-583, 688-695, 904-909, 1076 above.

visits, participated in the Operations, Commercial and Barley Inventory Calls, held numerous internal meetings to evaluate the relevant information, prepared assessments for the leadership team and the Cargill, Inc board, and requested further information via the Q&A Process;[4071] all of which demonstrated that Cargill made its own assessment.

4668 Further, both the contemporaneous documents and the evidence of the relevant witnesses called by Cargill demonstrated that Cargill did satisfy itself as to the accuracy, content, legality and completeness of the Confidential Information to such a level that Cargill was willing to rely upon much of the Confidential Information as part of conducting its own analysis.[4072] Therefore, the Viterra Parties have not established a breach of clause 8.3(a) of the Confidentiality Deed by reason of the fact that the relevant representations were relied upon.

4669 Turning to clause 8.3(c), Cargill was required to rely solely on its own investigations and analysis in evaluating the "Transaction". Transaction was defined as any transaction, acquisition or investment contemplated in connection with the Approved Purpose.[4073] Some observations need to be made in determining the proper construction of clause 8.3(c).

4670 *First*, there was nothing stated in the clause (or any other part of the Confidentiality Deed) that indicated that Cargill could not make use of the Confidential Information and rely on such use.[4074] On the contrary, it was implicit that Cargill would do so in making its own assessment in accordance with clause 8.3(a) and conducting its own investigations and analysis pursuant to clause 8.3(c). *Secondly*, nothing stated in clause 8.2 or 8.3 precluded Cargill, after properly making its own assessment, from treating

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4071 See pars 652-658, 702-703, 735-741, 743-750, 765, 838-854, 866-885, 910-914, 925-929 above.

4072 This statement is necessarily qualified as Cargill made assumptions of its own (such as provision for floods or drought in seeking to verify for itself the volatility of the price of barley: see par 947 above) which did not always align with information that was provided by the Viterra Parties.

4073 See par 588 above.

4074 In making this observation, clause 8.1(a) stated that most or all of the Confidential Information consisted of data prepared in the ordinary course of business and had not been prepared with the intention that Cargill, Inc should rely on it. Such a clause was entirely consistent with Cargill relying on the Confidential Information after making the acknowledgements in clause 8.2 and complying with its obligations in clause 8.3(a) and other terms of the Confidentiality Deed.

the Confidential Information as accurate or reliable. *Thirdly*, relying solely on Cargill's "own investigations and analysis" did not require Cargill to exclude the Confidential Information from consideration; quite the opposite. Given the strict confidentiality regime that Glencore had insisted upon, it was the Confidential Information that was largely to be the subject of the investigations and analysis that Cargill was required to undertake. *Fourthly*, the acknowledgement in clause 8.3(b) was limited to forecasts and estimates. *Fifthly*, the attempt by the Viterra Parties to have some form of clear demarcation concerning reliance between the process up to the Cargill Indicative Bid being submitted and the process thereafter found no support in the wording of clause 8.3. There was nothing in the language of the clause that suggested it was intended to permit use of the Confidential Information in Phase 1 as a starting point, but to treat such an approach as a breach of the Confidentiality Deed in Phase 2.[4075] Relevantly, the key difference between Phase 1 and Phase 2 was the amount of information Cargill could access, and the extent to which it could consequently investigate and analyse the relevant information. However, under both Phases 1 and 2 a key (if not the key) source of information upon which Cargill was to conduct its investigations and analysis was necessarily the Confidential Information. These matters were all relatively uncontroversial.

4671 That said, a real difficulty arose in construing clause 8.3(c) in seeking to determine what was objectively intended in relation to any reliance by Cargill on the investigations or analyses that formed part of the Confidential Information itself; that is, investigations or analyses performed for or on behalf of the Viterra Parties (including by their subsidiary, Joe White) which Glencore or Viterra (or both) chose to disclose to Cargill in the Information Memorandum or as part of the Due Diligence. On a literal reading of the clause, if Cargill relied on anything at all that arose out of the investigations or analyses of Glencore or its subsidiaries as recorded in the Information Memorandum or otherwise disclosed as part of the Confidential Information, then it would not be relying solely on its own investigations and analysis

4075 Consistent with this lack of distinction, the Phase 2 Process Letter made no such suggestion and simply reiterated the ongoing applicability of the Confidentiality Deed as previously conveyed in the Phase 1 Process Letter: see par 639 above.

and would be in breach of the clause.

4672 Consistent with the position adopted by the Viterra Parties, on this basis it would follow that, to the extent that the Confidential Information consisted of investigations or analyses of others (for example, the normalised financial results contained in the Information Memorandum),[4076] then reliance on such matters (rather than, or even in conjunction with, Cargill's investigations and analysis) would be inconsistent with relying *solely* on Cargill's own investigations and analysis.

4673 However, such a construction would make no commercial sense for a number of reasons and if it were adopted would lead to an absurd scenario.

4674 *First and foremost*, consistent with the concession made, it would have been known by Glencore (who had already had the Information Memorandum prepared at the time Cargill executed the Confidentiality Deed) and contemplated by Cargill, Inc (who was familiar with the type of information that would ordinarily be included in an information memorandum for a transaction of this kind) that the Information Memorandum contained or would contain analyses (such as profit and loss statements and a balance sheet) that were clearly intended to be the basis of an evaluation of any bid. Whatever investigations or analyses Cargill might have been capable of performing, it was completely implausible that such historical financial statements would be ignored such that it would not be relied upon at all. Both Glencore and Cargill, Inc would have contemplated that the historical financial performance of Joe White would have to be taken into account to some significant degree in evaluating the Transaction.[4077] Thus, the requirement to rely solely on Cargill's own investigations and analysis did not contemplate the exclusion of Cargill taking into account any analysis contained in the Confidential Information, provided that Cargill ultimately relied solely upon its own investigations and analysis.

4675 *Secondly*, the nature of the confidentiality regime was significant. At the time the Confidentiality Deed was executed by Cargill, Inc it was contemplated that Glencore

4076 See par 523 above.
4077 See, for example, pars 473-474, 766 above.

would be disclosing Confidential Information that Cargill was obliged to keep confidential, and could only be the subject of questions to Glencore or the Sellers through the Due Diligence. Again, a useful example was the historical financial statements and the "normalised" statements, which clearly by their very nature must have been the subject of investigations and analysis before finalisation. Such statements as to past performance were integral to any evaluation of the Joe White Business. There was simply no other source of information with respect to these matters and no capacity to obtain the information from any other source.

4676 *Thirdly*, the whole purpose of Glencore providing the Confidential Information, including such analyses that had already been conducted in relation to the Joe White Business, was so that Cargill could form its own view as to the value of the Joe White Business and what amount it would be willing to pay for it.[4078] If the clause were construed in the manner contended for by the Viterra Parties, it would follow that every Cargill employee that had viewed any of the Confidential Information pertaining to an investigation or analysis (which would have included any employee who had read the Information Memorandum) would either have to completely eliminate such information from her or his mind or be completely excluded from the evaluation process. In other words, it would have been necessary to exclude any meaningful consideration or any form of reliance on the very information it was necessary to refer to in order to evaluate the Joe White Business. Not only would this have been nonsensical, it would be entirely inconsistent with the contemplated investigations and analysis. Thus, a possible literal reading of the clause would run entirely counter to what the parties understood was the reason for their commercial relationship and the provision of the Confidential Information.

4677 The better view is that the limitation on reliance did not mean that Cargill could not consider and take into account the Confidential Information when conducting its own investigations and analysis. Accordingly, "solely" in this context must be understood

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4078 King's evidence made it clear that a reason he was so fastidious to get all the relevant figures included and accounted for was so that the valuation by a prospective purchaser would be more favourable to the Sellers than if the information concerning margins was not provided: see, for example, par 797 above.

to mean that Cargill would only rely on its own investigations and analysis after duly considering all the Confidential Information provided, such consideration being consistent with the obligation to satisfy itself as to its accuracy and so on.[4079] The evidence demonstrated that this was precisely what Cargill did.[4080]

4678 In light of the surrounding circumstances and the purpose and object of the Confidentiality Deed, the wording of clause 8.3(c) was not intended to prevent Cargill from relying on the Confidential Information as part of its own investigations and analysis. Essentially, it was contemplated the clause would foreclose any exposure of the Viterra Parties to liability for Cargill making a claim based on the provision of the Confidential Information, including Glencore's or Viterra's investigations or analyses, separate and distinct from the investigations and analyses required to be conducted by Cargill. In other words, Cargill was required to rely solely on its own investigations and analyses, in circumstances where it was contemplated those investigations and analyses would be based on information including the Confidential Information, and subject to the limitations otherwise imposed by the Confidentiality Deed, including those in clause 8.

4679 It follows that reliance upon each of the Financial and Operational Performance Representations, the Warranty Representations, the Pre-Completion Representations and the Other Bidders Representations was entirely consistent with Cargill relying solely on its own investigations and analysis as that phrase was intended to be understood.

4680 To summarise, Cargill was required to rely solely on its own investigations and analysis. Cargill understood this,[4081] and did in fact conduct its own investigations and analysis in evaluating the Joe White Business and determining the amount it was willing to bid. Broadly, the product of Cargill's investigations and analyses was what

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4079 That is, consistent with its obligations under the Confidentiality Deed, including clause 8.3(a).

4080 Indeed, in contending that Cargill did not rely on the Financial and Operational Performance Representations, the Viterra Parties submitted that the evidence demonstrated that Cargill conducted the Due Diligence in accordance with the Sale Process Disclaimers "in that Cargill proactively and independently investigated the facts on which Cargill proposed to base their decision to enter into the Acquisition Agreement": see par 3182 above. See also par 735 and fnn 452, 495 above.

4081 Ibid. See also, for example, pars 472, 743, 947-948, 960-961, 969-974 above.

was presented to the Cargill, Inc board and the Cargill leadership team, and it was this information which was relied upon in deciding to make US$400 million available for any purchase. By Cargill solely relying on these investigations and its analyses, such conduct was not to the exclusion of the matters that had formed part of, and had been relied upon as part of, the investigations and analyses. In practical terms, the clause was to operate to prevent Cargill, Inc and its Representatives from relying upon an evaluation confined to details of the Confidential Information, including any investigations or analyses provided by Glencore, without satisfying its obligation to rely ultimately solely on its own investigations and analyses (which necessarily included investigating and analysing the Confidential Information). Thus, Cargill was prevented from adopting a position where it could claim that it relied both on its own investigations and analyses, and separately also relied upon the Confidential Information in any event, including the investigations and analyses provided by the Viterra Parties.

4681 It must follow from these conclusions regarding clauses 8.3(a) and 8.3(c) that there was no breach of clause 3.3. Further, this construction of clause 8.3 was not inconsistent with the other provisions of the Confidentiality Deed. In particular, provisions concerning potential liability and the ability to make any claim were distinct matters from whether or not Cargill was acting in breach of the Confidentiality Deed by conducting itself in the manner that it did.

X.105.3.3 The Deed of Release

4682 The Deed of Release and its effect is set out elsewhere in the judgment.[4082] For present purposes, it suffices to say that if, contrary to the findings set out above, Cargill, Inc breached either clause 8.3(a) or 8.3(c) then a cause of action would have accrued to Glencore at the time of any breach. Accordingly, as each of the matters relied upon in contending that a breach occurred happened before 31 October 2013, it would have followed that such accrued causes of action would not have been the subject of the release contained in the Deed of Release. However, for the reasons stated, no such

4082 See issue 84 above.

causes of action arose.

X.105.3.4 Further observations

4683 It is convenient to deal with a general submission made by the Viterra Parties that this case was about whether Cargill could succeed in disturbing the parties' agreed allocation of risk in circumstances where Cargill was experienced, highly sophisticated and expertly advised. This submission appeared to be premised on the basis that the terms of the Confidentiality Deed and the Acquisition Agreement (amongst other documents) allocated all risk in the transaction to Cargill and none to the Viterra Parties beyond what was expressly stated in the Warranties. In relation to the construction issues dealt with above, it suffices to say that none of the clauses in question, in terms, stated that all risk lay with Cargill. In negotiating the terms of the Confidentiality Deed,[4083] undoubtedly the Viterra Parties sought to minimise or even extinguish any liability they might otherwise have been exposed to by reason of the sale of Joe White to the maximum extent permitted by law. However, the language used must still be construed according to established contractual principles of construction to produce a commercially sensible result consistent with the wording used.

X.106 What, if any, damages or other relief is Glencore and/or Viterra entitled to as a consequence?

4684 This issue does not arise.

X.107 Are Glencore and/or Viterra estopped from making a claim against Cargill, Inc for breach of clauses 8.3(a) and/or 8.3(c) of the Confidentiality Deed?

4685 Although this issue also does not arise in light of the finding that neither Cargill, Inc nor Cargill Australia breached clause 8.3(a) or 8.3(c), it should be considered as it raised questions of fact that ought to be determined.

4083 The terms of the Confidentiality Deed were not simply terms put forward by Glencore and adopted by Cargill, but were the subject of negotiation: see par 458 above.

X.107.1 Principles

4686 Broadly speaking, an estoppel at common law may arise where a representor induces a person to adopt and act upon an assumption of an existing fact.[4084]

4687 Common law estoppel may be established where the relying party acts on an assumption of fact and would subsequently suffer detriment if the representor denied the truth of that assumption.[4085] Therefore, the representor may be estopped from departing from the assumed truth of the representation.[4086] The detriment is that which would flow to the person who has acted on the assumption from the change of position if the representor resiled from the assumption and made a different state of affairs the basis of their respective rights and liabilities.[4087]

4688 Equitable estoppel has its basis in unconscionable conduct.[4088] It comes to the relief of a plaintiff who has acted to its detriment on the basis of an assumption induced by the conduct of the representor where it would be unconscionable for the representor to resile from the assumption. The form of relief a plaintiff may obtain depends on what would do justice in the circumstances. In *Waltons Stores (Interstate) Ltd v Maher*, Brennan J outlined the elements of equitable estoppel as follows:[4089]

(1) The representee assumed that a particular legal relationship existed or would exist and, in the latter case, that the representor would not be free to withdraw from the expected legal relationship.

(2) The representor induced the representee to adopt that assumption or expectation.

(3) The representee acted or abstained from acting in reliance on the

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4084 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 398.4 (Mason CJ and Wilson J, discussing *Legione v Hateley* (1983) 152 CLR 406, 432 (Mason and Deane JJ)), 413.2, 415.1 (Brennan J).

4085 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674.3-675.2 (Dixon J, with whom McTiernan J agreed), quoted in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 414.3 (Brennan J).

4086 Ibid.

4087 Ibid.

4088 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 405.2 (Mason CJ and Wilson J).

4089 Ibid, 428.9-429.2. See also *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1, 65 [211] (Nettle J); *Commonwealth v Verwayen* (1990) 170 CLR 394, 502.2 (McHugh J).

assumption or expectation.

(4) The representor knew or intended that the representee acted or abstained from acting.

(5) The representee's action or inaction will occasion detriment if the assumption or expectation is not fulfilled.

(6) The representor failed to act to avoid that detriment, whether by fulfilling the assumption or expectation or otherwise.

4689 Whilst the courts have noted distinctions between common law estoppel and equitable promissory estoppel,[4090] some common principles and elements underscore both.[4091] The object of estoppel, both at common law and in equity, is "to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment".[4092] The representor may be taken to have induced an assumption in various circumstances. These include where the assumption formed the conventional basis upon which the parties entered into a contractual relationship; or where the representor's imprudence was a proximate cause of the assumption made and acted upon when care was required of the representor; or if the representor has failed to take steps to correct a mistake that it knew the other party was labouring under in circumstances where it was under a duty to do so.[4093]

4690 In respect of this last circumstance, a duty not to remain silent and correct a mistake will arise where the assumption or expectation can be fulfilled only by a transfer of the representor's property, a diminution of the representor's rights or an increase in the representor's obligations. Where a representor knows that the representee is

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4090 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 413.6 (Brennan J).

4091 Ibid, 413.7; *Legione v Hateley* (1983) 152 CLR 406, 435.4 (Mason and Deane JJ).

4092 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 458.3 (Gaudron J), quoting *Thompson v Palmer* (1933) 49 CLR 507, 547.2 (Dixon J). See also *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 657.4 (Latham CJ), 674.3 (Dixon J, with whom McTiernan J agreed).

4093 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 427.5 (Brennan J, quoting *Thompson v Palmer* (1933) 49 CLR 507, 547.2 (Dixon J)). See also 398.1-399.2 (Mason CJ and Wilson J); 461.6 (Gaudron J).

labouring under such an assumption, they must either warn the representee that they deny the truth of the assumption, or otherwise act in a way that will avoid any detriment the representee may suffer in reliance on the assumption.[4094]

X.107.2 The Cargill Parties' submissions

4691 The Cargill Parties submitted that Glencore or Viterra, or both, were estopped from making a claim against Cargill, Inc for breach of clauses 8.3(a) and 8.3(c). Their submissions relied on common law estoppel, acknowledging that for common law estoppel to operate there must have been assumptions as to an existing state of affairs and not future conduct.

4692 The Cargill Parties addressed the elements of estoppel, as follows::

(1) Cargill, Inc assumed that it was entitled to rely upon the accuracy of the financial and operational performance information of the Joe White Business provided by Glencore or Viterra, or both (that is, the Financial and Operational Information), in the sale process and in relation to the Other Bidders Representations ("the Assumption").

(2) By reason of Glencore or Viterra, or both, continuing to deal with Cargill, Inc and provide information to it despite Cargill, Inc making known its position, Cargill, Inc was induced to make the Assumption.

(3) In reliance upon the Assumption, Cargill Australia entered into the Acquisition Agreement.

(4) By reason of the dealings between the parties, Glencore and Viterra knew and intended that Cargill, Inc and Cargill Australia would rely on the Assumption.

(5) Cargill, Inc would suffer detriment if Glencore and Viterra were permitted to resile from the Assumption.

4094 Ibid, 428.4 (Brennan J), 462.5 (Gaudron J).

(6) It would be unconscionable to permit Glencore and Viterra to resile from the Assumption including by maintaining a claim for breach of clauses 8.3(a) and 8.3(c) of the Confidentiality Deed and each of Glencore and Viterra are estopped from doing so.

4693 The Cargill Parties submitted that the Phase 1 Process Letter[4095] established that Cargill was expected to be able to determine its indicative bid on the basis of the financial and operational information provided in the Information Memorandum.[4096] They repeated their contention (which has been rejected)[4097] that it was not until later in May 2013 and after receipt of the Information Memorandum that the Confidentiality Deed imposed restrictions on Cargill's ability to use, disclose and conduct investigations into the Confidential Information. It was submitted that it was clear to the Viterra Parties that Cargill had approached the sale process on the basis that it could, and did, rely on the financial and operational information provided in the Information Memorandum and that it would proceed to rely upon more detailed information obtained during the Due Diligence. This submission was based on the contents of the letter accompanying the Cargill Indicative Bid, which stated:[4098]

(1) The Cargill Indicative Bid was based on Cargill's review of the information contained within the Information Memorandum.

(2) Cargill intended to refine its valuation with an expectation that it could enhance its assessment of value based on more detailed information provided in Phase 2.

(3) For the purposes of Cargill's valuation, Cargill had based its analysis on the pro forma [normalised Unadjusted Earnings] provided in the

4095 See pars 461-469 above.

4096 In the Cargill Parties' closing submissions, Cargill Australia was referred to as the entity determining an indicative bid. In the defence to the Third Party Claim, it was Cargill, Inc that was referred to. A similar discrepancy appeared in other aspects of the Cargill Parties' submissions on this issue. Nothing turns on this in circumstances where the Cargill, Inc employees were acting for and on behalf of both Cargill, Inc and Cargill Australia in evaluating the Joe White Business.

4097 See issue 5 above.

4098 See par 623 above.

Information Memorandum.

Further, it was submitted that Glencore and Viterra did not disabuse Cargill of the Assumption when the Phase 2 Process Letter was sent by Merrill Lynch as agent for Glencore and Viterra.[4099] The Phase 2 Process Letter stated that, in "order to assist [Cargill] in making" its final bid, Phase 2 would include access to the Data Room and the Q&A Process, a management presentation, site tours of Joe White's "Export Super Sites" in Sydney, Adelaide and Perth and the provision of a draft share purchase agreement.

4694 The Cargill Parties submitted that by continuing to deal with Cargill notwithstanding its openly disclosed reliance upon the financial and operational information provided, Glencore and Viterra, through their agent Merrill Lynch, induced Cargill to continue to proceed upon the Assumption as to the reliability of the Confidential Information.

4695 Furthermore, the Cargill Parties submitted that at all times Glencore and Viterra had knowledge that Cargill Australia proceeded to act upon the Assumption, given that the First Final Bid stated that Cargill had confirmed its view that the Joe White Business was impressive based on the Due Diligence and its discussions with Joe White management.[4100] In addition, they pointed to the confirmation by Cargill that it had conducted the Due Diligence based on the information provided to date in the sale process and that it had included a review of the information provided in the Information Memorandum, management presentations, site visits, the [Data Room] (including responses provided through the Q&A Process) and some public registers.[4101]

4696 Moreover, it was submitted that in reliance on the Assumption, after conducting its own investigations and analyses of the Confidential Information, Cargill Australia entered into the Acquisition Agreement and proceeded to Completion.

4099 See pars 639-644 above. See also issues 18 and 19 above in relation to the attribution of Merrill Lynch's conduct to Glencore and Viterra.

4100 See pars 976-978 above.

4101 Ibid.

4697 Finally, if it were found that there had been a breach of clause 8.3, it was submitted that Cargill would suffer significant detriment if the Viterra Parties were permitted to resile from the Assumption (which detriment was suggested to be the equivalent of Cargill Australia's claimed loss and damage in this proceeding). The Cargill Parties submitted that in these circumstances it would be unconscionable for Glencore and Viterra to resile from the Assumption by maintaining a claim for breach of clause 8.3 of the Confidentiality Deed. Therefore, it was submitted that the Viterra Parties should be estopped from doing so.

4698 The Cargill Parties concluded their submissions on this point by noting that Glencore and Viterra provided the information for the purpose of wanting to sell Joe White to the highest bidder, and for that purpose alone. Therefore, it was contended their claim for breach of clause 8.3 of the Confidentiality Deed was in direct contradiction of their conduct throughout the sale process and the singular motivation underpinning that process.

X.107.3 The Viterra Parties' submissions

4699 In contrast to the Cargill Parties' submissions regarding common law estoppel, the Viterra Parties considered this issue under the doctrine of equitable estoppel. They referred to the 6 elements of equitable estoppel as set out above[4102] and submitted that there was no basis for Glencore or Viterra to be estopped as claimed.

4700 *First,* the Viterra Parties submitted that there was no factual basis to find that Cargill, Inc assumed that it was entitled to rely upon the accuracy of the information obtained during the sale process, including by reason of the Other Bidders Representations. The Viterra Parties contended that there was an absence of lay evidence from Cargill's witnesses to support the Assumption and that the pleaded sources of the Assumption were misrepresented, for example:

(1) No part of the Phase 1 Process Letter stated that it was premised on the basis that Cargill, Inc would be able to make an indicative bid and

4102 See par 4688 above.

determine the amount of any such bid based on the financial and operational information provided. It was contended that the Phase 1 Process Letter specifically stated that the Information Memorandum was provided pursuant to the terms contained in the Information Memorandum and constituted Confidential Information for the purpose of the Confidentiality Deed. The letter further stated that Cargill, Inc was required to make and rely on its own investigations.

(2) The Confidentiality Deed imposed restrictions on Cargill, Inc's ability to use or disclose Confidential Information, but did not restrict its ability to conduct its own investigations into the accuracy of the information. The clauses of the Confidentiality Deed relied upon in particulars[4103] all related to the handling of the Confidential Information and did not impose restrictions on Cargill, Inc conducting and relying on its own investigations.

(3) The Cargill Parties misrepresented the Phase 2 Process Letter. The letter reiterated that all the information provided in that phase, including the Management Presentation and site visits, was subject to the Confidentiality Deed and further, stated that Cargill, Inc was required to make and rely on its own investigations.

(4) Cargill, Inc's own letters could not constitute a basis for an assumption.[4104]

(5) The Other Bidders Representations were not conveyed.[4105]

4701 *Secondly,* relying on their submissions above, the Viterra Parties submitted that the Cargill Parties failed to establish that Glencore or Viterra induced Cargill, Inc into making the Assumption as the basis for the inducement was the same sources as the

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4103 The particulars referred to cll 1.3, 3, 6 and 9 of the Confidentiality Deed.

4104 Why this might have been so was not explained.

4105 This is addressed in issue 54 above. This submission was contrary to the findings made.

basis of the Assumption itself.

4702 *Thirdly*, the Viterra Parties submitted the court should not find that Cargill Australia entered into the Acquisition Agreement in reliance upon the Assumption. They referred to their submissions in issue 15 above in support of this contention.[4106]

4703 In addition, the Viterra Parties submitted that Cargill, Inc was informed, and expressly agreed by signing the Confidentiality Deed twice, that all information provided to it in the sale process was and could be nothing more than a starting point, and were not statements of fact. Particularly, the terms of the Confidentiality Deed that stated that Cargill, Inc would not draw any inference of fact made it clear that none of the information had been sufficiently verified so as to make it reliable for any inference. Subsequent to entry into the Confidentiality Deed, it was submitted that the following also made it clear that the information provided a starting point and not a statement of fact:

(1) The Phase 1 and Phase 2 Process Letters, which told Cargill that it was "required to make and rely on [its] own investigations and satisfy [itself] in relation to all aspects of the Proposed Transaction".[4107]

(2) The Information Memorandum Disclaimers and the Management Presentation Memorandum Disclaimers included:[4108]

> A Recipient that is considering the Proposed Transaction must make, and will be taken to have made, its own independent investigation and analysis of the information in this document … To the maximum extent permitted by law, no representation, warranty or undertaking, express or implied, is made. ... The information contained in this document has not been independently verified. … In particular, no representation or warranty is given as to the accuracy, completeness, likelihood of achievement or reasonableness of any forecasts, projections or forward-looking statements contained in the document. Forecasts, projections and forward-looking statements are by their nature subject to significant uncertainties and contingencies. You should make your own independent assessment of the information and seek your own independent professional advice in relation to the information and any

4106 With regard to issue 15 above, the Viterra Parties' submissions did not expressly address whether Cargill, Inc relied on the Assumption.

4107 See pars 468, 643 above.

4108 See par 475 above.

action taken on the basis of the information.

(3) The Data Room Protocol, which provided that all persons accessing the Data Room agreed that they would rely on their own independent assessment of any information in the Data Room, and further agreed that they did not rely on any representation, guarantee or warranty by Glencore or its Representatives.[4109]

4704 Further, it was submitted that clause 13.1 of the Acquisition Agreement identified to Cargill the statements that the Viterra Parties could make with enough confidence for them to be statements of fact and none of the Warranties contained any of the Financial and Operational Performance Representations.[4110] In relation to the terms of the Acquisition Agreement, the Viterra Parties also relied upon the acknowledgements of Cargill Australia in clause 13.4.[4111]

4705 Furthermore, the Viterra Parties relied upon the Refusal of Certain Terms. They noted that in negotiations Cargill requested further terms,[4112] including a warranty to the effect that, to Viterra Malt's knowledge and awareness, Joe White had not committed any default of Material Contracts and that the knowledge of the knowledge individuals for the purposes of clause 31.15 of the Acquisition Agreement included knowledge of information disclosed to Cargill in writing in the Due Diligence, both of which Viterra refused. Therefore, the Viterra Parties submitted that Cargill was testing whether it could rely on information provided in the Due Diligence for the purposes of the Acquisition Agreement, to which the answer was no.

4706 Moreover, the Viterra Parties submitted that for 3 reasons objectively it was made plain that no inference could safely be drawn from the information provided to Cargill in the sale process:

(1) The Cargill Group knew that the Glencore Group had no involvement or experience in running a malt company. Further, they referred to

4109 See par 655 above.
4110 See par 1029 above.
4111 Ibid.
4112 See pars 979, 992 above.

Eden's evidence that he knew that Joe White had only recently been acquired and that Eden considered that Glencore would have relied on Joe White in the preparation of the Information Memorandum.[4113] As such, it was submitted Cargill must have known that any information provided should have been treated with the caution afforded to any statement made by a non-industry player.

(2) Cargill knew that Glencore decided not to conduct a vendor due diligence,[4114] and therefore must have known that the information provided was not provided with the confidence that a vendor due diligence may have given.

(3) Much of the information provided was by way of documents, the purpose of which was no more than to identify a relevant starting point for Cargill's own investigations. It was contended the Information Memorandum was little more than a brochure provided to give an impression of the Joe White Business and to assist with the decision of whether to place an indicative bid, without the sign off of an accounting firm.[4115] Cargill, Inc knew that the Information Memorandum did not displace the need for a due diligence on Joe White, and Le Binh's evidence was that when he received the Information Memorandum, he understood that Cargill, Inc was required to conduct its own investigations and satisfy itself in relation to all aspects of the transaction.[4116]

4707 *Fourthly,* the Viterra Parties submitted that the evidence did not support the allegation that Glencore or Viterra knew and intended that Cargill, Inc and Cargill Australia would rely on the Assumption.

4113 See par 513 above.
4114 See pars 561, 623, 974 above.
4115 Compare pars 473-474 and fn 364 above.
4116 See par 472 above.

X.107.4 Analysis

4708 As already noted, the Cargill Parties relied on the doctrine of common law estoppel, whereas the Viterra Parties' submissions were directed to equitable estoppel. Submissions on both approaches will be dealt with below.

4709 The *first* matter to consider was whether Cargill, Inc made the Assumption. The first substantive step in the sale process, after the Confidentiality Deed was executed and delivered by Cargill, Inc on 13 May 2013,[4117] was that Cargill was provided with the Phase 1 Process Letter.[4118] By that letter, Cargill was informed that it was entitled to rely upon the financial and operational performance information of the Joe White Business provided in the Information Memorandum. The Phase 1 Process Letter established that Cargill was expected to be able to determine its indicative bid on the basis of the 31 January 2013 balance sheet set out in the Information Memorandum. This expectation was created by the direction of Merrill Lynch, which was plainly considered to be consistent with the simultaneous further direction of Merrill Lynch for Cargill, Inc to act in accordance with the terms of the Confidentiality Deed. In addition, Cargill was expressly required to inform the Viterra Parties if it made any assumptions that varied from information disclosed in the Information Memorandum.[4119] Thus, at a time when Cargill had already signed the Confidentiality Deed, the position was unequivocally established in writing for the purposes of Phase 1; namely that, unless Cargill stated in writing that it had done otherwise, Cargill was directed to: (1) rely upon the information and "key assumptions" contained in the Information Memorandum; and (2) represent that it had so relied.

4710 As already observed,[4120] the Viterra Parties' senior counsel stated that the Information Memorandum was a starting point "in the sense that it could be relied upon" for the purpose of an indicative offer, and that was what "everything" said. Therefore, it was clear that even though the Confidentiality Deed and the Information Memorandum

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4117 See par 459 above.
4118 See par 461 above.
4119 See par 466 above.
4120 See par 2926 above.

contained disclaimers and references to recipients conducting and relying on their own investigations, the Phase 1 Process Letter was to be read in conjunction with these documents and expressly indicated that it was intended for Cargill, Inc to be able to arrive at an indicative offer based on the historical financial and operational information in the Information Memorandum.[4121] Accordingly, the Viterra Parties' submission that there was no factual basis to find that Cargill assumed it was entitled to rely upon the accuracy of the Financial and Operational Information must fail, at least to the extent that it was the documented common intention of Cargill and the Viterra Parties that the Information Memorandum could be used as a starting point for establishing an indicative offer.[4122]

4711 Further, it must be noted that up until the end of Phase 1, Cargill had very little information about the financial position of Joe White beyond what was contained in the Information Memorandum. While Cargill undoubtedly had a large amount of knowledge concerning many aspects of the malting industry in light of its extensive experience in that industry,[4123] in order to make any meaningful assessment of the value of Joe White it had very little empirical and detailed information about the financial performance of Joe White itself beyond what was contained in the Information Memorandum. This fact was known to Glencore and Viterra as they held the Financial and Operational Information, had kept it confidential and were only willing to disclose it on the basis that it was (and remained) Confidential Information.[4124] In short, any suggestion that Cargill was precluded from assuming it could rely on the Financial and Operational Information contained in the Information Memorandum in formulating an indicative bid was contrary to the agreed arrangement.

4712 The next critical matter was what Cargill represented at the time it made the Cargill Indicative Bid. Not only did Cargill state that the bid had been made based on its

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4121 A balance sheet by its nature reflecting the financial position at any particular point in time in light of the historical performance of a company.

4122 In fairness, this conclusion largely aligns with the position ultimately put by the Viterra Parties.

4123 See par 511 above.

4124 Though noting for completeness, certain obligations in relation to Confidential Information did not apply to information Cargill already had: see par 586 above.

review of the information contained in the Information Memorandum, but it further informed the Viterra Parties that Cargill intended to "refine" its valuation in Phase 2. This was expressed in terms of an expectation that the existing preliminary valuation (based on the contents of the Information Memorandum) could be enhanced based on the more detailed information to be provided in Phase 2. In other words, Cargill stated it was a continuous process and was not a situation where it was going to start afresh with a completely new valuation once Phase 1 had been completed. Further, Cargill expressly recorded that Cargill assumed at the time of making the Cargill Indicative Bid that the information that had been provided was true and accurate and supported by due diligence findings.[4125] Furthermore, the Viterra Parties were expressly told that Cargill's valuation of Joe White was based on Cargill's analysis of the normalised Unadjusted Earnings provided in the Information Memorandum. Cargill then reserved its right to vary its valuation assumptions in making any final offer.

4713 The Phase 2 Process Letter sent after the Cargill Indicative Bid did not gainsay or attempt to undermine the position that Cargill was entitled to rely upon the Assumption after the Cargill Indicative Bid in order to make the First Final Bid. The Phase 2 Process Letter stated that information would be provided to Cargill, Inc to "assist [it] in making [its] Final Bid," including by access to the Data Room, the Q&A Process, the Management Presentation, site tours and a share purchase agreement, in the context of the ongoing operation of the Confidentiality Deed.[4126] There was also a reminder of the requirement for Cargill, Inc to make its own investigations.[4127]

4714 Moreover, the Phase 2 Process Letter must be considered within the context in which it was provided. The Cargill Indicative Bid had outlined the approach that had been taken by Cargill, which was based on the directions in the Phase 1 Process Letter. Both the Phase 1 Process Letter and the Phase 2 Process Letter were expressly subject to the Confidentiality Deed. Further, both the Phase 1 and Phase 2 Process Letters stated that Cargill, Inc was required to make and rely on its own investigations. In short, the

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4125 This was a reflection of Cargill's belief at that time, but for the position shortly before the end of Phase 2 see pars 973-974 above and fn 4130 below.

4126 See par 639 above.

4127 See pars 642-643 above.

reminders about the usage of information in the Phase 1 and Phase 2 Process Letters were not materially dissimilar. Thus, even though the Phase 2 Process Letter contained references to the Confidentiality Deed, the Data Room Protocol (which included the Q&A Process terms and procedures) and to Cargill, Inc undertaking its own investigations, given that it provided information to assist Cargill to reach a final bid and given its similarities to the Phase 1 Process Letter (which was a starting point for determining the Cargill Indicative Bid), it was reasonable that, based on the Phase 2 Process Letter, Cargill assumed that it was entitled to rely on the accuracy of the Financial and Operational Information obtained (subject to the terms of the Confidentiality Deed and any information it might have discovered as part of the Due Diligence as part of properly conducting its own investigations and analysis).

4715 Therefore, nothing contained in the Phase 2 Process Letter informed Cargill that it was not entitled to proceed in the manner that it had expressly stated it would in the Cargill Indicative Bid.

4716 *Secondly,* at least up until the time the First Final Bid had been made, the Viterra Parties induced Cargill to make the Assumption. This was because Cargill had made it clear that it was relying on the information obtained during the Due Diligence. Significantly, as part of Cargill making the First Final Bid by email, it attached a draft acquisition agreement which included draft terms concerning "Warranties and representations".[4128] Since, on the Viterra Parties' case (and contrary to what has been found), such reliance from Cargill would amount to a breach of clause 8.3 of the Confidentiality Deed, the only way that the Assumption could be fulfilled would be through the diminution of Glencore or Viterra's rights under that deed. On the Viterra Parties' construction of the Confidentiality Deed, this would give rise to a duty on Glencore or Viterra, or both, to inform Cargill that they disputed the truth of the Assumption. However, Glencore and Viterra continued to deal with Cargill without giving any indication as to any incorrectness of the Assumption upon which Cargill was conducting its affairs.[4129] In particular, nothing was stated by the Viterra Parties

4128 See par 979 above.
4129 See par 4689 above.

to gainsay Cargill's ability to act in accordance with the stated intention of refining the valuation that it had already performed (for the purposes of the Cargill Indicative Bid) on the basis that the Financial and Operational Information was "true and accurate and supported by due diligence findings".[4130]

4717 In short, Cargill, Inc made the fact that it was making the Assumption clear. Neither Glencore nor Viterra corrected Cargill, Inc or disabused it of the belief that it had the ability to make the Assumption in formulating its First Final Bid (and then increasing that bid to $420 million). In particular, there was no suggestion that the manner in which Cargill had unequivocally indicated it intended to proceed was contrary to the terms of anything that had been agreed or stated previously. Such a position induced Cargill to rely on the Assumption. In my view, the manner in which the terms of the proposed acquisition agreement were subsequently negotiated (including the precise ambit of the Warranties) could not alter the position as to what had come before in establishing the assumed basis on which Cargill was to formulate (and did formulate) its evaluation of, and bids for, Joe White.

4718 Further, Glencore's conduct, at least up until 2 August 2013,[4131] induced Cargill to rely on the Assumption on an ongoing basis. As noted above, the Phase 2 Process Letter took no exception to Cargill's stated position. Nothing changed concerning the existence of Financial and Operational Information which had been provided to be used as a starting point. In other words, the "starting-point" use of the Financial and Operational Information provided up to that time did not somehow cease to exist once the Cargill Indicative Bid was made. Further, Cargill made it clear that that information would remain the foundation of its ongoing evaluation as part of, and in accordance with, Phase 2.

4130 To reiterate, in relation to the issue of due diligence findings, it was clear that at the time the Cargill Indicative Bid was sent it was Cargill's belief that the financial and operational performance information was supported by due diligence findings: see pars 561, 623 above. However, in late July 2013 this position changed (see par 974 above), but it did so at a time when Cargill itself had conducted the Due Diligence and satisfied itself as to its ability to rely upon the financial and operational performance information it had been provided, coupled with the Warranties.

4131 See par 992 above, noting that the initial position on 1 August 2013 was expressly stated to be subject to further instructions from Glencore and subject to Mallesons' further review: see par 989 above.

4719 Further, the confidentiality regime remained consistent throughout Phase 1 and Phase 2. The key difference between the 2 phases was that in Phase 2 Cargill was given access to more information in order to assess the Confidential Information and more meaningfully conduct its own investigations and analysis. This being the case, neither Glencore nor Viterra disabused Cargill of the Assumption by simply reiterating the restrictions on information usage in the Phase 2 Process Letter.

4720 As such, in continuing to deal with Cargill in the manner in which they did notwithstanding its evident reliance upon the Financial and Operational Information, Glencore and Viterra induced Cargill Australia to proceed upon the Assumption.

4721 *Thirdly,* as a matter of fact Cargill acted in reliance on the Assumption, by relying on the Financial and Operational Information in making the First Final Bid, and then in increasing that bid to $420 million.[4132]

4722 *Fourthly*, Glencore and Viterra knew that Cargill continued to rely on the Financial and Operational Information. In addition to the Cargill Indicative Bid stating that Cargill had relied on the information provided and intended to continue to do so based on more detailed information provided in Phase 2, in the First Final Bid, Cargill, Inc confirmed that:[4133]

> it has conducted its due diligence based on the information provided to date in the process. This includes a review of the information provided in the Information Memorandum, management presentations, site visits, the [Data Room] (including responses provided through [the Q&A Process]) and some public registers.

When this statement was read in the context of what had been stated at the time of the Cargill Indicative Bid, the Viterra Parties were again informed that Cargill Australia had proceeded on the basis that it was entitled to rely on the Assumption.

4723 It was of little moment that no witness called by the Cargill Parties gave specific

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4132 See issue 20 above. There was no evidence to suggest that at the time the Cargill executives considered what to do in response to the First Further Bid Call they had taken into account any proposed changes to the draft agreement that were forwarded by Mallesons late in the afternoon of 2 August 2013 Australian eastern standard time: see par 992 above.

4133 See par 976 above.

evidence of reliance upon the Assumption. The contemporaneous documentation made the position Cargill was adopting perfectly clear. Further, as explained in issue 20 above, there was a large body of evidence to indicate that at the time Cargill was compiling and then refining the Cargill deal model, Cargill was proceeding on the basis that the Financial and Operational Information contained in the Information Memorandum and subsequently obtained during Phase 2 was reliable, such that it could be relied upon in valuing Joe White and formulating a bid.

4724 Thus, to summarise the position as at 2 August 2013, Cargill had made it clear it was relying on the Assumption, which it did in carrying out the Due Diligence in accordance with the Confidentiality Deed. Further, it was acting on the Assumption when it made the First Final Bid and its last bid of $420 million. On the basis of the findings made, it was of no moment whether the Assumption was characterised as an assumed position in relation to a fact or an assumed position in relation to Cargill's and the Viterra Parties' approach in the future. On either basis, at least up until 2 August 2013, the facts above were relevant to whether an estoppel would have arisen if a breach of clause 8.3 had been established.

4725 However, the Acquisition Agreement was not entered into until 4 August 2013. Between late 2 August and 4 August 2013, Cargill Australia negotiated and ultimately agreed the terms of the Acquisition Agreement, including clauses 13.1 and 13.4. Therefore, the question of whether the Assumption could continue to operate in these circumstances arose. Further, the manner in which Cargill Australia pleaded its case was that it not only conducted the Due Diligence and made each of its bids based on the Assumption, but it also alleged that it entered into the Acquisition Agreement itself on the same basis.

4726 As it has been found there was no breach of clause 8.3 of the Confidentiality Deed, it is not strictly necessary to deal with the issues that arise concerning whether Cargill Australia was entitled to continue to rely on the Assumption up to and upon entering into the Acquisition Agreement. Although Cargill made clear at the time of its First Final Bid on 29 July 2013 that it was continuing to do so and the First Final Bid

included a draft acquisition agreement which contained clauses concerned with Warranties and representations (and limiting reliance in relation to such matters), there were subsequent changes to this draft. No party made any submissions on the significance or otherwise of such changes to the question of whether they altered the position that existed as at 29 July 2013 when the First Final Bid was made.[4134]

4727 In those circumstances, I do not propose to make any final determination on the questions raised in issue 107, including what effect the release in clause 10.3 of the Confidentiality Deed may have had on any plea of estoppel. If it ever becomes necessary for another court to determine this issue, all relevant facts have been found. Further, on that occasion the court would have the benefit of the parties' submissions on the significance, if any, of the amendments that were made up to 4 August 2013, on the issues relating to whether Glencore or Viterra were estopped as alleged.

X.108 Did Cargill, Inc wrongfully induce Cargill Australia to breach clauses 10.2(a) and/or (b) and/or 10.3 of the Confidentiality Deed?

4728 As it has not been found that Cargill Australia breached clause 10.2(a) or (b), or clause 10.3, this issue does not arise.

X.109 What, if any, damages or other relief is Glencore and/or Viterra entitled to as a consequence?

4729 This issue also does not arise.

X.110 Did Cargill, Inc represent to Glencore and/or Viterra the Confidentiality Deed Representations as pleaded in paragraph 27 of the Third Party Claim?

X.110.1 Allegations

4730 Paragraph 27 of the Third Party Claim alleged, in substance, that in May 2013 Cargill, Inc represented to Glencore and Viterra that Cargill, Inc and Cargill Australia would:

4134 A large number of the clauses remained the same or were only the subject of very minor amendments (including clauses 13.1 and 13.4).

(1) Rely solely on their own investigations and analysis in evaluating a possible Joe White acquisition ("the First Confidentiality Deed Representation").

(2) Not rely on Confidential Information[4135] in evaluating the proposed Joe White acquisition ("the Second Confidentiality Deed Representation").

(Together, "the Confidentiality Deed Representations".)[4136]

4731 In support of this allegation, the Viterra Parties relied upon certain terms of the Confidentiality Deed.[4137] The first of the alleged Confidentiality Deed Representations was reflective of clause 8.3(c), which stated that "[t]he Recipient agrees and acknowledges that: it will rely solely on its own investigations and analysis in evaluating the Transaction".

X.110.2 Principles

4732 In some circumstances it has been suggested a contractual term can amount to a representation for the purposes of establishing misleading or deceptive conduct under the Australian Consumer Law.[4138] Whether such is the case is a question that must be determined by reference to all the circumstances, including the terms of the contract as a whole.[4139] Equally, a clause such as clause 8.3(c) may be nothing more than the

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4135 The reference to Confidential Information was a reference to the expression as defined in the Confidentiality Deed: see par 586 above.

4136 In making this allegation the Viterra Parties sought to establish a contravention of the Australian Consumer Law. Importantly, for the purposes of section 18, the term "conduct" is not limited to conduct that amounts to representations. A reference to "engaging in conduct" for the purposes of the Australian Consumer Law, includes "the making of, or the giving effect to a provision of, a contract or arrangement": s 2(2)(a)(i); see also for example, *Hunt Contracting Co Pty Ltd v Roebuck Resources NL* (1992) 110 ALR 183, 187.10-189.5 (French J). However, the manner in which the Viterra Parties pleaded their case confined the relevant conduct to be considered as a representation.

4137 The terms relied upon by the Viterra Parties were those specifically pleaded in the Third Party Claim, which included key definitions and clauses 2, 3, 8, 9, 10 and 11: see pars 586-590 above for an extract of the relevant definitions and clauses.

4138 See, for example, *RCR Energy Pty Ltd v WTE Co-Generation Pty Ltd* [2017] VSCA 50, [61]-[64] (Weinberg, Whelan and Santamaria JJA); *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 322 [35] (French CJ); *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647, 691-692 [222] (Edelman J); *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217, 239.8 (Ormiston J). See further the definition of "engaging in conduct" referred to in fn 4136 above. See also issue 48 above.

4139 Ibid.

undertaking of an obligation. The mere undertaking of an obligation does not amount to a representation other than that the obligation has been undertaken, which ordinarily reflects the fact.[4140]

X.110.3 Analysis

X.110.3.1 The First Confidentiality Deed Representation

4733 There was nothing in clause 8.3(c) to indicate expressly that this clause amounted to a express representation.[4141] Clause 2.1 of the Confidentiality Deed described the obligations set out in the Confidentiality Deed as "undertakings".[4142] Thus, on 1 view, it might be said that this clause amounted to nothing more than an undertaking of an obligation.

4734 The finding that a contractual promise does not amount to an express representation does not, however, preclude that same promise being construed as an implied representation. Recognising the uncertainty in the state of the law, Ormiston J in *Futuretronics International Pty Ltd v Gadzhis* surmised that:[4143]

> It is not difficult to see that particular promises may be expressed in terms which can properly be characterised as representations as to future conduct, albeit that the promises form part of the process of making a contract. It is another matter to take obligations arising under a contract and imply from them representations from each side that it will perform the agreed obligations.

Reservations aside, and after making the obvious observation that it would be wrong to treat every contractual obligation as an unqualified promise to perform, his Honour concluded that the weight of the authorities supported the proposition that a contractual promise could amount to an implied representation that the promisor had

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4140 *RCR Energy Pty Ltd v WTE Co-Generation Pty Ltd* [2017] VSCA 50, [65] (Weinberg, Whelan and Santamaria JJA).

4141 Compare this with the circumstances in issue 48 above. In finding that the Warranty Representations were representations in the Acquisition Agreement, a key factor noted was the presence of the words "represent and" in cl 13.1, as well as the definition of "Warranties" itself providing that that term meant "warranties and representations set out in Schedule 4".

4142 See par 590 above. In brief, clause 2.1 set out the consideration and described the promises and obligations in the Confidentiality Deed as "undertakings" given by Cargill, Inc in exchange for the disclosure of the Confidential Information.

4143 [1992] 2 VR 217, 235.2. See also *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd* (1993) 113 ALR 677, 694.6 (Sheppard J).

an intention, and current ability, to carry out the promise when it was made.[4144] His Honour further stated that where an unconditional promise forms part of the contract, "then it is proper to treat the giving of that promise, at least in the ordinary case, as the making of a representation as to a future matter".[4145]

4735 The promise set out in clause 8.3(c) might be viewed as unconditional, in the sense that it was not qualified by any reciprocal obligation of Glencore or Viterra beyond the provision of the Confidential Information. On another view, the promise could be considered conditional in the sense that it was provided in return for the provision of information pursuant to the Confidentiality Deed.

4736 There is no binding authority that has definitively resolved the question of when a contractual promise may amount to a representation (and therefore conduct for the purpose of section 18 of the Australian Consumer Law).[4146] Perhaps that reflects the position that each contractual provision must be considered on its particular terms in its particular context. In short, whether the contractual promise reflected in clause 8.3(c) was a representation remains a question of fact.[4147] For reasons that will become apparent, it is not necessary to determine conclusively whether agreeing to clause 8.3(c) amounted to a representation. For the sake of addressing this and related issues, I will proceed on the basis that it did.

X.110.3.2 The Second Confidentiality Deed Representation

4737 As to the second alleged Confidentiality Deed Representation, no such term was expressly stated in the Confidentiality Deed. The manner in which the allegation was made and the submissions that accompanied it were somewhat obtuse. The particulars to the allegation stated that the Viterra Parties relied on all the terms of the Confidentiality Deed pleaded. In the Viterra Parties' submissions, it was contended

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4144 Ibid, 239.8.

4145 Ibid, 241.1; quoted in *RCR Energy Pty Ltd v WTE Co-Generation Pty Ltd* [2017] VSCA 50, [61] (Weinberg, Whelan and Santamaria JJA).

4146 See *RCR Energy Pty Ltd v WTE Co-Generation Pty Ltd* [2017] VSCA 50, [62] (Weinberg, Whelan and Santamaria JJA); *Futuretronics International Pty Ltd v Gadzhis* [1992] VR 217, 239.1 (Ormiston J). In both decisions it was made clear that this issue remained a matter of controversy.

4147 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 322 [35] (French CJ).

that the Confidentiality Deed Representations were made by Cargill, Inc entering into the Confidentiality Deed and agreeing to its terms, "particularly … clause 8,[4148] as further outlined in Issue 87". The submissions in respect of issue 87 only referred to clause 8.3.

4738 In short, there was no clear allegation or submission made on how it was contended that Cargill, Inc represented it would not rely on the Confidential Information. In any event, there was nothing contained in clause 8 or any other provision of the Confidentiality Deed that could have given rise to the alleged prohibition, much less any representation to that effect.[4149] Leaving aside the commercial impracticality of such a prohibition in the confidentiality regime created by Glencore, which imposed significant limitations on Cargill's access to relevant information beyond that provided by the Viterra Parties, clause 8.3(a) expressly contemplated such reliance. For Cargill, Inc to make its own assessment of the Confidential Information and to conclude it was satisfactory, it would necessarily have had to place some reliance on its contents. The fact that the Confidentiality Deed provided in clause 8.3(b) that forecasts or estimates may not prove to be correct or be achieved only touched upon some aspects of the use or potential use of the historical information underlying such forecasts or estimates. Further, the requirement that Cargill, Inc rely solely on its own investigations and analysis did not shut out reliance on the underlying information. Quite the contrary, such information would have been contemplated to have been the very focus of much of the foreshadowed investigations and analysis. Furthermore, the investigations and analysis were in a context where the only possible source of information from which Joe White's historical performance could be derived was the Confidential Information.

4739 Therefore, leaving aside the issue of whether a representation could be made by the execution of the Confidentiality Deed, there was simply no basis for any implied representation to the effect of the Second Confidentiality Deed Representation.

4148 See par 590 above.

4149 See par 4670 above.

X.111 Were the Confidentiality Deed Representations made in trade or commerce within the meaning of section 18 of the Australian Consumer Law?

4740 The Cargill Parties conceded that, if the Confidentiality Deed Representations were made, then they were made in trade or commerce.

X.112 Did Viterra rely upon the Confidentiality Deed Representations in entering into the Acquisition Agreement?

4741 As it has been assumed that the First Confidentiality Deed Representation was made, this issue will be addressed on the basis of this assumption. The Viterra Parties led no oral evidence from any witness to suggest that Viterra relied upon the Confidentiality Deed Representations. Accordingly, this issue fell to be determined based on the existence of the Confidentiality Deed itself, and the context in which it was executed as part of the sale process. Nothing stated by Cargill subsequently concerning what it was relying upon,[4150] suggested that Cargill was doing anything other than acting in accordance with clause 8.3(c). Further, the Confidentiality Deed remained on foot at the time the Acquisition Agreement was executed.

4742 The legal principles relevant to causation are referred to above.[4151] In the Defence, the Viterra Parties alleged Viterra entered into the Acquisition Agreement "in reliance upon" the Confidentiality Deed Representations.

4743 At the commencement of the sale process, the provision of the Confidential Information was predicated on Cargill, Inc's acceding to the terms of the Confidentiality Deed.[4152] The inclusion of a clause such as clause 8.3(c) is standard commercial practice in large acquisitions. There were good commercial reasons for including such a clause, including that it limited, or attempted to limit, the scope of responsibility of possible sellers in the context of a sale. The fact that the terms of the Confidentiality Deed were a necessary part of the sale process was repeated in writing on numerous occasions. When considering the approach taken by Glencore for and

4150 See issue 107 above.
4151 See issue 20.2 above.
4152 See issue 5 above.

on behalf of the Sellers, there can be no doubt that the Confidential Information would not have been provided, and Cargill would not have been able to participate in the sale process, unless Cargill, Inc had executed the Confidentiality Deed and agreed to its terms. Further, the fact that there may have been a host of other matters that also contributed to Viterra's decision did not preclude a finding of reliance.[4153]

4744 In summary, the Confidentiality Deed was an integral part of the process. Its execution by Cargill, Inc was an essential step in allowing Cargill to have access to the Confidential Information and to participate in the bidding process. On this basis it must be inferred that the Viterra Parties relied upon the undertakings given by Cargill, Inc, including pursuant to clause 8.3(c), at all relevant times in determining Cargill Australia was an appropriate prospective purchaser, and the purchaser with whom the Sellers were willing to enter into the Acquisition Agreement.[4154] It follows that, on the assumption that the First Confidentiality Deed Representation was made, it would have formed part of what was relied upon by Viterra in entering into the Acquisition Agreement.

X.113 If the Confidentiality Deed Representations were representations with respect to future matters, did Cargill, Inc have reasonable grounds for making them?

4745 This issue was framed on the basis of the allegation that 2 representations were made comprising the Confidentiality Deed Representations. As it has been found that the Second Confidentiality Deed Representation was not made, this issue will be confined to the First Confidentiality Deed Representation, but only on the basis that it has been assumed it was made.

X.113.1 Submissions

4746 The Viterra Parties' primary position was that the Confidentiality Deed Representations were not representations as to a future matter. They submitted they

4153 See par 3153 above.
4154 See pars 3154-3157 above.

were statements of present intention. Alternatively, they contended that if they were representations as to future matters, Cargill, Inc had failed to establish reasonable grounds on the basis that Cargill, Inc did not adduce any evidence of reasonable grounds.

4747 The word "will", its textual placement in clause 8.3(c), and the fact that it was agreed and acknowledged before the Confidential Information was available (and therefore related only to a forthcoming event of reliance), connoted a concept of future conduct. The definition of "will" in the Macquarie Dictionary includes "indicating future likelihood".[4155] Further, clause 8.3(c) read in the wider context of clause 8.3 was an immediate undertaking, which took effect once the Confidentiality Deed was executed. The prelude to clause 8.3(c) conveyed a statement of present intention. Upon execution of the Confidentiality Deed, Cargill, Inc "agree[d] and acknowledge[d]" to comply with the obligations set out in clause 8.3 both presently and on an ongoing basis.

4748 The Cargill Parties addressed both limbs of the Viterra Parties' submissions. They contended that on either basis there was no evidence of any intention of Cargill to do anything other than make its own assessment, and to rely on its own investigations and analysis. They contended the evidence demonstrated that that was what Cargill actually did.

X.113.2 If with respect to future matters, Cargill, Inc had reasonable grounds

4749 As a preliminary point, the Viterra Parties' submission that there was no evidence of reasonable grounds was misplaced. Hawthorne, the person who executed on behalf of Cargill, Inc, gave evidence that he read and understood the terms of the Confidentiality Deed. There was no suggestion that Hawthorne's understanding of the terms was incorrect. Although the subsequent conduct was not determinative of the issue, it was instructive that Cargill did in fact engage in its own investigations and analysis, and made its own very detailed assessment of the Confidential

4155 *Macquarie Dictionary* (8th ed, 2020) "will" (v, def 1).

Information. This evidence from the person who executed the Confidentiality Deed on behalf of Cargill, Inc (and therefore Cargill Australia) demonstrated a proper understanding of the obligations, which was supported by actions in 2013 entirely consistent with the acknowledgements contained in the clause. Further, Hawthorne was not alone in his understanding about Cargill being required to conduct its own investigations.[4156]

4750 On the basis that the First Confidentiality Deed Representation was a representation as to the future, section 4 of the Australian Consumer Law reads as follows:[4157]

> (1) If:
>
> (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
>
> (b) the person does not have reasonable grounds for making the representation;
>
> the representation is taken, for the purposes of this Schedule, to be misleading.

4751 Pursuant to this provision, it may be deemed that the First Confidentiality Deed Representation was misleading if there was no evidence adduced by the representor to the contrary.[4158] However, for the reasons outlined above, to the extent that Cargill, Inc made any representation as to a future matter, it had reasonable grounds for doing so.[4159] For completeness, subsequent events demonstrated that Cargill did not breach clause 8.3(c).

4156 See, for example, pars 472, 554, 643, 660, 743 above. See also par 1845 above.

4157 See also generally *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217, where Ormiston J considered the scope of s 10A of the *Fair Trading Act 1985* (Vic), the equivalent of which was at that time s 51A of the *Trade Practices Act*. Section 51A was the predecessor of s 4 of the Australian Consumer Law: see Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), [2.22], [6.7].

4158 Australian Consumer Law, s 4(2) and (3)(b).

4159 As to proving whether there were reasonable grounds, the representor faces an evidentiary, as opposed to legal, burden. In other words, the representor can adduce evidence to demonstrate a genuine intention to perform or an ability to perform, or both, which will displace the presumption, but if evidence on the issue is led then ultimately it is for the court to consider whether the representation was misleading on the balance of probabilities: *McGrath v Australian Naturalcare Products Pty Ltd* (2008) 165 FCR 230, 242 [44] (Emmett J), 283 [192] (Allsop J).

X.113.3 Conclusion

4752 The contractual promise (in the form of the First Confidentiality Deed Representation assumed to have been given) was not inaccurate at the time it was made. Further, there was no probative evidence Cargill had any intention of breaching that clause.

X.114 Were the Confidentiality Deed Representations misleading or deceptive or likely to mislead or deceive and did Cargill, Inc thereby engage in misleading or deceptive conduct in contravention of section 18 of the Australian Consumer Law?

4753 The negative answer to this question is already apparent from issue 113 above. However, some further observations should be made.

4754 Whether or not the Confidentiality Deed Representations were made, the manner in which the Viterra Parties pleaded this part of their case was somewhat deficient. There was no elaboration as to how it was alleged the Confidentiality Deed Representations were said to be misleading or deceptive. Instead the Viterra Parties confined themselves to: (1) referring to the allegations in the Statement of Claim; (2) noting that the Viterra Parties denied the allegations; (3) alleging the execution of the Confidentiality Deed on 2 occasions and pleading its terms; (4) referring to Cargill Australia being a Representative of Cargill, Inc and the Viterra entities being Representatives of Glencore; (5) alleging that the Confidentiality Deed Representations were made in trade or commerce; (6) alleging that the Acquisition Agreement was entered into in reliance upon the Confidentiality Deed Representations; (7) alleging the Confidentiality Deed Representations were misleading or deceptive (without saying how); (8) alternatively to (7), alleging that if the Confidentiality Deed Representations were representations as to future matters, they were made without Cargill, Inc having reasonable grounds to do so and Cargill, Inc had therefore engaged in conduct that was misleading or deceptive or likely to mislead or deceive. In other words, there was no positive allegation as to why it was

said that the alleged conduct contravened the statutory prohibition.[4160]

4755 Even if it had been established that the First Confidentiality Deed Representation had been made by reason of the words in clause 8.3(c) viewed in the broader context and that the representation turned out to be incorrect because clause 8.3(c) had not been complied with, "[t]he non-fulfilment of a promise when the time for performance arrives does not of itself establish that the promisor did not intend to perform it when it was made or that the promisor's intention lacked any, or any adequate, foundation".[4161] Therefore, the precise basis on which it was said that Cargill, Inc had contravened section 18 was far from clear.[4162] In any event, for the reasons set out in issue 113 above, I am not satisfied that Cargill, Inc engaged in any misleading or deceptive conduct by reason of the undertaking given in the form of clause 8.3.

4756 Some further observations should also be made about the surrounding circumstances. Considering the relevant circumstances objectively, it would have made little commercial sense for Cargill not to make its own assessment of the information provided and to form its own view as to whether it was satisfied with it based on its own independent enquiries and analysis. There was no probative evidence to suggest Cargill had any other intention in May 2013 (or at any other time). Further, Cargill did conduct its own investigations and analysis, which was made clear in submitting the First Final Bid.[4163] This and other evidence also indicated that Cargill relied on its own investigations and analysis.

4757 Finally, for reasons discussed elsewhere,[4164] relying solely on Cargill, Inc's investigations and analysis did not remove the need for due consideration of, and the taking into account of, the underlying information contained in the Confidential

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4160 While this might have been acceptable if the allegations had been made based solely on the Confidentiality Deed Representations being with respect to a future matter, that was not how the matter was pleaded.

4161 *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, 88.6 (Bowen CJ, Lockhart and Fitzgerald JJ). See also *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 649 [13] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

4162 In making this observation, issues relating to the onus of proof have not been overlooked: see the Australian Consumer Law, s 4(3)(b). Further, the primary position put by the Viterra Parties was that the Confidentiality Deed Representations were *not* representations as to future matters.

4163 See par 976 above.

4164 See issue 105 above.

Information as it formed a necessary part of the analysis that it was contemplated that Cargill would engage in.

X.115 What, if any, damages or other relief is Glencore and/or Viterra entitled to as a consequence?

4758 This issue does not arise.

X.116 Are Glencore and/or Viterra estopped from maintaining a claim against Cargill, Inc based upon the Confidentiality Deed Representations?

4759 This issue does not arise.

X.117 If Cargill Australia is held to have engaged in misleading or deceptive conduct by:

(1) Making the Confidentiality Deed Representations; and/or
(2) Making the No Reliance Representations,

was Cargill, Inc involved in that misleading or deceptive conduct, within the meaning of section 2(1) of the Australian Consumer Law?

4760 This issue does not arise in relation to the Confidentiality Deed Representations. Although strictly the issue does arise concerning the No Reliance Representations, as it has been found that those representations did not cause any loss as claimed, it is unnecessary to consider this issue further.

X.118 What, if any, damages or other relief is Glencore and/or Viterra entitled to as a consequence?

4761 This issue does not arise.

X.119 Are Glencore and/or Viterra estopped from maintaining a claim against Cargill, Inc based upon its alleged involvement in any misleading or deceptive conduct by Cargill Australia?

4762 This issue does not arise.

X.120 If Glencore and/or Viterra have suffered loss as a result of any

contraventions by Cargill, Inc of section 18 of the Australian Consumer Law, has Glencore and/or Viterra suffered that loss partly as a result of their failure to take reasonable care and ought their recoverable loss be reduced?

4763 This issue does not arise, but see issue 80 above in relation to the failure of Glencore and Viterra to take reasonable care.

X.121 Are Glencore and/or Viterra's claims against Cargill, Inc for contravention of section 18 of the Australian Consumer Law apportionable claims within the meaning of section 87CB(1) of the *Competition and Consumer Act*? If so, are Cargill, Inc, Hughes, Stewart, Youil, Wicks, Argent, Fitzgerald, Rees and/or Mattiske concurrent wrongdoers? If so, what proportion of the damage or loss claimed by Glencore and/or Viterra does the court consider just for each party to bear?

4764 This issue does not arise.

X.122 Were the No Reliance Representations incorrect or misleading?

4765 As has been found above, Cargill Australia conveyed the No Reliance Representations by clauses 13.4(a) and (d) of the Acquisition Agreement,[4165] and those representations were incorrect and misleading or deceptive within the meaning of section 18 of the Australian Consumer Law.[4166]

X.123 Is Cargill, Inc required by reason of clause 20.3(a)(iv) of the Acquisition Agreement to indemnify Viterra against any liability arising as a consequence of the No Reliance Representations?

4766 By the Third Party Claim, the Viterra Parties pleaded that Cargill, Inc was required by clause 20.3(a)(iv) of the Acquisition Agreement to indemnify Viterra against any liability arising as a consequence of the No Reliance Representations. Clause 20.3(a)(iv) relevantly set out that Cargill, Inc indemnified Viterra against any liability

4165 See issue 95 above.
4166 See issue 98 above.

or loss arising, and any reasonable costs it incurred, if a representation or warranty by Cargill Australia in the Transaction Documents was found to be incorrect or misleading when made or taken to be made.[4167]

4767 This claim must fail for the following reasons.

4768 *First*, the similar basis upon which the Viterra Parties claimed loss in their counterclaim against Cargill Australia has already been rejected. Paragraph 40 of the Third Party Claim against Cargill, Inc pleaded that by clause 20.3(a)(iv) of the Acquisition Agreement and the existence of the No Reliance Representations, Cargill, Inc was required to indemnify Viterra against any liability for damages and costs that were found contrary to the Viterra Parties' case, including costs reasonably incurred by Viterra, arising as a consequence of the No Reliance Representations being incorrect or misleading.

4769 This basis was materially similar to the loss claimed by paragraph 126 of the counterclaim, which characterised the loss suffered as a result of the No Reliance Representations against Cargill Australia as Viterra's liability for damages and costs which, contrary to the Viterra Parties' case, Viterra would be held to have to Cargill Australia, including the costs of the proceeding. For reasons outlined above,[4168] that claim has been rejected.

4770 Specifically, the relief sought would place Viterra in the position it would have been in if the Acquisition had proceeded, but Cargill Australia had not brought the proceeding. There was dissonance between this result and the case put by the Viterra Parties, and accepted, whereby Viterra would not have entered into the Acquisition Agreement had it known the No Reliance Representations were misleading. Therefore, to allow the present measure of loss to be claimed by way of "indemnity" would be to accept a counterfactual where, had the Viterra Parties still owned Joe White, they could have sold it for $420 million with no exposure for misleading or deceptive conduct to any prospective purchasers. This counterfactual has been found

4167 See par 1032 above.
4168 See pars 4590, 4592 above.

to be inappropriate and not a scenario remotely open on the facts. As the Viterra Parties have not advanced any alternate measure of compensation, this claim must be rejected.

4771 *Secondly*, clause 20.3(a)(iv) provided that Viterra was indemnified against any liability or loss *arising from* any representation or warranty by Cargill Australia in the transaction documents which was found to be incorrect or misleading. The Cargill Parties correctly submitted that Viterra's liability in this proceeding did not *arise from* the No Reliance Representations, but rather from Viterra's own conduct. It follows that Viterra's loss is directly attributable to its own misleading or deceptive conduct and misrepresentations, without which this proceeding would not have been brought.

4772 In conclusion, clause 20.3(a)(iv) cannot be used to indemnify Viterra for any liability or costs it has incurred by this proceeding.

4773 Given this finding, it is not strictly necessary to consider whether, if the indemnity was to have the effect claimed by the Viterra Parties, it would also be unenforceable as contrary to public policy. However, if it had been found that the indemnity contained in clause 20.3(a)(iv) was enlivened by Cargill Australia's conduct in making the No Reliance Representations, then it would also have been found in the particular circumstances of this case that the indemnity was unenforceable.[4169]

X.124 Prior to entry into the Acquisition Agreement, did Joe White represent to Glencore or Viterra, or both, that:

(1) the Information Memorandum Statements were true and correct;

(2) the Financial and Operational Information was true and correct;

(3) the Operations Call Statements were true and correct;

(4) the Commercial Call Statements were true and correct;

(5) the Management Presentation Statements were true and correct;

(6) the Undisclosed Matters did not exist; and/or

(7) the Warranties (being Warranties 4.2(a)-(c), 6.1(e), 7.3, 9.2, 12(a)-(c),

4169 See issue 144 below.

13.4, and 17(a) of the Acquisition Agreement) were true and correct? (Collectively, "the Joe White Representations".)

4774 For reasons discussed elsewhere, the representations comprising (1) to (7) above have been found, in most respects, to have been made.[4170]

X.124.1 Any representations made as alleged not made by Joe White

4775 The relevant representations were not made by Joe White. Quite simply, to the extent they were involved in them being made, the Third Party Individuals made the representations above in the course of their employment by Viterra Ltd, and participated either at the direction or request of Glencore or Viterra, or both, for the purposes of Viterra selling the issued capital in Joe White and related assets. Further, to the extent they were made by the Third Party Individuals themselves, they were made in that capacity and not on behalf of Joe White.[4171]

4776 The Viterra Parties contended that the Third Party Individuals had roles within Joe White and therefore their conduct could be attributed to Joe White. However, this argument failed to grapple properly with the fact that, to the varying degrees to which they were involved in the sale process, the Third Party Individuals' conduct was occurring in the context of each individual assisting Glencore and Viterra in the sale of Joe White. In other words, in providing such assistance, the Third Party Individuals were acting outside of their usual respective roles for Viterra Ltd as Joe White executives within the Joe White Business insofar as they were performing services or related activities outside the usual conduct of the Joe White Business.[4172]

4777 Given this issue arose in the context of the Australian Consumer Law, the statutory

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4170 In respect of the representations comprising the Information Memorandum Statements, see issue 1; the Financial and Operational Performance Representations, see issue 15; the Operations Call Statements, see issue 2; the Commercial Call Statements, see issue 3; the Management Presentation Statements, see issue 4; and the Undisclosed Matters, see issue 10. The representations alleged to have been made as part of the Warranty verification process have not been found to have been made, see issue 125.6 below.

4171 After Viterra acquired Joe White, each Third Party Individual was a party to a contract of service with Viterra Ltd: see issues 136, 137 below. These contracts and other employment documents demonstrated each Third Party Individual was treated as a Viterra employee; for example, position descriptions for each of Stewart and Argent placed them as "a valued member of the Viterra team". See also par 121 above.

4172 See also par 483 above.

principles of attribution were relevant. Section 139B(2) of the *Competition and Consumer Act* relevantly states:[4173]

> Any conduct engaged in on behalf of a body corporate:
>
> (a) by a director, employee or agent of the body corporate within the scope of the actual or apparent authority of the director, employee or agent;
>
> …
>
> is taken … to have been engaged in also by the body corporate.

4778 Statutory attribution under this provision is considered at length in issue 18 above. Although considering this issue with respect to the Third Party Individuals crosses into the territory of issue 125 below, it is convenient to address this briefly to demonstrate why it was not Joe White that made the representations in question.

4779 The Third Party Individuals, as employees of Viterra Ltd, were engaged in conduct on behalf of Glencore or Viterra, or both. This was done at the direction of Viterra Ltd, and within the scope of their actual authority as given by Viterra Ltd.[4174] Objectively, the representations were made for the purposes associated with enabling the sale of the shares in Joe White (owned by Viterra Malt) and the assets used in the Joe White Business (owned by Viterra Operations and Viterra Ltd). Further, the Third Party Individuals made the representations in the course of Viterra's affairs, again being the selling of the shares in Joe White and related assets used in the Joe White Business.[4175] It was no part of Joe White's usual operations or affairs to be selling its issued shares owned by Viterra Malt, or assets it did not own.

4780 In addition, in relation to the requirement in section 139B(2)(a) that the conduct in question fell within the scope of authority imparted on the Third Party Individuals (whether actual, and express or implied, or apparent),[4176] Hughes and Argent were subject to a retention program with Glencore or Viterra.[4177] Thus, they were furnished

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4173 See par 3077 above for the provision set out in full.
4174 See pars 3080-3081 above.
4175 See pars 3083, 3085 above.
4176 See pars 3087, 3090 above.
4177 See par 1876 above for an excerpt of Hughes' retention letter.

with actual authority on the further basis that they were specifically retained by Viterra (with Glencore's express approval) to be involved in the sale of Joe White to "assist in divesting the [Joe White Business] and ensuring that operations [continued] in a professional and efficient manner".[4178] The entitlement to a retention bonus to be paid by Viterra upon the sale of Joe White was in recognition of their work in assisting Glencore and Viterra with the divestment of Joe White. Further, the final amount and timing of the bonus payment was left entirely to Viterra's (and therefore presumably Glencore's) discretion.[4179]

4781 Furthermore, the work performed by Hughes and Argent in preparing Joe White for sale was largely directed and managed by representatives of Glencore or Viterra.[4180] In some respects, this direction and management was to a great level of detail.

4782 In relation to Youil, Wicks and Stewart, to the extent of their involvement in the Joe White sale, those employees acted under direction from Hughes and, more generally, Viterra.[4181] Indeed, their respective contracts of service contained a "reporting" clause, which stated that "[t]he employee shall report to and be directly responsible to the Executive Manager, Malt, Gary Hughes", and Hughes was, up until December 2012, a director of Viterra, and thereafter remained a Viterra executive until Completion. Although there was no formal arrangement in place for Youil, Wicks or Stewart's role in the sale process, their involvement in stages of the sale process to varying degrees up to Completion was at the direction of Viterra, with the approval of Glencore.[4182] Finally, there was simply no evidence that any of Youil, Wicks or Stewart conducted themselves for a purpose other than as directed by Hughes or

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4178 See par 368 above.

4179 Although it was stated this would be no less than 3 months' and no more than 6 months' pay.

4180 See, for example, pars 470, 492-493, 507, 543 above in relation to the Information Memorandum, and pars 709, 2175-2179 above in relation to the Management Presentation and the Management Presentation Memorandum. Furthermore, key documents such as the Information Memorandum and the Management Presentation Memorandum were presented with the name or logo of Glencore, and these 2 documents were finalised by others (including Mattiske and Fitzgerald) in addition to Hughes and Argent: see pars 470, 711 above.

4181 See, for example, in relation to Stewart's position as a Viterra Ltd employee, pars 161, 167-168, 1104 above.

4182 See, for example, pars 2161-2162 above in respect of Youil. Further, the fact that Youil, Wicks and Stewart were involved in the Warranty verification process was also indicative of their role in assisting Glencore and Viterra with the sale: see issue 125.6 below.

Viterra for the overall purpose of selling Joe White.

4783 Accordingly, to the limited extent it was alleged Youil, Wicks and Stewart were involved, they were so involved as representatives of Viterra and perhaps also Glencore, but not of Joe White. It follows that any representations they might have made could not be attributed to Joe White.

4784 Speaking generally, although not determinative to the issue of establishing statutory attribution, it was significant that any benefit to be derived from the involvement of the Third Party Individuals in the sale process was to be derived by Viterra and Glencore, not Joe White.

4785 The Viterra Parties also made a very general submission that in order to determine whether Joe White made the Joe White Representations, Joe White's conduct needed to be viewed as a whole. In submitting that all statements should be considered together, they referred specifically to the Warranty verification process. In so doing, they submitted any deficiencies in that process needed to be considered alongside the conduct of Joe White as a whole in making the other statements comprising the Joe White Representations. While it was unquestionable that there were significant deficiencies in the Warranty verification process,[4183] this general submission did not affect the fundamental underlying circumstances that the conduct in question that was engaged in by the Third Party Individuals was done for, and at the request of, Glencore and Viterra in their positions as Viterra Ltd employees.

X.124.2 The Viterra Parties' submission suggesting murkiness

4786 Succinctly, to adopt the words of King, "[i]n any business you are selling you need the incumbent management to sell the business *for you*" (emphasis added). Although King's evidence was that he believed Hughes and Argent were making the representations that they did at the Management Presentation in their capacity as Joe White executives, that was an overly simplistic view. The knowledge they had was because of their role as Joe White executives (and Viterra Malt executives), but in

4183 See issue 125.6 below.

making representations about the Joe White Business as set out in the Management Presentation Memorandum and more generally, they were not acting in that capacity, but rather were involved as employees of Viterra Ltd, at the direction of Viterra and in pursuit of Viterra's interests. No labelling of Hughes and Argent as "Joe White management" (which they plainly were) altered this fact.

4787 An exchange that took place during closing submissions exposed the artificiality the Viterra Parties sought to impose on the situation, which undoubtedly was done in order to seek to distance themselves from what was represented and to lay the blame at the feet of Joe White and the Third Party Individuals. It was submitted by the Viterra Parties that Glencore controlled the sale process and was not familiar with the malting industry. In the same breath, it had to be conceded that Viterra was so familiar. When it was suggested that Viterra also controlled aspects of the sale process and that it was being performed by Viterra's officers, this was rejected on the basis that those involved were Joe White's officers. However, when it was raised by way of example that the Warranty verification process was being conducted by Viterra's in-house counsel, Wilson-Smith, in speaking to Viterra Ltd employees, it was then conceded that there was a "mixture perhaps". After then suggesting that the Third Party Individuals were "in 1 sense Viterra employees and in another sense were Joe White … employees",[4184] it was further conceded that Wilson-Smith was talking to Viterra employees. It was then submitted the position was a bit murky.

4788 With respect, any murkiness arose because of the artificial construct that was sought to be created by the Viterra Parties to distance themselves from the fact that, to the extent that Viterra Ltd employees were involved in the sale process, they were involved because they had been directed or asked to be so involved by Glencore and Viterra. Further, they were so directed or asked because of their knowledge of running the Joe White Business (treated as a business unit of Viterra for a number of years), but that fact did not make their conduct in responding to the directions or requests in the manner instructed conduct that was attributable to Joe White.

4184 In fact, they were not "Joe White employees", but were only employed by Viterra Ltd.

4789 But the matter did not rest there. Subsequently, the Viterra Parties submitted that their primary position was Wilson-Smith was acting for Glencore, and the Third Party Individuals were acting for Joe White. Notwithstanding Wilson-Smith's evidence that he provided legal services to the "Viterra Group", it was submitted that in performing the task concerning the Warranty verification process, Wilson-Smith was acting exclusively for Glencore. When this was queried, the submission was made that it was a fact of modern life that "the way large organisations organise themselves" is to have a single treasury company and usually a single human resources company. This was said to be done for tax and other "efficiencies". However, so it was submitted, in analysing the true state of affairs, the court ought to put such matters aside and focus on and identify what and for whom those services were being predominantly provided.

4790 Not surprisingly, a number of counsel for the Third Party Individuals took exception to this later submission on the basis that it was embarrassing. Leaving aside that the position put was inconsistent with what the court had been told 2 days before, it was not the manner in which the case was pleaded in the Third Party Claim.[4185] In short, this was another attempt to characterise the situation in a way that suited the Viterra Parties' case by effectively ignoring or seeking to diminish the significance of some of the material facts before the court (including as pleaded by the Viterra Parties).

X.125 Prior to entry into the Acquisition Agreement, did Hughes, Youil, Wicks, Stewart and/or Argent represent to Glencore and/or Viterra the representations set out below in relation to each of them (collectively defined as "the Joe White Executives' Representations")?

(1) Did Hughes represent to Glencore and/or Viterra that:

(a) the Information Memorandum Statements were true and correct;
(b) the Financial and Operational Information was true and correct;
(c) the Operations Call Statements were true and correct;

4185 In the Third Party Claim, it was alleged that each of the Third Party Individuals represented to both Glencore and Viterra that the Warranties were true and correct, and that both Glencore and Viterra relied upon such representations. This was alleged to have been done by each of them verifying the relevant Warranties in a meeting with Wilson-Smith.

(d) the Commercial Call Statements were true and correct;
(e) the Management Presentation Statements were true and correct;
(f) the Undisclosed Matters did not exist; and/or[4186]
(g) the Warranties (being, in relation to Hughes, Warranties 4.2, 6.1(e), 7.3, 9.2, 12 and 17(a)) were true and correct?

(Collectively, "the Hughes Representations".)

(2) Did Youil represent to Glencore and/or Viterra that:

(a) the Operations Call Statements were true and correct;
(b) the Undisclosed Matters did not exist; and/or
(c) the Warranties (being, in relation to Youil, Warranties 4.2, 7.3, 9.2, 12 and 17(a)) were true and correct?

(Collectively, "the Youil Representations".)

(3) Did Wicks represent to Glencore and/or Viterra that:

(a) the Undisclosed Matters did not exist; and/or
(b) the Warranties (being, in relation to Wicks, Warranties 4.2, 7.3, 9.2, 12 and 17(a)) were true and correct?

(Collectively, "the Wicks Representations".)

(4) Did Stewart represent to Glencore and/or Viterra that:

(a) the Undisclosed Matters did not exist; and/or
(b) the Warranties (being, in relation to Stewart, Warranties 7.3 and 17(a)) were true and correct?

(Collectively, "the Stewart Representations".)

(5) Did Argent represent to Glencore and/or Viterra that:

(a) the Information Memorandum Statements were true and correct;
(b) the Financial and Operational Information was true and correct;
(c) the Commercial Call Statements were true and correct;
(d) the Management Presentation Statements were true and correct;
(e) the Undisclosed Matters did not exist; and/or
(f) the Warranties (being, in relation to Argent, Warranties 4.2, 6.1(e), 7.3, 9.2, 12, 13.4, and 17(a)) were true and correct?

(Collectively, "the Argent Representations".)

X.125.1 The case against each Third Party Individual on this issue

4791 It is important to address the manner in which this part of the case was pleaded against the Third Party Individuals. The relevant allegations were concerned with

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4186 The "and/or" in the framing of this issue did not reflect the pleadings in relation to Hughes or any of the other Third Party Individuals. With respect to each Third Party Individual, the specific representations were pleaded with "and" (and no "/or") appearing after the penultimate allegation: see further par 4797 below.

alleged contraventions of the Australian Consumer Law. Broadly, the Viterra Parties sought to establish that each of the Third Party Individuals engaged in conduct by making various representations, in trade or commerce, that were misleading or deceptive or likely to mislead or deceive.

4792 In alleging the different components for each of the Hughes Representations, the Youil Representations, the Wicks Representations, the Stewart Representations and the Argent Representations, the Viterra Parties adopted various definitions used by Cargill Australia in the Statement of Claim. Some of those definitions, namely the Information Memorandum Statements, the Operations Call Statements, the Commercial Call Statements and the Management Presentation Statements, were cumulative. Other definitions, namely the Financial and Operational Information and the Undisclosed Matters, were defined by reference to "collectively, individually, or in any combination", thereby picking up each matter within the definition.

4793 For the purposes of this and subsequent issues, it is important to identify precisely what these latter 2 terms defined in paragraph 19 of the Statement of Claim.[4187] "Financial and Operational Information" was pleaded to be a reference to information about Joe White's financial and operational performance for the financial years from 2010 to part of the 2013 financial year (to the extent it was disclosed in the Information Memorandum and during the Due Diligence) collectively or in any combination. Although "Undisclosed Matters" was defined to include the matters in paragraph 19 of the Statement of Claim that preceded its definition "collectively, individually or in any combination", this must be understood based on each of the earlier definitions in paragraph 19. "Viterra Practices" was defined cumulatively. Thus, the definition of Undisclosed Matters did not refer to each of the Operational Practices individually, but only holistically,[4188] and on the basis that they were routinely engaged in without informing customers. A like observation applies to the definition of "Viterra Policies",

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4187 See par 1851 above.

4188 This was confirmed during the Cargill Parties' opening, when the Viterra Practices collectively were identified as the "first undisclosed matter".

which was a reference to both documents identified.[4189]

4794 The last substantive matter said to form part of the Undisclosed Matters was Joe White's inability, but for the Viterra Practices, to produce and sell malt in a particular manner. The alleged inability (unless the Viterra Practices were implemented) had 2 limbs. *First*, "in the volumes and to the specifications required by customers", and *secondly*, "in the volumes and for the returns reflected in the Financial and Operational Information". Although they were not expressly linked by "and", the 2 limbs need to be considered together for the purposes related to the definition of the Undisclosed Matters.[4190]

4795 Further, in adopting the definitions from the Statement of Claim, the Viterra Parties did not seek to rely upon individual representations, but rather alleged a series of representations (as set out in the questions as framed above). By this means, it was alleged the representations pleaded cumulatively comprised the conduct forming the basis of the respective claims. No doubt, this was done advisedly in order to seek to encapsulate the allegations made by Cargill Australia against the Viterra Parties in seeking indemnity or contribution from the Third Party Individuals as part of the "pass through" approach to the Third Party Claim.[4191]

4796 Based on the pleadings, the consequence of such an approach would be that it was incumbent upon the Viterra Parties to prove (respectively against the relevant Third Party Individual) each of the components of the Hughes Representations, the Youil Representations, the Wicks Representations, the Stewart Representations and the Argent Representations, to the extent that Cargill Australia proved the corresponding representations against any of the Viterra Parties, in order to make out this part of the Third Party Claim. In other words, in order to establish, for example, as against

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4189 The Viterra Policies together were described in the Cargill Parties' opening as the "second undisclosed matter".

4190 In the Cargill Parties' opening, these 2 limbs were referred to as the "fourth undisclosed matter".

4191 Compare par 53 above. The fact that "and" was intended to be read to have its natural meaning in making these allegations, and not be read as "or" or "and/or", was clear from the repeated use of "and/or" in other parts of the Third Party Claim. If a party chooses to approach a case in such a manner then the court should determine the issues accordingly: compare *Ridd v James Cook University* [2021] HCA 32, [63]-[65] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

Hughes that the Hughes Representations were made, based on the pleadings it would be necessary for the Viterra Parties to prove that Hughes himself represented that all (not just some) of the Information Memorandum Statements were true and correct, as it has been proven by Cargill Australia that all the Information Memorandum Statements were made by the Viterra Parties. Further, because of the matters referred to in the preceding paragraph, in addition to all the Information Memorandum Statements, the Third Party Claim was based on the Viterra Parties proving: (1) Hughes had made representations as to the truth of all of the Financial and Operational Information, all of the Operations Call Statements, all of the Commercial Call Statements and all of the Management Presentation Statements; (2) Hughes represented all of the Undisclosed Matters did not exist (to the extent these statements and matters were established by Cargill Australia); and (3) all of the Warranties alleged to have been verified by Hughes as true and correct were represented by Hughes as such.

4797 However, the matter was somewhat clouded by the way the parties agreed to formulate this issue. By introducing "and/or" at the penultimate level of the question pertaining to each Third Party Individual, the issue as identified for determination did not strictly mirror the pleadings.[4192] The parties had been directed to ensure that the issues for determination faithfully reflected the pleadings, and this use of "and/or" was not raised as an issue during the trial. Accordingly, in construing this issue consistent with the pleadings it must be assumed that "and/or" was inserted because of nature of the definitions of the Financial and Operational Information and of the Undisclosed Matters. Principally, this issue and related issues will be addressed accordingly.[4193]

4798 Before turning to allegations against each of the Third Party Individuals, a further observation should be made. As lead senior counsel for the Viterra Parties properly acknowledged in closing submissions, it was necessary for the Viterra Parties to prove

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4192 See fn 4186 above.

4193 To be clear, to be consistent with the manner in which the Third Party Claim was pleaded, the "and/or" shall be applied to each defined set of representations alleged and as proven by Cargill Australia, rather than each individual representation said to make up each defined set of representations.

the case against each of the Third Party Individuals separately. In other words, it did not follow from the mere fact that Cargill Australia managed to prove that a particular representation was made or a certain state of affairs existed that such a circumstance could simply be "passed through" to each of the Third Party Individuals. The specific allegations made against each Third Party Individual needed to be established.

X.125.2 Hughes

4799 It has been found that Hughes agreed to assist, and did in fact assist, Glencore and Viterra in the sale of the shares in Joe White and some related assets.[4194] Before turning to each of the matters alleged to comprise the Hughes Representations, an all-encompassing submission of Hughes' must be addressed.

4800 Hughes alleged that Glencore and Viterra knew and were aware of, or should have been aware of, the Viterra Practices prior to entry into the Acquisition Agreement by reason of the knowledge of a large number of individuals at Viterra. These persons included Fitzgerald, Rees, Mattiske, Ross, Malecha, Gordon, Ward Ast (head of finance of Viterra and a former director of Joe White from 28 September 2010 to 23 March 2012),[4195] Dean McQueen (executive manager of Viterra Australia's grain division and a former director of Joe White from 13 December 2011 to 17 December 2012),[4196] Simon Stone (manager of transformation consulting Australia and New Zealand of Viterra),[4197] Jones, Mayo Schmidt (president and chief executive officer of Viterra in 2010), Peter Davey (director and executive manager "agriproducts" of Viterra and a former director of Joe White from 14 December 2011 to 17 December 2012), Warren Buck (head of information technology), Wilson, Don Drombolis (general manager operations of Viterra), Rex McLennan (global chief financial officer of Viterra), Steve Berger (global senior vice president of human resources and

4194 See, for example, pars 367-369, 373, 1876-1877 above.

4195 Ward Ast was also a director of Viterra Ltd and Viterra Operations from 4 June 2010 to 23 March 2012, and of Viterra Malt from 28 September 2010 to 23 March 2012.

4196 Dean McQueen was also a director of Viterra Ltd and Viterra Operations from 8 November 2011 to 17 December 2012, and of Viterra Malt from 13 December 2011 to 17 December 2012.

4197 Simon Stone was originally an Accenture consultant retained as part of the Malt Cost Reduction Transformation Project, but then joined Viterra in May 2010.

transformation), Doug Wonnacott (global senior vice president "agriproducts" of Viterra), Karl Gerrand (global senior vice president food processing of Viterra), Merrill Lynch, Roelfs, Walt, Maw, King, Argent, Youil, Stewart, as well as Hughes himself.[4198]

4801 The submissions in support of these allegations referred to a large number of documents connected with the Malt Cost Reduction Transformation Project, a number of which are set out in the facts as stated above. Hughes referred to these documents and submitted that, from Hughes' point of view, he was required by his employer to deliver on the objectives of the Malt Cost Reduction Transformation Project notwithstanding the issues and concerns he had brought to the attention of Viterra "by reason of the 10 August 2010 email".[4199]

4802 While Viterra was responsible for the creation, supervision and implementation of the Malt Cost Reduction Transformation Project as part of a global strategy by Viterra to reduce costs and increase profits, nothing contained in any of the documents referred to by Hughes demonstrated that Hughes informed others at Viterra (not including the Viterra Ltd employees working at Joe White who reported to him) of the existence of the Operational Practices.[4200] The fact that a direction was given to increase the use of off-grade barley, or even that Viterra was informed that customers were being incorrectly told that grade 1 malting barley was being used when it was not, said nothing about the existence of the Operational Practices. It must follow that, to the extent that Hughes sought to establish that others in Viterra senior to him had been informed of the Viterra Practices, Hughes' submissions on this point must be rejected.[4201] That said, Hughes was correct to submit that Viterra knew of the Viterra Practices by reason of his own knowledge, as well as the knowledge of the other Third

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4198 The inclusion of Hughes in this list effectively reflected the acceptance by Hughes that his knowledge was attributable to both Glencore and Viterra for the purposes of the issues in this proceeding.

4199 See pars 162-163 above.

4200 The reference to "other minor changes on the Certificate of Analysis", in the context of the 10 August 2010 email, did not give notice to recipients of that email that Joe White was engaged in the Reporting Practice as it involved far more than that: see par 162 above. See also fn 153 above in relation to the Varieties Practice and the Gibberellic Acid Practice.

4201 See more generally pars 161-166 and fn 793 above.

Party Individuals (except Argent).[4202]

4803 In relation to the submission that Glencore and Viterra should have been aware of the Viterra Practices beyond the knowledge of the individuals referred to in the last sentence of the preceding paragraph, I accept there was some force in this submission insofar as both Glencore (since late 2012) and Viterra (since late 2009) had representatives who were directors of Joe White. Further, it was not possible to quibble with Hughes' general submission that, as a director of Joe White, Mattiske was required to be involved in the company's management and to take all reasonable steps to guide and monitor the Joe White Business. In circumstances where the Viterra Practices were such an integral part of Joe White's operations, it might have been expected that the directors of Joe White, acting consistent with duties imposed upon them by reason of that position, would have gained some knowledge of at least the Operational Practices.[4203] However, this observation is made with considerable circumspection in circumstances where the Viterra Practices were concealed by Hughes and others such that it appeared on the evidence that even Argent, who by all accounts was diligent and hard-working as financial controller, was not aware of the Operational Practices. In particular, in none of the evidence regarding what Hughes, Youil, Wicks or Stewart said about the Viterra Practices in 2013 was there anything to suggest that Argent was aware of them and no submission was made to that effect on their behalf.

4804 In any event, this aspect of Hughes' case was not advanced by consideration of what ought to have been known by Glencore and Viterra by reason of the directorships held over a number of years.[4204] That was because Hughes fully appreciated in 2013 that the existence and implementation of the Viterra Practices was not known by Glencore[4205] and was not generally known within Viterra beyond those Viterra Ltd

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4202 See issues 11, 18, 22 above in relation to Hughes. See also pars 1102-1132, 1276-1313 above in relation to Hughes, Youil, Wicks and Stewart.

4203 See pars 2688, 3281, 4456 above.

4204 Noting also that Fitzgerald was company secretary: see par 114 above.

4205 See par 1281 above. See further par 4877 below.

employees engaged in the operations of Joe White.[4206] Further, for reasons explained above,[4207] it has not been established that, in 2010 or at any time while Gordon was in charge, Hughes properly disclosed to Gordon the existence of the Operational Practices.[4208]

4805 It followed that, in 2013, when Hughes participated in the sale process there was no basis for him to assume that the Viterra Practices were known by Glencore or those representatives of Viterra engaged in that process. Accordingly, it was highly likely that Hughes appreciated that, if he failed to disclose the Viterra Practices as part of the sale process, their existence and implementation would likely have remained unknown by Glencore and the relevant representatives of Viterra. I so find.[4209]

X.125.2.1 Information Memorandum Statements

4806 There was no issue that the Information Memorandum contained the Information Memorandum Statements.[4210]

X.125.2.1.1 The Viterra Parties' submissions

4807 The Viterra Parties made a number of submissions that sought to establish that Hughes represented to Glencore or Viterra, or both, that the Information Memorandum Statements were true and correct. The Viterra Parties noted that "Hughes and Argent" participated in preparation of the Information Memorandum and submitted that because of that participation each of the relevant statements was verified by Hughes or Argent, or largely by both. Additionally, the Viterra Parties submitted that Hughes and Argent were told that the verification of the Information Memorandum meant ensuring the contents were true and correct. Further, the Viterra Parties submitted that King relied on Joe White management to verify the information

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4206 See pars 1255-1256 above. In the interviews conducted by Fitzgerald (with Lindner and Rees) on 23 October 2013, there was no suggestion by any of Hughes, Youil, Wicks or Stewart that Fitzgerald had already been told about the Operational Practices.

4207 See pars 162-166, 1299 above.

4208 See also par 4874 below.

4209 See par 1281 above. See also Hughes' submission querying why he would have disclosed the Viterra Policies to Viterra (par 4871 below), thereby apparently acknowledging that they were not generally known (beyond those aware by reason of the Viterra Policies having been uploaded on Pulse and Hughes having authorised their circulation to Joe White's operational staff).

4210 See par 2146 above.

in the Information Memorandum. Furthermore, the Viterra Parties relied on the fact that when Merrill Lynch emailed the then final version of the Information Memorandum to Hughes, Argent and others, it stated that verification would be undertaken by "management"[4211] and that Hughes and Argent had "primary responsibility" for general business and industry information.

X.125.2.1.2 Hughes' submissions

4808 In addition to the general submissions referred to in the introduction to this sub-issue, Hughes submitted that no representation as alleged was made by him to Glencore or Viterra. He submitted that the whole of the course of conduct involved in the preparation of the Information Memorandum must be considered.[4212] Broadly, Hughes referred to the following.

4809 *First*, that the Information Memorandum was expressly stated to be a document prepared by Glencore and its subsidiaries, not by Hughes, and was drafted by the Viterra Parties, including King, and not by Hughes. *Secondly*, Hughes was asked to verify the Information Memorandum in the context of his employment relationship with Viterra, which it was submitted included the 10 August 2010 emails[4213] and Hughes' belief that the Viterra Parties were aware of the practices prevailing in the commercial malting industry. *Thirdly*, Hughes' role in the preparation and finalisation of the Information Memorandum was limited and subject to the direction and supervision of Glencore employees. *Fourthly*, Hughes noted that the Information Memorandum was drafted in the context of the regime in which Glencore and Viterra disavowed making any representations to Cargill, including that the Viterra Parties were making no representations and taking no responsibility for any omissions in the Information Memorandum. Further, Hughes was a "Discloser" and a "Representative" for the purposes of disclaimers included in the sale process.[4214] Hughes submitted that this demonstrated that comments by Hughes on the Information Memorandum could not be characterised as a representation that the

4211 The Viterra Parties submitted that this was a reference to the Joe White management.
4212 Relying on *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 625 [109] (McHugh J).
4213 See par 162 above.
4214 See par 475 above.

Information Memorandum was true and correct. *Fifthly*, Hughes noted that none of the representatives of Glencore or Viterra gave evidence that they regarded Hughes' conduct as constituting a representation of truth and correctness, which Hughes submitted was a telling factor in relation to the nature and effect of the verification. *Sixthly*, Hughes submitted that the recipients of an email sent on 23 April 2013, which stated Hughes had "been through" the Information Memorandum,[4215] were not from the Viterra Parties and the actual recipients were not called to give evidence. Further, there was no evidence the 23 April 2013 email itself was subsequently forwarded to the Viterra Parties. *Seventhly*, King's evidence was to the effect that he could not recall much about the verification process and that he did not make any enquiries himself about whether there was any statement in the Information Memorandum that required verification or some level of assurance.

X.125.2.1.3 Analysis

4810 The verification process for the Information Memorandum is described above.[4216] Notwithstanding written assurances from Mallesons that "prospectus-type" verification was not required and that Hughes and Argent were not concerned with a process involving "prospectus liability", it was still made clear that the accuracy of the Information Memorandum was to be verified by them.[4217] In short, Hughes was informed that the purpose of the verification process was to "ensure the [Information Memorandum was] accurate by having the relevant person(s) within the business focus on an allocated section and verify the accurateness of that section".[4218] The process was recorded in the verification table, which Hughes was required to sign off on, and did in fact place his initials upon the table for all but 2 of the pleaded statements comprising the Information Memorandum Statements.[4219]

4215 See par 448 above.

4216 See pars 442-452 above.

4217 Every page of the Information Memorandum was allocated to either Hughes or Argent or both (as well as others in relation to a small number of pages), except page 1 which contained the Information Memorandum Disclaimers.

4218 See par 447 above. See also par 446 above.

4219 The remaining Information Memorandum Statements appeared on pages which were not verified by Hughes. The statements Hughes did not verify were, *first*, that over the last 10 years Joe White had undertaken a substantial capital investment program which had created a state-of-the-art

4811 By inserting his initials in the specified parts of the verification table, Hughes represented that the relevant pages of the Information Memorandum were true and correct. The representation was to Glencore and Viterra. Not only had Hughes agreed to assist these entities with the sale process, and did so, but Hughes was instructed to undertake the verification by Mallesons and Merrill Lynch, who were engaged to act in relation to the sale.[4220]

4812 Hughes' submission that he made no representation, because the Information Memorandum was expressly stated to be prepared by Glencore and its subsidiaries and not by Hughes, cannot be accepted. The attribution of the contents of the Information Memorandum more generally did not change the effect of Hughes participating in the preparation of parts of the Information Memorandum, and then initialling the verification table and having it provided to Merrill Lynch. Further, regardless of the vagueness of the evidence concerning the exact scope of Hughes' role in the preparation of the Information Memorandum, it included verifying the accuracy of specified pages of the Information Memorandum, which conduct of itself amounted to making representations as to the truth and accuracy of what had been verified by him.

4813 In relation to the submissions concerning the events in 2010, including the 10 August 2010 emails[4221] and the disquiet in response to the introduction of the Viterra Code,[4222] it was unclear precisely the link Hughes sought to make. No doubt at that time there was some level of disclosure of practices engaged in with respect to the Joe White Business, but the extent of this disclosure was unclear.[4223] In any event, the limited

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manufacturing footprint with high operational efficiency and low future capital needs in the short to medium term. This statement appeared on page 4, which page Hughes did not verify. Pages 8 and 21 were also referred to in the Statement of Claim, but only the reference to a "state-of-the-art manufacturing facility" and a chart setting out historical and forecast capital expenditure (without the alleged statement as to the level of investment) appeared on page 8. The remainder of the statement was only on page 4. *Secondly*, statements of the historical and forecast future operational and financial performance of Joe White appeared on pages 42 and 47, which Hughes did not verify. For completeness, the pages that Argent alone verified were 4, 5, 10, 41-43, 45-49 and 51-55.

4220 See par 367 above.

4221 See pars 162-163 above.

4222 See pars 64, 156-164 above.

4223 In circumstances where Hughes himself would have been in a position to elaborate on this issue and chose not to give evidence, the lack of clarity did not advance his submission: see also par 4802 above.

evidence concerning these historical events could not change the proper characterisation of Hughes' verification of the Information Memorandum as a representation that the statements he verified were true and correct.

4814 Further, to elaborate on Hughes' fourth submission, he relied upon the Viterra Parties' allegations concerning the Sale Process Disclaimers. In particular, Hughes highlighted the contention that, by reason of the Sale Process Disclaimers, Cargill was taken to accept that the Information Memorandum did not purport to contain all necessary information to evaluate the transaction, that the Viterra Parties were under no obligation to disclose various matters, and that there were no consequences for non-disclosure. Hughes submitted that in the context of this regime, his comments on the Information Memorandum could not be characterised as a representation that the Information Memorandum Statements were true and correct.

4815 The existence of disclaimers in the regime that existed as between Cargill (and other prospective purchasers) and the Viterra Parties did not materially change the nature of Hughes' verification of the Information Memorandum for Glencore and Viterra. It formed no part of his role in verifying various parts of the Information Memorandum to review what was stated in the Information Memorandum Disclaimers, and there was nothing in the responses sent to Merrill Lynch to suggest that he did. Hughes chose not to give evidence. Even in the highly unlikely event that he carefully read the Information Memorandum Disclaimers before or at the time of engaging in the verification process, the terms of the Information Memorandum Disclaimers did not alter what Hughes agreed to do as between himself and the Viterra Parties, in his role as a senior executive of Viterra Ltd who had agreed to assist Glencore and Viterra in the sale of the shares in Joe White.[4224]

4816 The written instructions given to Hughes clearly required him to confirm the statements in the relevant section were true and correct by ensuring the relevant information was "factual" and "accurate" and by verifying "the accurateness" of each section. This position was confirmed by the verification table itself, which listed

[4224] See pars 373, 1876-1877 above.

Hughes as the "Verification Party" for each section he verified. The absence of further evidence from representatives of Glencore or Viterra could not alter the proper characterisation of Hughes' written verification, nor the effect of its provision to Merrill Lynch.

4817 Finally, the submission regarding the 23 April 2013 email did not take the matter any further. Although neither the email nor the attachment identified who was responsible for each of the suggested changes,[4225] it was sent to Merrill Lynch on behalf of both Hughes and Argent. Merrill Lynch was charged with the responsibility of co-ordinating the verification process so that the Information Memorandum could be finalised. Additionally, as would be expected, Merrill Lynch promptly informed Glencore that the document then under consideration had been verified and signed off by management.[4226] Following this, the remaining steps were taken to finalise and distribute the Information Memorandum. In these circumstances, it was of no moment that no one from the Viterra Parties gave evidence of having received or relied upon Hughes' response. The evidence demonstrated that the verification process was a step that Glencore required to be completed before dissemination of the Information Memorandum could occur.

4818 In conclusion, the Viterra Parties have established that Hughes represented to them that, to the extent that they were verified by Hughes, the statements contained in the Information Memorandum were true and correct. However, Hughes did not verify all of the Information Memorandum Statements. With respect to the historical financial information and various other financial matters that formed part of the Financial and Operational Information, it was clear that primarily Deloitte, Merrill Lynch and King (with the assistance of Argent) were responsible for collating this information and Argent was responsible for verifying it.[4227] Accordingly, although Hughes verified a significant number of pages of the Information Memorandum, the

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4225 See par 448 above. Further, for this reason these documents did not establish that Hughes or Argent individually were making representations as to the truth or accuracy of the entirety of the Information Memorandum Statements.

4226 An email to this effect was sent to King on 24 April 2013.

4227 See fn 4219 above.

Viterra Parties have not established that Hughes himself represented that all of the Information Memorandum Statements were true and correct.

X.125.2.2 The Financial and Operational Information

4819 The Financial and Operational Information included information disclosed in the Information Memorandum and during the Due Diligence.

X.125.2.2.1 The Viterra Parties' submissions

4820 In the Third Party Claim it was alleged that "Hughes and Argent" provided the Financial and Operational Information by their participation in the preparation and finalisation of the Information Memorandum. It was further alleged that they were responsible for providing, and provided, the Financial and Operational Information to Glencore and Viterra *for disclosure* during the Due Diligence. That is, the particulars of the allegations appeared to be confined to information alleged to have been provided to Glencore and Viterra for the purpose of that information being disclosed by Glencore and Viterra during the Due Diligence. The Viterra Parties submitted that this provision of information during the Due Diligence involved:

(1) Discussions between Bickmore and Argent regarding documents required to be included in the Data Room,[4228] including Bickmore asking Argent if he had spoken with Stewart about documents relevant to fields for which Stewart was responsible,[4229] as well as Argent informing Bickmore that he had "liaised with Hughes in relation to the contents of the Data Room".[4230]

(2) Bickmore's understanding that, in relation to her working list of documents to go into the Data Room, Argent was responsible for co-ordinating document collection within Joe White, and she believed that the documents provided were complete because she trusted that Argent

4228 See par 663 above.

4229 Bickmore's evidence concerning Stewart was of little probative value: see fn 482 above.

4230 In fact, Bickmore's conclusory evidence was that she knew that Argent had discussions with Hughes "and then fed that back to me": see fn 482 above.

would let her know if anything was missing.[4231]

X.125.2.2.2 Hughes' submissions

4821 Broadly, in addition to the submissions made in relation to the Information Memorandum Statements, Hughes submitted that the factual matters relied upon by the Viterra Parties did not establish that Hughes was responsible for providing the Financial and Operational Information for disclosure during the Due Diligence. He contended the Viterra Parties adduced no specific evidence of him providing information in relation to the operational performance of Joe White for disclosure in either the Information Memorandum or during the Due Diligence. Hughes submitted the evidence that was relied upon only went to illustrate his limited role.

X.125.2.2.3 Analysis

4822 Naturally as part of finalising the Information Memorandum, to the extent the statements Hughes verified as accurate were statements that contained the Financial and Operational Information, it must follow that he represented that that information was true and correct. However, there were some deficiencies and limitations with the evidence upon which the Viterra Parties sought to rely in seeking to establish that Hughes represented that *all* the Financial and Operational Information was true and correct.

4823 *First,* to reiterate, significant aspects of the Financial and Operational Information contained in the Information Memorandum were contained on pages that were not verified by Hughes.[4232] Further, to Hughes' knowledge (as it was expressly stated on the verification table that Hughes initialled repeatedly), Argent was given the specific responsibility to verify some of the Information Memorandum Statements. Thus, by reason of the level of dependence placed on Argent in preparing the Information

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4231 Part of Bickmore's evidence on this issue was limited under the *Evidence Act*, s 136, to her state of mind rather than being evidence of the truth of the fact. See also pars 663-667 above.

4232 The pleaded statements of the historical and forecast future operational and financial performance of Joe White alleged in the Statement of Claim, and as repeated by the Viterra Parties in their Third Party Statement of Claim, were extracted from pages 42 and 47 of the Information Memorandum, neither of which were verified by Hughes. For completeness, with respect to most pages in the Information Memorandum that would fall under the description of financial performance, these were verified by Argent and not by Hughes: see fn 4219 above.

Memorandum, including Argent's role in the verification process, Hughes made no representation that the information verified by Argent alone was true and correct.[4233]

4824 *Secondly,* the Statement of Claim identified the Financial and Operational Information as including all financial and operational information disclosed during the Due Diligence. This necessarily included the financial and operational information disclosed in the Management Presentation, the Operations Call and the Commercial Call. On each of these occasions, Merrill Lynch was present. In substance, with some minor exceptions in relation to the Operations Call,[4234] the allegations concerning various statements having been made on these occasions have been established. Further, with the exception of the financial information presented by Argent at the Management Presentation, Hughes either made or was effectively responsible for the making of each relevant representation. To that extent, but not otherwise, Hughes represented to the Viterra Parties that those aspects of the Financial and Operational Information were true and correct.[4235]

4825 *Thirdly,* in relation to the Financial and Operational Information disclosed in the Data Room, the Viterra Parties relied on evidence that Argent told Bickmore that he had "liaised with Hughes in relation to the contents of the Data Room".[4236] The suggestion that Hughes "liaised" with Argent fell significantly short of establishing a representation by Hughes that the Financial and Operational Information, disclosed by inclusion of documents in the Data Room, was true and correct. When the vagueness of this submission was raised in closing submissions, the Viterra Parties submitted the evidence suggested Hughes was accepting some responsibility for the contents of the Data Room, or "perhaps" some responsibility was being thrust upon him. It was then acknowledged the matter could not be taken any further than what the evidence said, noting that neither Hughes nor Argent was called as a witness. Further, the evidence of Bickmore on a number of issues (including this matter) was vague and self-serving. Many of the conclusory statements she made about what

4233 See par 4810 above.
4234 See pars 2155-2156 above.
4235 See par 4847, 4862 below.
4236 See par 4820(1) above.

allegedly had occurred more than 5 years before she gave her evidence, often without the benefit of contemporaneous documents to corroborate her account, were of limited probative value. Furthermore, there was no evidence to indicate that before 4 August 2013 Hughes was ever told what was or was not in the Data Room.

4826 In conclusion, the Viterra Parties have not established that Hughes represented that *all* the Financial and Operational Information was true and correct. However, given the variable way in which the issue was defined, the Viterra Parties have proven that Hughes represented some of the Financial and Operational Information was true and correct through the representations Hughes made to the effect outlined above and below.[4237]

4827 Before leaving this particular topic, it must be noted that it has been determined on a basis which perhaps went beyond the manner in which the allegations were particularised by the Viterra Parties. As noted above,[4238] the Third Party Claim appeared to confine the allegations concerning what occurred during the Due Diligence to the provision of information for disclosure. Consistent with this, the Viterra Parties' submissions only addressed matters in connection with information that was collated for the purposes of the Data Room. The same position was adopted by Hughes. If this more narrow understanding of the issue had been adopted, then the only manner in which it could have been found that Hughes represented that the Financial and Operational Information was true and correct would have been to the extent that Hughes was engaged in verifying the Information Memorandum. In short, there was no basis to find Hughes assumed, or was given, any responsibility by the Viterra Parties for the appropriateness or completeness of the contents of the Data Room.

4237 That is, the Financial and Operational Information was represented to be true and correct by reason of Hughes making the Information Memorandum Statements (to the extent that he did: see par 4818 above), the Operational Call Statements (to the extent that he did: see par 4824 above and par 4838 below), the Commercial Call Statements (see par 4824 above and par 4846 below) and the Management Presentation Statements (to the extent that he did: see par 4824 and pars 4864, 4866 below), but not otherwise.

4238 See par 4820 above.

4828 However, I decided it was appropriate to determine this issue on the broader basis set out above. The meaning of "Financial and Operational Information" in the Statement of Claim, and accordingly adopted in the substantive allegations made in the Third Party Claim,[4239] was not confined to matters related to the compilation of the Data Room. This was not only how the issue was pleaded, but also how the case was run more generally.[4240] As may be seen from the determination of related issues below, ultimately nothing turned on this broader approach being adopted.

X.125.2.3 The Operations Call Statements

4829 The circumstances and content of the Operations Call have been described elsewhere.[4241] It has been established that all but 2 of the statements were made by Hughes or Youil, or both.[4242] That is, it has not been proven that some statements as pleaded were expressly made, namely that "Joe White's plants were sufficient to produce malt to customer specifications", and that in substance after 2 additional storage silos in Sydney had been built there would be sufficient storage at that plant. Otherwise, the allegations concerning the Operations Call have been made out.[4243]

4830 In addition to Hughes and Youil, the Operations Call was attended by Goldman Sachs, Merrill Lynch and De Samblanx. The questions raised were answered by Hughes or Youil, or both.[4244] Hughes and Youil were asked to provide comments on a summary of the call. Hughes confirmed that he was happy with Youil's comments on the summary. The summary was attached to the Acquisition Agreement as annexure E.

X.125.2.3.1 The Viterra Parties' submissions

4831 To establish that Hughes made the representation that the Operations Call Statements were true and correct, the Viterra Parties submitted that, if the statements in the Operations Call were made, they were made by Hughes or Youil, or both. Further, they pointed to Hughes having expressed agreement with the contents of the

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4239 See pars 4791-4796 above and par 5117 below.
4240 See, for example, pars 3541, 3552, 3564, 4824 above.
4241 See pars 865-884 above. See also issue 2 above.
4242 See pars 2151, 2155-2156 above. See also par 4889 below.
4243 See par 2156 above.
4244 See par 873 above.

summary.

X.125.2.3.2 Hughes' submissions

4832 Hughes submitted that his act of confirming that he was happy with the summary did not constitute a representation that the Operations Call Statements were true and correct. *First*, Hughes repeated his submission that the disclaimers made by Glencore and Viterra to Cargill meant it was inconsistent for the Viterra Parties to argue they received unqualified representations from Hughes. *Secondly*, Hughes referred to that fact that he was instructed by Glencore not to provide information that had not been requested or to answer questions that had not been asked. *Thirdly*, Hughes submitted that there was no evidence that he was informed that the notes of the Operations Call would be annexed to the Acquisition Agreement or fall within the definition of "Disclosure Material", or that comments in relation to the accuracy of the notes would be a "verification" of the process. *Fourthly*, Hughes submitted that statements he made during the Operations Call were relevantly communicated only to De Samblanx, and that the representatives of the Viterra Parties (being Merrill Lynch) present on the call did not give evidence. *Fifthly*, Hughes submitted that no evidence was adduced by the Viterra Parties in relation to how they understood or relied on any representation.

X.125.2.3.3 Analysis

4833 It is highly likely that Hughes made each of the statements found to have been made on the Operations Call given that he spoke for 90 to 95 percent of the time.[4245] However, what Hughes himself actually said was not the subject of any evidence. Strictly on the confined question of whether or not Hughes made the representations as alleged, this was of little significance as Hughes reviewed and agreed to the entire contents of the summary.[4246]

4834 The Operations Call occurred between representatives of the Sellers and a potential purchaser in the context of the sale process. In the absence of any instruction to the

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4245 The pleaded statements did not amount to the entirety of what was said on the Operations Call. Therefore, logically it must follow that, although Hughes spoke for 90 to 95 percent of the time, this did not necessarily reflect the precise proportion of the pleaded statements that were made by Hughes.

4246 See pars 4836-4838 below.

contrary, it was implicit in Hughes' instruction to participate in the Operations Call that he should provide information that was true and correct for the following reasons. *First*, Glencore and Viterra were engaged in a substantial commercial sale in providing information to Cargill. *Secondly*, the Operations Call was part of a due diligence by which a potential purchaser was seeking information in order to determine whether to make a significant investment. *Thirdly*, it was a relatively formal process to be conducted in accordance with an agenda, with Merrill Lynch and Goldman Sachs in attendance. *Fourthly*, the process was being managed by Merrill Lynch and King, and there was no indication that either Merrill Lynch or King was intending to provide information to Cargill that was untrue or inaccurate.

4835 Hughes' submission in relation to the disclaimers must be rejected for the reasons discussed above.[4247] Further, Hughes was correct that he was instructed not to provide information that had not been requested in the Q&A Process.[4248] However, this did not carry with it any basis for providing anything other than accurate information; nor did it impact on whether the information that was provided in response to questions asked was true and correct, or whether Hughes represented that this was so. Equally, an express understanding that Hughes and Youil were not to stray from the message Glencore sought to deliver did not convey to Hughes that he was required or permitted to provide information that was not true or accurate.[4249]

4836 In relation to Hughes providing comments on the summary of the Operations Call, both Hughes and Youil were provided with the draft summary and asked to let Merrill Lynch know if they had any comments, in particular in relation to certain highlighted items. Youil responded with an updated version, stating that he had made "some clarifications". Youil specifically asked Hughes whether he had anything to add to Youil's clarifications. Hughes confirmed it was "all good" and he was happy with Youil's comments. The final version of the summary of the Operations Call reflected Youil's amendments as approved by Hughes.

4247 See par 4812 above.
4248 See par 943 above.
4249 See par 872 above.

4837 In essence, Hughes' and Youil's review of the summary was directed towards ensuring the statements it contained were true and correct. This was demonstrated by Youil's comments, which added further detail, made amendments that changed the meaning of the statements and made amendments to the information that had been included. As a result, Youil's comments went further than merely ensuring the summary was an accurate record of what was said. This was demonstrated by the following examples:

(1) A comment left by Youil expressly stated, "This is true".

(2) In relation to Perth, Youil amended a statement that "all blending and storage" would occur at Co-Operative Bulk to state that "the majority of blending" would occur at Joe White and then provided further explanation in relation to blending and packing.

(3) In the draft notes there was a statement that "Sydney – currently in the process of building additional storage silos to increase capacity to over 3kt". This conveyed that storage at the Minto plant was currently less than 3000 metric tonnes. Youil amended this, adding a comment that "actual storage in Minto is 3600 metric tonnes of malt" and stating that storage would be increased to 4,800 tonnes.

4838 Thus, in considering the circumstances as a whole, it has been established that Hughes represented the Operations Call Statements were true and correct (in relation to the Operations Call Statements that Cargill was able to prove were made). Further, in this context, the review and approval with amendments of the summary by Hughes and Youil, and its provision to Merrill Lynch, amounted to a representation not only of what was said during the Operations Call, but also that those statements contained in the summary were true and correct.

4839 All of this said, a further matter must be considered in light of the next issue concerning whether any of the Joe White Executives' Representations were made in

trade or commerce.[4250] In circumstances where Hughes spoke on the Operations Call for 90 to 95 percent of the time, it must be more probable than not that he made each of the Operations Call Statements orally during the Operations Call.[4251] In the context that they were made, for the reasons set out above, Hughes represented both orally and in writing that the Operations Call Statements (to the extent proved) were true and correct.

X.125.2.4 The Commercial Call Statements

4840 The circumstances and content of the Commercial Call are described above.[4252] The Commercial Call was between Hughes, Eden, Viers (and perhaps Engle) and representatives of Merrill Lynch and Goldman Sachs. The Commercial Call Statements were made by Hughes.[4253] Hughes reviewed the minutes of the Commercial Call.

X.125.2.4.1 The Viterra Parties' submissions

4841 The Viterra Parties made brief submissions noting that if the Commercial Call Statements were made in the Commercial Call, they were made by Hughes, and also pointed to Hughes' review of the minutes of the Commercial Call.

X.125.2.4.2 Hughes' submissions

4842 Hughes submitted that he did not represent to the Viterra Parties that the Commercial Call Statements were true and correct. Hughes referred to a number of his submissions in relation to the Operations Call. It is unnecessary to repeat them.

X.125.2.4.3 Analysis

4843 The Commercial Call, like the Operations Call, occurred between representatives of the Sellers and a potential purchaser as part of a sale process. The context of the Commercial Call was materially similar to that of the Operations Call. Therefore, for the reasons stated concerning the Operations Call, the statements made by Hughes in the Commercial Call amounted to a representation to Glencore and Viterra, through

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4250 See issue 126 below.

4251 Even accepting the possibility that Youil may have made 1 or more of the Operations Call Statements, it was more probable than not that Hughes made each of them. In any event, by Hughes allowing any such statement to be made by someone who answered to him and not correcting Youil but continuing with his responses, if that was what occurred, Hughes would have effectively made the statement.

4252 See pars 910-915 above.

4253 See pars 910-914 and issue 3 above.

their adviser Merrill Lynch, that the Commercial Call Statements were true and correct.

4844 Whether or not Hughes himself made the amendments that were made to the summary (the evidence was not clear on this), the review by Hughes of the summary of the Commercial Call amounted to a representation that the statements made in the call were true and correct. The following factors were relevant:

(1) The summary of the Commercial Call was for the purpose of being provided to Merrill Lynch.

(2) The review involved changes to the factual accuracy of the statements, for example, a statement regarding a $25 per tonne margin was changed to a range of $20 to $25 per tonne.

(3) The meaning of some statements was changed, for example, a line that said "Australian Malt commands a price premium…" was replaced with "Efficiencies in the Australian Malt production allow for margin premiums".

4845 While it was possible that such amendments were made merely to reflect accurately what was said, in the overall context of the Due Diligence, it suggested the review was a more meaningful process. In my view, it was relevant that Hughes participated not only in settling this summary, but it was part of a process in which he also gave and conveyed approval of the statements in the Operations Call in the manner that he did.[4254]

4846 Thus, the Commercial Call Statements conveyed both during Hughes' participation in, and by his review and approval to amendments of the summary of, the Commercial Call amounted to representations that the Commercial Call Statements made were true and correct.

4254 See par 4837 above.

X.125.2.5 The Management Presentation Statements

4847 The circumstances of the Management Presentation Statements are described above.[4255] All but 1 of the Management Presentation Statements were recorded in the Management Presentation Memorandum.[4256] The evidence of De Samblanx has been accepted that Hughes made the remaining statement; words to the effect that "whilst Joe White had limited storage capacity, Joe White managed their customers well, and there were no real quality issues".[4257]

4848 In substance, insofar as it related to Hughes, this issue has been addressed in dealing with the allegations concerning the Financial and Operational Information above.[4258] However, as the issues raised were dealt with separately by the parties, the additional submissions on this topic are addressed here.

X.125.2.5.1 The Viterra Parties' submissions

4849 The Viterra Parties submitted that there was overlap in the content of the Management Presentation Statements and the content of the Information Memorandum Statements, and relied on their submissions in respect of the Information Memorandum to the extent of the overlap. The Viterra Parties made a number of further submissions.

4850 *First*, the Viterra Parties submitted that Hughes and Argent were "intimately involved" in making the Management Presentation Statements and in doing so represented to the Viterra Parties that they were true and correct. In seeking to establish this proposition, the Viterra Parties identified a series of 8 emails of which Hughes and Argent were recipients, and in which some of Hughes' and Argent's involvement was evidenced.

4851 *Secondly*, the Viterra Parties pointed to King's evidence that in selling any business it is the management team of the business who are ultimately familiar with the business, and a management presentation is an opportunity for them to convey messages about the business.

4255 See pars 708, 742 above.
4256 See par 2168 above.
4257 See pars 2169-2171 above.
4258 See par 4824 above.

4852 *Thirdly*, the Viterra Parties submitted that the drafting of the Management Presentation Memorandum was run by Merrill Lynch working with Hughes and Argent and contended that Hughes and Argent controlled the content of the slides.

4853 *Fourthly*, the Viterra Parties submitted the Management Presentation was given by Joe White alone. They submitted that Hughes and Argent gave the presentation in the capacity of Joe White management representatives, giving a formal presentation around the Management Presentation Memorandum. They further submitted that "[n]o one from the [Viterra Parties] attended the Management Presentation".

4854 *Fifthly*, the Viterra Parties submitted that Merrill Lynch prepared the summary in consultation with Hughes and Argent, which formed part of the Disclosure Material for the purposes of the Acquisition Agreement.

X.125.2.5.2 Hughes' submissions

4855 Hughes referred to his submissions in relation to the Information Memorandum Statements. In addition, he pointed to a number of further matters.

4856 *First*, he submitted the evidence demonstrated that persons from within the Viterra Parties and their advisers were primarily responsible for preparation of the Management Presentation Memorandum.

4857 *Secondly*, Hughes contended that King accepted that it was Glencore and Merrill Lynch who controlled the direction of the Management Presentation, including that Hughes and Argent had to convey Glencore's messages.

4858 *Thirdly*, it was submitted that, in the slides comprising the Management Presentation Memorandum, it was expressly stated to be a document prepared by Glencore and its subsidiaries and was not a document of Hughes' creation.

4859 *Fourthly*, Hughes submitted that anything said during the Management Presentation was communicated by Hughes or Argent, or both, on behalf of the Viterra Parties to Cargill, and the representatives of the Viterra Parties who attended the Management Presentation (being Merrill Lynch employees) did not give evidence.

4860 *Fifthly*, notes of the Management Presentation were sent by Merrill Lynch to Mallesons (copied to people including Fitzgerald, Hughes and Argent) and the Viterra Parties adduced no evidence in relation to reliance by any person on these notes.

4861 *Sixthly*, in the same vein as the Operations Call submissions, it was submitted there was no evidence Hughes was informed the notes of the Management Presentation would be annexed to the Acquisition Agreement or fall within the definition of "Disclosure Material" in the Acquisition Agreement. Equally, it was put that Hughes was not told any comments in relation to the amendments or accuracy of those notes would be "verification" of the process in which he had been directed to participate.

X.125.2.5.3 Analysis

4862 In relation to the contents of the Management Presentation Memorandum, the process adopted for the drafting was significant.[4259] Some of the contents of the Management Presentation Memorandum were a repetition or an expansion of what had already been stated in the Information Memorandum, which statements had been verified in large part by Hughes or Argent, or both. Further, notwithstanding the initial drafting by Merrill Lynch and then the supervisory and controlling role played by the Viterra Parties and their advisers in producing the Management Presentation Memorandum,[4260] Hughes also played a role. There was no evidence to suggest that he did anything other than generally endorse its contents. However, none of the emails relied upon by the Viterra Parties specifically stated that Hughes was taking responsibility for everything that was said. On the contrary, an email sent by Merrill Lynch on 21 June 2013 specifically identified that it was Argent that was expected to address risk management, a topic that was ultimately presented by Argent and not Hughes.

4863 Conversely, all of the Management Presentation Statements other than those concerning risk management were addressed by Hughes as part of the Management Presentation. In doing so, Hughes, as an employee of Viterra Ltd who had agreed to

4259 See pars 696-697 above.

4260 Similar to the position with respect to the Information Memorandum: see, for example, par 399 above.

assist with the sale of the shares in Joe White, represented to Glencore and Viterra, both initially through King (and perhaps Mattiske),[4261] and through their advisers Merrill Lynch, that the Management Presentation Statements within the area Hughes agreed to present (being statements other than those which Argent presented in the "Financials" section)[4262] were true and correct. Further, what it was that Hughes was and was not representing needed to understood through the prism of how things had been approached in presenting the Joe White Business. There was a clear demarcation between information to be addressed by Hughes (either on his own or together with Argent) and that covered solely by Argent. The manner in which the information contained in the Information Memorandum had been dealt with previously, and the manner in which the Management Presentation was conducted under the supervision of Glencore, demonstrated that the Viterra Parties were looking to Argent, and not to Hughes, to make certain representations in relation to a number of the financial and other matters pertaining to the Joe White Business.

4864 Furthermore, to the extent Hughes was given responsibility for statements made, it was not only Hughes' involvement in the preparation of the document that became the Management Presentation Memorandum that gave rise to the representations being made.[4263] By speaking to the slides when delivering the Management Presentation in the presence of Merrill Lynch, Hughes further represented not only to Cargill but also to the Viterra Parties that the Management Presentation Statements within the area that it had been agreed he would take responsibility for and would present were true and correct.

4865 Similar to the position in relation to the Operations Call and the Commercial Call, it did not matter that Hughes may not have understood the Merrill Lynch summary of what had been presented was intended to be verified or was to form part of the

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4261 See par 699 above. Essentially, this was done by Hughes participating in the rehearsals preceding the Management Presentation by which Hughes indicated his agreement to present those parts of the Management Presentation Memorandum for which he was responsible in the manner that he did.

4262 See pars 728, 733 above.

4263 Although the evidence on this was far from certain, it was highly likely that Hughes indicated to those present at the rehearsals by what he rehearsed that he would in substance convey what was in the relevant parts of the Management Presentation Memorandum. However, any uncertainty in this regard did not enure in light of what occurred at the Management Presentation itself.

Disclosure Material. To establish that representations were made by Hughes to the Viterra Parties in relation to the Management Presentation, it sufficed that a management presentation was part of the sale process and that Hughes (as someone who had agreed to assist Glencore and his employer, Viterra Ltd, in the sale) had agreed to the operational and some financial aspects of the Management Presentation Memorandum, and then gave a presentation in accordance with the substance of its terms.

4866 The oral statement not contained in the Management Presentation Memorandum was made by Hughes in response to a question during the Management Presentation.[4264] The Management Presentation, like the Operations Call and Commercial Call, occurred between representatives of the Sellers and a potential purchaser in the context of the sale process. The position was the same as that for Hughes' statements made in the Operations Call and Commercial Call, namely, the making of this further statement constituted a representation by Hughes to Glencore and Viterra, through their adviser Merrill Lynch, that it was true and correct.

4867 In conclusion, although Hughes made most of the statements covered by this issue, the Viterra Parties have not established Hughes made them all or that he verified them all (as some were made and verified by Argent) and accordingly have not proven he represented the Management Presentation Statements were true and correct.

X.125.2.6 The Undisclosed Matters

X.125.2.6.1 The Viterra Parties' submissions

4868 The Viterra Parties submitted that the Third Party Individuals, including Hughes, represented that the Undisclosed Matters did not exist, based on the following:

(1) The Third Party Individuals did not disclose to the Viterra Parties the Undisclosed Matters in circumstances where there was a reasonable expectation that they would do so.

(2) The circumstances of the verification of the statements in the

4264 See pars 737, 2169-2171, 4847 above.

Information Memorandum, the Financial and Operational Information, the Operations Call, the Commercial Call, the Management Presentation and of the verification of the Warranties were opportunities to convey the existence of the Undisclosed Matters.

(3) Based on the evidence, the Viterra Parties did not know about the existence of the Undisclosed Matters prior to entry into the Acquisition Agreement and the Third Party Individuals had superior knowledge about Joe White's engagement in the Viterra Practices.

X.125.2.6.2 Hughes' submissions

4869 Hughes submitted that a failure to disclose would only give rise to an inference that a fact did not exist if there was a reasonable expectation that if the fact existed it would have been disclosed.[4265] Hughes submitted that this required the Viterra Parties to identify the circumstances that gave rise to a reasonable expectation to disclose.

4870 Hughes submitted that the definition of Undisclosed Matters involved a very broad concept, as it incorporated "routinely". In relation to the allegation that, but for the Viterra Practices Joe White could not produce malt in the volumes and to the specifications required by customers, Hughes referred to the matters disclosed in 2010 to Gordon.[4266] In addition, Hughes relied upon Argent revealing to King on 2 July 2013 that the use of off-grade barley contributed to a component of the malt margin, and that such use was not disclosed to customers.[4267]

4871 In relation to the further allegation that, but for the Viterra Practices Joe White could not produce and sell malt in the volumes and for the returns reflected in the Financial and Operational Information, Hughes submitted that it did not follow from what Hughes disclosed in October 2013 that he must have known of the relevant matters before 4 August 2013. Further, it was submitted there was no reason for Hughes to disclose Joe White's processes when the evidence of what was said in October 2013

4265 See, for example, *Demagogue Pty Ltd v Ramensky* (1993) 39 FCR 31, 32.3 (Black CJ); *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR (Digest) 46-054, 53,195.5 col 1 (French J).

4266 See pars 162-163 above.

4267 See pars 804-805 above.

indicated he believed that Joe White's processes were robust and better than Cargill's theoretical blend approach. Furthermore, Hughes queried why he would have disclosed the Viterra Policies to Viterra when they had been uploaded on Pulse and when he thought it was a sensible process. Insofar as the Reporting Practice contemplated malt being shipped to customers even when results for specifications went beyond 2 standard deviations without disclosing that fact to the customer, Hughes' senior counsel put the question rhetorically, "What is Mr Hughes' involvement in that?". Further, it was submitted that there were only 2 relevant documents signed by Hughes over thousands of contracts, with no explanation as to how supplying malt out of specification would offend a customer's sensibility to the extent a result was more than 2 standard deviations from the specification.

4872 In addition, Hughes referred to that fact that in 2013 he was no longer a board member of Viterra and to his limited role in the sale process. He submitted that he could not have known what had gone on in the broader milieu between Glencore and Cargill when the alleged time for non-disclosure came up. He also contended that he was not told that something that he had disclosed to his employer had not been disclosed to Cargill.

4873 More generally, Hughes pointed out that it was an "all or nothing case on non-disclosure".[4268] Hughes contended that it had to be shown that his state of mind was "all of paragraph 19" of the Statement of Claim, and that if he did not know all of the items pleaded then the case against him was bound to fail. He also referred to the Viterra Parties' submission that the time of the Warranty verification process "in particular" was when Hughes should have disclosed the Undisclosed Matters. In this regard, it was submitted that accordingly this was when it was alleged any disclosure should have occurred.

X.125.2.6.3 Analysis

4874 In considering this issue, the level of disclosure Hughes (or others to his knowledge)

4268 See pars 4791-4796 above.

had previously made to his superiors at Viterra was relevant. As already discussed,[4269] the evidence in relation to the events in 2010 was far from clear. It was of particular significance that the email Gordon sent seeking advice after being informed by Hughes of his version of the issue at the time stated that he understood the malt being delivered was in specification.[4270] In the absence of any evidence from Hughes, it can only be assumed that Hughes either misrepresented the position or, at best, explained it in such a manner that the true nature of the Operational Practices was not exposed in a way that enabled Gordon to properly appreciate the conduct involved.

4875 Further, reliance upon what Argent disclosed to King and others in early July 2013 concerning the undisclosed use of off-grade barley did not assist Hughes' submission that the Undisclosed Matters had been communicated to Glencore and Viterra. As a matter of definition, the Undisclosed Matters did not expressly include non-disclosure in relation to off-grade barley.[4271] As a matter of fact, the use of off-grade barley was disclosed.[4272] In any event, by revealing this information about the use of off-grade barley, Argent did not disclose to King that customer specifications were not being met or that customer contracts were not being complied with. (For the avoidance of doubt, there was no evidence to suggest Argent ever knew of such matters.)

4876 Furthermore, to the extent that Hughes' submissions invited a finding that Hughes was not aware, or not fully aware, of the existence of the Viterra Practices, they must be rejected. Stewart's evidence, regarding both when he first joined Joe White and subsequently,[4273] made it clear Hughes was very conscious of the nature of the conduct involved in the Reporting Practice. Additionally, Hughes' submission that the fact that the Viterra Policies were available on Pulse provided a legitimate reason for not disclosing the Viterra Policies appeared to run counter to any suggestion about any lack of knowledge on his part of the Reporting Practice. Also, contrary to Hughes'

4269 See par 4813 above.
4270 See par 156 above.
4271 See par 1851 above.
4272 See par 926 above.
4273 See pars 73, 168 above.

submission, when the events of October 2013 were viewed in their totality, there could be little doubt that Hughes had a complete understanding of the substance of each of the elements of the Viterra Practices.[4274]

4877 Moreover, Hughes was fully appreciative that Mattiske, who became a director of Joe White and Viterra in December 2012, was not across the details of the Viterra Practices.[4275] He must have had the same appreciation with respect to King, who had no background in malting. Equally, there was nothing to suggest that the other more senior Glencore executives could have had any real understanding of the way in which Joe White operated; in particular, that it engaged in the Viterra Practices.

4878 To put things in context, Hughes must have understood that the Viterra Practices involved seriously inappropriate conduct. Leaving aside the remote possibility that he might have held any (misguided) view that the Reporting Practice could have been justified,[4276] the events of October 2013 starkly exposed Hughes' appreciation that the concealment from customers of the Varieties Practice and the Gibberellic Acid Practice was entirely unsatisfactory, as was the fact. Thus, given the lack of knowledge of the relevant facts by Glencore and Viterra (obviously not including Hughes and some of those Viterra Ltd employees that worked underneath him), objectively, at the very least,[4277] the circumstances gave rise to a reasonable expectation that the Operational Practices would be disclosed to Mattiske and others representing Glencore and

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4274 See, for example, pars 1211-1218, 1279-1288 above. In Hughes' defence, it was pleaded that he was unaware of the full extent of the Viterra Practices. Such an allegation was likely to have been accurate insofar as it seems highly unlikely he could have been aware of every instance when steps were taken in accordance with the Viterra Practices (it is not possible to say so with complete certainty given Hughes did not give evidence). However, any such a lack of knowledge did not alter Hughes' general awareness of the existence of the Viterra Practices, including their routine implementation.

4275 See, for example, par 1281 above in relation to the Varieties Practice. Also the manner in which Hughes reacted to the Cargill 22 October Letter demonstrated that Hughes was conscious that Mattiske was not aware of the Operational Practices. Finally, in Mattiske's cross-examination by Hughes' senior counsel, it was not put to Mattiske that Hughes had ever told Mattiske about the Operational Practices before 22 October 2013.

4276 Although Hughes (like Stewart) sought to justify it in October 2013, it is difficult to perceive objectively how he would have done anything other than make substantially the same sort of concessions that Stewart did: see, for example, pars 168-176 above.

4277 Compare *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 371 [23] (French CJ and Kiefel J).

Viterra.[4278] Such an expectation required disclosure in such a manner so as to properly expose the nature and extent of the existence and implementation of the Operational Practices; that is, that the Viterra Practices were an ongoing part of the operations of the Joe White Business.

4879 In addition, Hughes must have been aware that the Information Memorandum, the contents of which he had assisted in drafting and had been asked to verify substantial parts of, contained patently false statements such as:[4279] (1) Joe White had the ability to produce to a customer's exact specifications; (2) Joe White's business model was focused on delivering high quality products adhering to specific customer requirements; (3) Joe White's business model was focused on ensuring its customers received the highest quality malt to meet their exact specifications and requirements; and (4) once a customer's specific needs had been identified, the procurement function ensured that the appropriate quantity of malting barley was acquired to meet these specifications. In such circumstances, it was incumbent on Hughes to point out these falsehoods, at least at the time of the verification (if not earlier) and before any distribution of the Information Memorandum by the Viterra Parties. Subject to the events being later in time, the same applied to the Management Presentation Statements, at least insofar as they consisted of patently material incorrect information, such as:[4280] (1) Joe White's business model was focused on ensuring customers received the highest quality malt to meet their exact specifications and requirements; (2) in relation to procurement, Joe White selected and had access to high-quality barley that best met customer specifications; and (3) Joe White had a reputation for production uniformity, consistency and the ability to meet exact specifications.[4281]

4880 Whatever Hughes' lack of knowledge of the "broader milieu", he must have known

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4278 This conclusion is expressed on the assumption that the rubric of the Australian Consumer Law applied (see further issue 126 below) and is entirely consistent with the terms of the Hughes/Viterra Contract: see issue 136 below.

4279 Hughes verified each of the statements set out in these examples.

4280 Each of these examples were Management Presentation Statements that Hughes presented orally at the Management Presentation.

4281 Even if it might have been thought that Joe White did in fact have such a reputation, Hughes must have known that such a reputation was based upon deceiving customers by means of the Viterra Practices.

(without being exhaustive) all of these statements materially misrepresented the operations of a business that engaged in the Viterra Practices.

4881 The consequence of this ongoing failure of disclosure by Hughes during the sale process was that before the Acquisition Agreement was entered into, Hughes represented to Glencore and Viterra that each of the Undisclosed Matters did not exist. Although Hughes did not verify every aspect of the Information Memorandum or present every component of the Management Presentation Memorandum, what he did positively represent by his endorsement of key parts of the majority of each of those documents was that: (1) the Viterra Practices and Policies did not exist; (2) the Financial and Operational Information was not substantially underpinned by supplying malt in accordance with the Viterra Practices and Policies when specifications did not comply with customer contracts; and (3) Joe White could produce and sell malt in the volumes and to the specifications required by customers, and in the volumes and for the returns reflected in the Financial and Operational Information. This necessarily followed from the numerous statements contained in the Information Memorandum and the Management Presentation Memorandum as to, speaking broadly, the ability of Joe White to perform satisfactorily and to meet the exact specifications and requirements of its customers. These statements ran entirely counter to the non-disclosure to customers of the existence of the Viterra Practices and Policies, and to the Joe White Business being underpinned by routine conduct of misrepresenting malt as complying with customer specifications when it did not.

4882 Although it was correct for Hughes to submit that this part of the case was "all or nothing" with respect to non-disclosure, that meant no more than the Viterra Parties were required to prove Hughes failed to disclose each element of the Undisclosed Matters pleaded in paragraph 19 of the Statement of Claim when there was a reasonable expectation that he would do so. Further, contrary to Hughes' submission, the case against him was not confined to the time of the Warranty verification process. The particulars to the representation that the Undisclosed Matters did not exist (and the existence of a reasonable expectation of disclosure in that context) traversed all

aspects of Hughes' involvement, including participation in the preparation of the Information Memorandum, and its verification. Thus, at the risk of being repetitious, the Viterra Parties needed to prove that Hughes did not disclose: (1) in the preparation and verification of the Information Memorandum or during the Due Diligence, the implementation of the Viterra Practices and existence of the Viterra Policies; (2) the Financial and Operational Information was substantially underpinned by the Viterra Practices and the Viterra Policies; and (3) Joe White could not produce and sell malt in the volumes and to the specifications required by customers, and in the volumes and for the returns reflected in the Financial and Operational Information. For the reasons stated, as against Hughes each of these matters and the reasonable expectation of disclosure has been established.

X.125.2.7 Warranties

4883 On the basis upon which the case was pleaded, unless the Viterra Parties established Hughes verified the Warranties as being true and correct, then the allegations could not be made out.[4282] For reasons discussed below,[4283] it has not been established that Hughes represented that any of the Warranties he was asked to verify were true and correct. Accordingly, this issue need not be considered further at this point.

X.125.2.8 Conclusion as to representations made by Hughes

4884 In conclusion, the Viterra Parties have established that Hughes made representations that the following were true and correct:[4284]

(1) The Financial and Operational Information he conveyed (not being all the information potentially encompassed by that term as defined).[4285]

(2) The Operations Call Statements (as found to have been made).

4282 In other words, there was no alternative allegation that, even if the Warranties were not verified as alleged, the circumstances relating to when the Warranties were discussed with Hughes were such that disclosure of the relevant matters should have occurred.

4283 See issue 125.6 below.

4284 For the reasons stated, it has not been established that, as alleged, Hughes made all the Information Memorandum Statements or all the Management Presentation Statements.

4285 That is, the information represented by reason of the Information Memorandum Statements he verified, the Management Presentation Statements he made, the Operations Call Statements found to have been made and the Commercial Call Statements.

(3) The Commercial Call Statements.

(4) The Undisclosed Matters did not exist.

X.125.3 Youil

X.125.3.1 Operations Call

4885 The details of the Operations Call Statements are outlined above.[4286] For the reasons that follow, it has been established that Youil represented to Glencore and Viterra that the Operations Call Statements, to the extent that they have been found to have been made, were true and correct.[4287] However, it has only been so established because of the events that occurred after the Operations Call. In other words, it has not been proven that Youil actually made any oral statements on the Operations Call to the effect that any of the Operations Call Statements were true and correct.

X.125.3.1.1 The Viterra Parties' submissions

4886 The Viterra Parties submitted that, if the Operations Call Statements were made, they were made by Hughes or Youil, or both, and in the making of the statements they represented that they were true and correct. Further, it was submitted that Youil, along with Hughes, reviewed and confirmed his agreement with a draft of the summary prepared by Merrill Lynch of the Operations Call, which was placed in the Data Room and included in Annexure E to the Acquisition Agreement.

X.125.3.1.2 Youil's submissions

4887 *First*, Youil submitted that based on De Samblanx's evidence that Youil only spoke 5 to 10 percent of the Operations Call, the Viterra Parties failed to discern between statements made by Hughes and Youil and, consequently, failed to establish that Youil made any of the statements.

4888 *Secondly,* Youil submitted that the Operations Call was in the context of Hughes and Youil acting as representatives of Viterra in the telephone conference with De Samblanx, and that the summary uploaded to the Data Room was only accessed by

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4286 See issue 2 above.

4287 See also par 4838 above.

Engle.[4288] Therefore, it was submitted, anything stated during the Operations Call was represented to Cargill, not to Viterra. Youil submitted that aside from Hughes and himself, Viterra was not privy to the Operations Call or the summary of the Operations Call. It was submitted that the Viterra Parties' particulars were vague in claiming that the representations were made to "officers, employees and agents of Glencore and Viterra" involved in various processes. Accordingly, it was submitted that Youil did not represent to Viterra that the Operations Call Statements were true and correct.

X.125.3.1.3 Analysis

4889 In relation to the making of the statements in the Operations Call, Youil spoke only 5 to 10 percent of the time.[4289] Although it was clear that Youil did make some statements, what Youil himself actually said was not the subject of any evidence.[4290] Accordingly, the Viterra Parties did not establish that Youil made any of the representations during the Operations Call.

4890 However, with regard to the review of the summary of the Operations Call, for the reasons outlined above,[4291] the review of, agreement with and provision of the summary by Youil represented to Glencore and Viterra that, regardless of who actually made the statements, to the extent the Operations Call Statements were made, they were true and correct.

X.125.3.2 The Undisclosed Matters

4891 For the reasons that follow, it has not been established that Youil represented to Viterra or Glencore that any of the Undisclosed Matters did not exist.

X.125.3.2.1 The Viterra Parties' submissions

4892 Similar to the position with Hughes,[4292] the Viterra Parties submitted in relation to Youil that a reasonable expectation arose for Youil to disclose the existence of the Undisclosed Matters in relation to the Operations Call and the verification of the

4288 See fn 575 above.
4289 See par 873 above.
4290 See also fn 4245 above.
4291 See pars 4836-4838 above.
4292 See par 4868 above.

Warranties. With regard to the verification process, the Viterra Parties submitted that a reasonable expectation arose to disclose the Undisclosed Matters given that Wilson-Smith asked the Joe White executives, including Youil, whether the Warranties were true and correct and each of them said that they were. It was also alleged that this expectation arose as Wilson-Smith asked each of the Joe White executives whether there was any inconsistent information in the Data Room and each of them said that there was not.

X.125.3.2.2 Youil's submissions

4893 Youil denied that such a representation was made. Youil submitted that the alleged opportunities for disclosure referred to by the Viterra Parties did not create a reasonable expectation of disclosure.

4894 *First*, Youil submitted that the Operations Call was between 2 negotiating counterparties and section 18 of the Australian Consumer Law did not require Youil to volunteer information which would be of assistance to the decision-making of another party.[4293] Further, Viterra had instructed employees not to provide information to Cargill that had not been requested and therefore Glencore and Viterra could not have reasonably expected Youil to volunteer information to Cargill as this would have contravened Viterra's own instructions. For these reasons, Youil submitted that the Viterra Parties could not have had an expectation that Youil would disclose the existence of the Undisclosed Matters in the Operations Call.

4895 *Secondly,* Youil submitted that the Viterra Parties failed to establish that Youil represented that the Warranties were true and correct. This meant they failed to establish that there was a reasonable expectation of disclosure, and consequently failed to establish that he represented on this occasion that the Undisclosed Matters did not exist.[4294]

4293 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 371 [22] (French CJ and Kiefel J). See also *Lam v Austinel Investments Australia Pty Ltd* (1989) 97 FLR 458, 475.3 (Gleeson CJ, with whom Meagher JA and Samuels AJA agreed).

4294 Youil also made submissions regarding insufficient evidence about the conversations between Youil and Wilson-Smith, but it is unnecessary to discuss this.

X.125.3.2.3 Analysis

4896 Based on the findings concerning the Warranty verification process,[4295] the issue of whether a reasonable expectation arose for Youil to disclose the Undisclosed Matters to Viterra and Glencore need only be considered in the context of the Operations Call.

4897 There could have been no such reasonable expectation in this limited context. Even if Youil provided any of the relevant responses (with Hughes) which comprised the Operations Call Statements, they were in relation to a confined subject matter and in a regime where he was expressly required not to provide information beyond that that was the subject of enquiry. Further, there was no evidence to suggest that Youil had any idea what other representations had been made by the Viterra Parties as part of the sale process, such that there could be any expectation that he would be able to assess whether further disclosure to the Viterra Parties would be expected to have taken place. The same observation may be made with respect to Youil's involvement in finalising the agreed record of what was said during the Operations Call.

4898 Further, there are 6 key points that apply to all the Third Party Individuals other than Hughes which make it difficult to conceive what it was about the circumstances that would have given rise to any reasonable expectation.

4899 *First*, it has not been established that any of Youil, Wicks or Stewart had knowledge of a substantial part of the Undisclosed Matters as defined. These 3 individuals all worked in the operations of the Joe White Business. Although they knew of the Viterra Practices and the Viterra Policies, there was nothing to suggest they were familiar with the manner in which the financial performance of Joe White was reported to Viterra. To the extent the Undisclosed Matters embraced financial-reporting related matters regarding the Financial and Operational Information, it was conceded in closing submissions by the Viterra Parties that there was no evidence to suggest they knew anything of substance about the accuracy or otherwise of Joe White's financial accounts.[4296] In short, insofar as the Viterra Parties maintained that these 3 executives

4295 See issue 125.6 below.

4296 The concession, namely, that the relationship between the Viterra Practices and the financial accounts

represented *all* of the Undisclosed Matters did not exist, it was without merit.

4900 Similarly, Argent, as the financial controller, was not directly involved in operations. There was no evidence from which it might be inferred that he was familiar with or even knew of the existence of the Viterra Practices. In closing submissions, the Viterra Parties submitted that, as financial controller, Argent would be "up to his elbows every day in the details of the finances of the company and how the income of the company is earned and whether the contracts are being performed and so on".[4297] Of the thousands of documents tendered in this case, the Viterra Parties did not identify a single document which might have suggested that Argent knew or was given notice of the Viterra Practices or the Viterra Policies. Further, in circumstances where the Viterra Policies were marked "obsolete" in the Records System to enable them to be concealed and to disguise the fact that they were operative documents, and where there were no records to formally document the Varieties Practice or the Gibberellic Acid Practice, there was no basis to infer that Argent knew of the Viterra Practices. Therefore, the contention that Argent represented that *all* the Undisclosed Matters did not exist was equally devoid of merit.

4901 *Secondly*, it has not been established that any of Youil, Wicks, Stewart or Argent had any knowledge that the Undisclosed Matters had not been disclosed. Again, in relation to the first 3 individuals, they were not involved in preparation of the Information Memorandum or the Management Presentation Memorandum, or the presentation of the latter. Further, there was no evidence to suggest that they were ever asked by the Viterra Parties to review or consider the contents of these documents or the topic of what ought to be disclosed to any prospective purchaser.[4298] As for Argent, there was no evidence to suggest that he might have had a basis for suspecting that, relevantly,[4299] the operations of the Joe White Business had not been disclosed

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was not something about which there was any evidence regarding the existence of knowledge in 2013, was confined to Youil and Wicks. However, the observation about the lack of evidence in this regard was equally applicable to Stewart.

4297 See also fn 1624 above.

4298 As these documents were Confidential Information for the purposes of the Confidentiality Deed, it was highly unlikely they were aware of any of the details.

4299 Argent was aware that Glencore had chosen not to disclose some information, but this information was

accurately and fairly in the documents put forward by the Viterra Parties during the sale process.[4300]

4902 *Thirdly*, in relation to the existence of the Viterra Practices, it must be presumed that each of the Third Party Individuals other than Hughes would have assumed that Hughes, as the executive manager with a very hands-on approach,[4301] would have been fully across the operational side of the Joe White Business. Up until 17 December 2012, Hughes was a director of each of the companies comprising Viterra working full time in the Joe White Business, and continued on as an executive of Viterra after that time. There was no suggestion at trial that any of these 4 individuals had ever concealed anything concerning the Viterra Practices from Hughes. Thus, to the extent that any of the Joe White executives had knowledge of the Undisclosed Matters,[4302] they were entitled to assume that these matters were also known to Hughes and accordingly had been known by Viterra.[4303] In such circumstances, there was no reasonable expectation to make any further disclosures pertaining to the Undisclosed Matters to the extent they were aware of them.[4304]

4903 *Fourthly*, it has not been established that there was any basis for any of these 4 individuals (including Argent for the sake of the point, despite his apparent lack of the relevant knowledge)[4305] to assume that in 2010 or otherwise Hughes would have been holding anything material back from Viterra or from late 2012, Glencore. In circumstances where Hughes was effectively the Viterra executive in charge of the

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not indicative of Argent being put on notice that what was disclosed was incorrect or materially incomplete: see pars 436, 536, 805 above.

4300 See also par 958 above; the enquiry in that case being confined to material contracts.

4301 See par 47 above.

4302 See, for example, pars 156, 161-162, 1289-1311 above.

4303 See par 4874 above.

4304 Ordinarily, an obligation to disclose does not include an obligation to communicate information to someone who already knows the facts in question: *Federal Commissioner of Taxation v Levy* (1961) 106 CLR 448, 469.1 (Owen J); *National Trustees Executors and Agency Co of Australasia Ltd v Federal Commissioner of Taxation* (1954) 91 CLR 540, 589.3 (Kitto J).

4305 Generally speaking, there cannot be a failure to disclose something about which you had no knowledge or were not reasonably capable of knowing in the circumstances: *Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation* (1953) 88 CLR 23, 33.2 (Fullagar J); *Federal Commissioner of Taxation v Westgarth* (1950) 81 CLR 396, 407.3 (Latham CJ), 411.9-412.1 (Williams J), 415.9-416.3 (Fullagar J). See also in this context par 2955 above.

affairs of Viterra Malt and Joe White and was taking a direct role in the conduct of the sale,[4306] these 4 individuals were not on notice before 4 August 2013 that there had been any failure to disclose any material information. On the contrary, based on Stewart's evidence it appeared that Hughes gave the impression that at least the issue of pencilling had been raised by Hughes with his superiors and that those superiors had given their imprimatur to proceed with the same conduct.[4307]

4904 *Fifthly*, independent of Hughes, from 2009 when Joe White became a wholly-owned subsidiary of Viterra Malt, Viterra had been hands-on in numerous material respects in relation to the operations of the Joe White Business. Not only had an extensive review been conducted as part of the implementation of the Malt Cost Reduction Transformation Project, but the issue of the manner in which Joe White conducted its operations had been raised in 2010 with senior Viterra executives (in addition to Hughes) as part of the introduction of the Viterra Code. Again, from the perspective of these individuals there was no reason to suspect that Viterra was not properly informed at that time.

4905 *Sixthly*, with Mattiske's appointments in December 2012, Mattiske was a director of both Viterra and Joe White.[4308] As the executive manager of Viterra Malt and Joe White, and an executive of Viterra employed by Viterra Ltd, Hughes reported to Mattiske directly on a regular basis. There was no evidence to suggest that, in these circumstances there was any reason why it could not reasonably be expected that Hughes would have reported to Mattiske accurately and fairly, and would have disclosed any material issues.[4309]

4906 Accordingly, the Third Party Individuals, other than Hughes, were reasonably entitled to assume that Viterra had knowledge of all matters material to the Joe White Business. Further, the matter that the Warranty verification process itself was

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4306 The retainer of Hughes itself was confidential: see par 1877 above.
4307 See par 161 above.
4308 See par 97 above.
4309 There was no evidence that any of Youil, Wicks or Stewart were aware or suspected that Argent did not know about the Viterra Practices.

fundamentally flawed and riddled with deficiencies did not displace the reasonableness of making such an assumption.[4310] Furthermore, these Third Party Individuals were entitled to proceed at least up until 4 August 2013 on the basis that, in the absence of any notice to the contrary (none was alleged), it would reasonably be expected that any material matter would have been conveyed to Glencore by Hughes or others in Viterra more directly involved in the sale process, such as Mattiske or Fitzgerald.

4907 In short, for these reasons no reasonable expectation arose for Youil (or Wicks, Stewart or Argent) to disclose the Undisclosed Matters during any of the alleged opportunities noted by the Viterra Parties. As a result, Youil did not make a representation that the Undisclosed Matters did not exist.

X.125.3.3 Warranties

4908 For reasons discussed below,[4311] this issue need not be considered further on the basis that it has not been established that Youil represented that any of the Warranties he was asked to verify were true and correct.

X.125.3.4 Conclusion as to representations made by Youil

4909 In conclusion, the Viterra Parties have established that Youil made the representation that the Operations Call Statements as found to be made were true and correct by way of the summary of the Operations Call. They have otherwise failed to establish Youil made any further representation as alleged.

X.125.4 Wicks and Stewart

4910 As the allegations against Wicks and Stewart raised substantially the same issues, it is convenient to deal with them together. Wicks and Stewart both submitted that they did not make the alleged representations.

4310 That is, a process to have executives formally verify certain matters the subject of a sale agreement, including if they were told not to hide anything (see par 996 above) did not carry with it any notice to the Third Party Individuals that Viterra itself did not already have knowledge of the Undisclosed Matters: see also fn 4282 above.

4311 See issue 125.6 below.

X.125.4.1 Warranties

4911 Similar to the position with Hughes and Youil, it has not been established that Wicks or Stewart represented that any of the Warranties they were asked to verify were true and correct.

X.125.4.2 The Undisclosed Matters

X.125.4.2.1 The Viterra Parties' submissions

4912 The Viterra Parties' submissions are outlined above.[4312] The Viterra Parties submitted that the Warranty verification process was a circumstance where a reasonable expectation arose for Wicks and Stewart to disclose the existence of the Undisclosed Matters.

X.125.4.2.2 Analysis

4913 The entirety of this part of the case against each of Wicks and Stewart concerning an alleged failure to disclose the Undisclosed Matters also was dependent on the Viterra Parties establishing that each of them made the representations that the Warranties were true and correct. As the Viterra Parties wholly failed to establish this, it must follow that neither Wicks nor Stewart represented to Viterra and Glencore that the Undisclosed Matters did not exist.[4313]

X.125.4.3 Conclusion as to representations made by Wicks and Stewart

4914 In conclusion, the Viterra Parties have not established that Wicks or Stewart made any of the alleged representations.

X.125.5 Argent

X.125.5.1 Information Memorandum Statements

X.125.5.1.1 The Viterra Parties' submissions

4915 Largely, the Viterra Parties relied on the same submissions in relation to Argent as were made in relation to Hughes based on the same alleged representations.[4314] The

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4312 See par 4868 above.

4313 See also pars 4898-4907 above.

4314 In the Third Party Claim, further particulars of this allegation were provided in relation to Argent. In addition to referring to his position as financial controller of Joe White and his verification of parts of the Information Memorandum, the particulars asserted Argent was allocated responsibility for certain aspects of the Due Diligence "as noted in document VIT.701.012.6345 [CB 3816]". The court book contained a document with the discovery number referred to, but it was not tendered at trial. Further, the court book did not contain a document which commenced with page 38169.

exceptions to this were that the Warranties identified as being verified by Argent did not overlap entirely with those as being verified by Hughes, and that there were no allegations against Argent in relation to the Operations Call.

X.125.5.1.2 Argent's submissions

4916 Argent submitted that the Viterra Parties failed to identify the individual participation of Hughes and Argent in preparation of the Information Memorandum. As a result, it was submitted the allegation lacked substance because the alleged representation could not be defined. Further, Argent submitted that the Viterra Parties "rolled up" the participation of Hughes and Argent so it was unclear whether Argent's or Hughes' participation was relied upon.

4917 Argent admitted that he initialled parts of the verification table.[4315] However, Argent submitted that the Viterra Parties' claim failed because they had failed to prove his participation in preparation of the Information Memorandum. Accordingly, it was contended they had failed to prove 1 of the 2 limbs of the key allegation; those 2 limbs being *first,* participation in preparation of the Information Memorandum; and *secondly,* verification of the Information Memorandum.

X.125.5.1.3 Analysis

4918 Argent initialled the verification table in relation to all but 3 of the Information Memorandum Statements.[4316] The remaining statements appeared on a page that was not verified by Argent and it has not been established he made those

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4315 See pars 450-451 above.

4316 See par 451 above. Argent initialled the relevant pages assigned to him, however he also initialled 3 pages that were not assigned to him. To elaborate, the statements pleaded in the Statement of Claim at par 12 (b4), (b5), (j), (l), (m) and (n) each appeared on page 21 of the Information Memorandum, and those in par 12(b6) and (i) on page 22. Argent initialled these pages but they had not been allocated to him. The statement pleaded at par 12(e) appeared on page 4, which was allocated to and initialled by Argent. Pages 8 and 21 were also referred to in the Statement of Claim as being relevant to the statement pleaded in par 12(e). Page 8 was allocated to and initialled by Argent and page 21 was not allocated to but was initialled by him. Only the reference to a "state-of-the-art manufacturing facility" appeared on page 8 and no part of the statement appeared on page 21. The statements pleaded at par 12(f) and (l) appeared on page 9, which was allocated to and initialled by Argent. Page 21 was also referred to in the Statement of Claim in relation to these statements, and was not allocated to but was initialled by Argent, but the statements alleged did not appear there. The fact that Argent's initials appeared in unallocated rows of the table was not explored at trial, nor were the circumstances in which this came about. In light of the conclusion ultimately reached in relation to issue 125, it is unnecessary to consider what further significance, if any, attached to the fact that Argent initialled parts of the verification table that were not allocated to him.

representations.[4317] On the contrary, the fact that Argent was not asked to verify the relevant page indicated he was not being requested to, and did not, make any representation in that regard. There was no probative evidence which suggested Argent's role encroached into the verification of the statements he did not formally verify.

4919 There was a substantial body of evidence to demonstrate that Argent, in a diligent and thorough manner,[4318] was materially involved in assisting Glencore and Viterra in finalising those parts of the Information Memorandum he was asked to work on. In addition to this evidence, the Viterra Parties have established Argent participated in the preparation of the Information Memorandum by sending the email on 23 April 2013 to Merrill Lynch.[4319] However, as already noted, that email did not represent that Argent had considered all the Information Memorandum Statements or that all of them were true and correct. That said, Argent emailed the verification table to Merrill Lynch the following day, and by so doing identified precisely what he had verified.[4320] As a result, Argent's submissions put on the basis that the Viterra Parties failed to identify or prove specific participation by Argent must be rejected.

4920 Argent's submission that the Viterra Parties needed to prove both participation and verification on his part of every single statement sought to be established against him was misplaced. For the reasons already stated,[4321] proof of his participation generally and the verification of various Information Memorandum Statements, together with the provision of the verification table to Merrill Lynch, was sufficient to establish that

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4317 The Information Memorandum Statements that were not verified by Argent were: (1) Joe White's procurement process was focused on meeting customer specifications; (2) once a customer's specific needs had been identified, the procurement function ensured the appropriate quantity of malting barley was acquired to meet those specifications; and (3) the barley procurement function was driven by the Sales and Marketing team, together with Technical, identifying varieties best suited to meeting customers' malt specifications.

4318 This included Mattiske's evidence that he believed Argent did an excellent job in the preparation for the sale of the Joe White Business and that he had been able to detect no problem or error with the numbers that Argent reported in relation to what Joe White had achieved. In giving this evidence, Mattiske acknowledged that he understood the issue in this case was about the practices underpinning the numbers achieved rather than the numbers themselves.

4319 See par 448 above.

4320 See par 451 above.

4321 See pars 4810-4811 above.

a representation was made by Argent that the statements he verified were true and correct. However, it has not been proved he made any representation beyond this in relation to the remaining Information Memorandum Statements.

X.125.5.2 Financial and Operational Information

X.125.5.2.1 The Viterra Parties' submissions

4921 The Viterra Parties relied on the same submissions in relation to Argent as made in relation to Hughes.[4322]

X.125.5.2.2 Argent's submissions

4922 Argent made a number of submissions in contending that the alleged representations were not made.

4923 *First,* Argent referred to the Viterra Parties treating Hughes and Argent together in their submissions. Argent contended this made it impossible to separate their alleged conduct. *Secondly,* the claims against Argent concerned the period prior to entry into the Acquisition Agreement on 4 August 2013, and so any responsibility of Argent should not extend to the date of Completion. It was submitted that Argent's lack of involvement in the events of October 2013 underscored the point. *Thirdly,* Argent relied upon the fact that the Viterra Parties had control over what information and documents were disclosed to Cargill during the Due Diligence and prior to Completion. *Fourthly,* Argent's responsibility for providing particular financial and operational information during the Due Diligence was not capable of amounting to a representation that the Financial and Operational Information was true and correct and there was no suggestion that the financial information provided by Argent was incorrect. *Finally*, more generally, Argent contended that in the absence of proper particularisation as to how Argent failed to act in accordance with his responsibilities,

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4322 See par 4820 above. Again, further particulars relating solely to Argent were set out in the Third Party Claim in relation to this allegation. In addition to referring to the particulars concerning the Information Memorandum Statements, the particulars stated Argent was responsible for providing, and provided, the Financial and Operational Information to Glencore and Viterra for disclosure during the Due Diligence as the financial controller of Joe White at all material times from about 6 February 2010 to at least 31 October 2013. The precise information the subject of these particulars was not identified.

the alleged representation had not been established.[4323]

X.125.5.2.3 Analysis

4924 As discussed above,[4324] in relation to the Information Memorandum and its preparation, Argent initialled and verified certain financial and operational information that was contained in the Information Memorandum, and thereby represented to Glencore and Viterra that those statements were true and correct.

4925 The Financial and Operational Information disclosed during the Due Diligence included the statements recorded in annexures D and E to the Acquisition Agreement. Annexure D contained some questions and answers relating to financial matters discussed at the Management Presentation. For present purposes, it suffices to record that at the Management Presentation Argent did make some relevant representations, but only with respect to a very small portion of the Management Presentation Statements alleged.[4325] Annexure E comprised a record of a "Finance and Accounting Discussion" held on 5 July 2013, the Operations Call, the Commercial Call, the Barley Inventory Call, and a record of a phone call in relation to environmental issues held on 26 July 2013. With respect to Argent, no reliance was placed on these records other than the contents of the Commercial Call, which is discussed below.[4326]

4926 Generally, Argent's role was to assist Bickmore to obtain some of the documents that were required by the Viterra Parties to be included in the Data Room.[4327] Precisely what Bickmore requested of Argent was not the subject of evidence, and her evidence in a number of respects was far from persuasive.[4328]

4927 In any event, by assisting Bickmore to obtain documents for the Data Room that

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4323 Submissions were made in relation to the Co-Operative Bulk Agreement, but it is unnecessary to refer to these as that matter was abandoned by the Cargill Parties: see issues 61-64 above.

4324 See par 4918 above.

4325 The only pleaded statements that Argent was alleged to have made at the Management Presentation, by reason of the statements being in the "Financials" section of the Management Presentation Memorandum, were in relation to risk management. They consisted of 2 statements which were contained in only 1 of the 11 subparagraphs alleging the making of the Management Presentation Statements in accordance with the contents of the Management Presentation Memorandum: see pars 732-733, 2168(11) above.

4326 See par 4935 below.

4327 See par 665 above. See also par 958 above.

4328 See par 4825 above.

contained financial and operational information, there could be no real issue that Argent was providing the information to Glencore and Viterra. Further, given Argent's position as financial controller and the role he had agreed to with respect to assisting with the sale process, to the extent he provided documents, in the absence of any evidence to the contrary, this must have been taken to amount to a representation that the documents he produced were the records that were responsive to the requests made (whatever they might have been). But, on the evidence at trial, subject to a minor exception,[4329] any representation by Argent did not go beyond that. In circumstances where the relevant evidence of Bickmore as to what was actually said to Argent was extremely vague, there was no basis to conclude that Argent was representing anything further about the documents or their contents than they were responsive to the requests made. Furthermore, there was no attempt during the trial to identify precisely which documents Argent produced that might be said to contain relevant information that he was alleged to be effectively representing was true and correct. In other words, Argent simply producing documents or classes of documents the subject of a request or requests did not amount to any representation that the information contained in each produced document itself was true and correct with respect to every single piece of information that was recorded in the documentation.

4928 In conclusion, similar to the position with Hughes,[4330] the Viterra Parties have proven that Argent made some representations concerning financial and operational matters being true and correct. But these are confined to the matters that Argent verified in the Information Memorandum and the matters he spoke to at the Management Presentation. To this limited extent, the Viterra Parties have established that Argent represented that the Financial and Operational Information was true and correct, but not otherwise.[4331]

X.125.5.3 Commercial Call Statements

4929 The circumstances and content of the Commercial Call are described above.[4332]

4329 See par 958 above.
4330 See par 4826 above.
4331 Including not by reason of events relating to the Commercial Call: see pars 4929-4935 below.
4332 See pars 910-915, 4840 above.

Argent did not attend the Commercial Call.

X.125.5.3.1 The Viterra Parties' submissions

4930 The Viterra Parties alleged on or about 1 August 2013 Argent reviewed and agreed to the summary of the Commercial Call. The particulars to that allegation referred to 2 documents in addition to the summary contained in the Acquisition Agreement. The *first* was an email from Argent dated 1 August 2013 which attached both the "minutes" of the Commercial Call and the Barley Inventory Call. The covering note simply stated, "[Hughes] and I have reviewed". The *second* was a draft of the Commercial Call summary, which had some tracked changes on it. The Viterra Parties made no substantive submission regarding Argent in respect of this allegation. On the contrary, in their summary of the facts it was submitted that the draft minutes were prepared by Merrill Lynch, and reviewed and approved *by Hughes*.

X.125.5.3.2 Argent's submissions

4931 Argent submitted that there was no evidence he reviewed and agreed to the draft summary of the Commercial Call and that the Viterra Parties' allegation that he did so was fundamentally misconceived. Argent noted the email sent on 30 July 2013 by Merrill Lynch to Hughes and Argent attached 3 draft summaries in respect of 3 calls for review; the Commercial Call, the Barley Inventory Call,[4333] and the environmental discussion.[4334] In that email, Merrill Lynch referred to the fact that the environmental discussion was "not in [Hughes' and Argent's] court", as neither Hughes nor Argent had attended the call, and requested that Hughes or Argent forward the summary to the appropriate person within Joe White or Viterra. Argent duly forwarded the relevant document for review by others.

4932 Argent submitted that on no sensible reading of the documents could it be suggested he reviewed the summary of the Commercial Call, which he had not attended. Argent submitted that, when Argent emailed Merrill Lynch on 1 August 2013 attaching the reviewed summaries of both the Commercial Call and the Barley Inventory Call and stated "[Hughes] and I have reviewed", this was a reference to Hughes having

4333 See par 924 above.
4334 See par 1039 above.

reviewed the summary of the Commercial Call and Argent the summary of the Barley Inventory Call.

X.125.5.3.3 Analysis

4933 Argent's submissions should be accepted. On its face, the statement in Argent's email that "[Hughes] and I have reviewed" was ambiguous. It could have meant either that both Hughes and Argent had reviewed the 2 documents, or that each had reviewed the single document that was relevant to the call each had attended respectively. In the circumstances, the latter interpretation must be preferred. *First*, Hughes had attended 1 call and Argent the other and there was no apparent reason why it was necessary for either to be checking a summary of a meeting he had not attended. *Secondly*, neither Hughes nor Argent was asked to review the summary of the environmental discussion, which neither of them had attended. *Thirdly*, the environmental summary was on-forwarded to persons who had attended the call without any apparent review by Argent or Hughes. *Fourthly*, there was no evidence to suggest Argent had ever been approached to participate in the Commercial Call. *Fifthly*, there must be a real issue of whether Argent was capable of meaningfully reviewing what purported to be a record of a meeting he did not attend.

4934 In any event, the onus of establishing this allegation rested with the Viterra Parties. On the documents relied upon, it has not been discharged.

4935 As a result, the Viterra Parties have failed to establish that Argent reviewed and agreed to the summary of the Commercial Call, or that he had represented that he had done so. Thus, they have not established that he represented that the Commercial Call Statements were true and correct.

X.125.5.4 Management Presentation Statements

4936 The circumstances of the Management Presentation Statements are described above.[4335]

4335 See pars 708-742, 4862-4866 above.

X.125.5.4.1 The Viterra Parties' submissions

4937 The Viterra Parties relied on the same submissions as made in relation to Hughes.[4336] When the Viterra Parties' senior counsel was asked during closing submissions how it was put that Argent was representing that each of the operational (as distinct from the financial) matters referred to in the Management Presentation was true and correct, the submission was made that it was a matter of inference.

X.125.5.4.2 Argent's submissions

4938 Argent accepted that he presented the "Financials" section of the Management Presentation.[4337] He submitted the evidence showed that he spoke only to this section and Hughes addressed the remaining topics.

4939 Argent submitted that the relevant allegation was vague and ambiguous. Further, he submitted that the Viterra Parties had not defined with precision the conduct of Argent that they sought to rely upon, other than particularising email correspondence, in which Argent and others were asked to provide comment or were said to have provided "input" or "comments" on drafts of the Management Presentation Memorandum.

X.125.5.4.3 Analysis

4940 Argent, like Hughes, played a role in drafting the Management Presentation Memorandum. From the emails relied upon by the Viterra Parties,[4338] it appeared that Argent specifically provided direct assistance in relation to finalising the risk management section (which was drafted by Merrill Lynch) and must be taken to have accepted the final form of what was said on this topic. In so doing, Argent represented to Glencore and Viterra, through their advisers, that the pleaded statements concerning risk management, located in the "Financials" section, were true and correct. Furthermore, by speaking to that part of the Management Presentation Memorandum allocated to him in the presence of Merrill Lynch (and as had been foreshadowed with King and others in the lead-up to the Management Presentation), Argent further represented that the risk management statements were true and

4336 See pars 4849-4854 above.
4337 At pages 24 to 39 of the Management Presentation Memorandum: see pars 728-733 above.
4338 See par 4850 above.

correct.

4941 However, there was no proper basis to draw any inference that Argent was representing all of the pleaded Management Presentation Statements were true and correct. It would be bordering on the absurd to suggest that anyone at Glencore or Viterra understood that Argent as financial controller was able to positively represent the truth and correctness of every aspect of the operational matters the subject of the Management Presentation Statements. Not surprisingly, no one gave evidence to this effect. Further, given the clear delineation between Hughes' presentation and Argent's presentation, if any inference were to be drawn it would be that Argent was not making any representation as to the truth or correctness of any part of the Management Presentation other than the part he spoke to in the "Financials" section and any questions he answered on that topic.[4339]

4942 Accordingly, the Viterra Parties have established the limited part of the case concerning risk management statements against Argent in relation to the Management Presentation Statements, but not that he made all the Management Presentation Statements as alleged in the Third Party Claim.

X.125.5.5 The Undisclosed Matters

4943 For the reasons that follow, it has not been established that Argent represented that the Undisclosed Matters did not exist.

X.125.5.5.1 The Viterra Parties' submissions

4944 The Viterra Parties' submissions are outlined above.[4340] There were no separate submissions on this point directed towards Argent alone, despite the fact he stood in quite a different position to the other Third Party Individuals (who were all involved in operations). When the Viterra Parties' senior counsel was asked to identify the facts the Viterra Parties relied upon to establish that Argent knew of the Undisclosed Matters, reference was made to sections "GG and HH" of the facts section of their

4339 It was not contended by reference to annexure D to the Acquisition Agreement or otherwise that Argent addressed any questions that went beyond matters raised in the financial section of the Management Presentation Memorandum.

4340 See par 4868 above.

closing submissions. In substance, no relevant reference was made to Argent in any part of those sections of the Viterra Parties' submissions.[4341] Further, sections GG and HH were concerned entirely with events after 4 August 2013. In short, there was no further evidence identified to support this part of the case against Argent other than Argent's alleged involvement in the Warranty verification process.

4945 The Viterra Parties submitted that the Warranty verification process was a circumstance where a reasonable expectation arose for Argent to disclose the existence of the Undisclosed Matters.

X.125.5.5.2 Argent's submissions

4946 Argent simply submitted that he did not represent that the Undisclosed Matters did not exist.

X.125.5.5.3 Analysis

4947 The Viterra Parties have established neither that Argent knew or even suspected that anything that was stated by him throughout the sale process was incorrect, nor that he knew or suspected that anything anyone else had said was incorrect. Further, in light of the way in which Hughes and others were not entirely open about the Viterra Practices, the Viterra Parties have not demonstrated that, in his role as financial controller, Argent ought to have known of the Undisclosed Matters.[4342] Furthermore, in circumstances where Argent knew Hughes, as the executive manager of Viterra responsible for the malt business, was part of a substantial number of the relevant communications pertaining to the Undisclosed Matters[4343] and had not taken any exception to what was represented, there could be no reasonable expectation of disclosure by Argent where it has not been established Argent knew or believed anything inaccurate had been stated. In addition, for the same reasons outlined above,[4344] Argent did not represent to Glencore and Viterra that the Undisclosed

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4341 Argent was only referred to twice in those sections of the submissions, both times erroneously suggesting Argent was involved in discussions with other Joe White executives in late October 2013 concerning the issues that had been raised by Cargill: see par 4948 below.

4342 By making this finding, it is naturally not suggested that Argent should not have been properly informed about the Viterra Practices by Hughes and others.

4343 Including those relating to his approval of most of the Information Memorandum and a large part of the Management Presentation Memorandum.

4344 See pars 4898-4907 above.

Matters did not exist.

4948 Further, it must be emphasised that Argent fell into a unique category so far as the Third Party Individuals were concerned. To reiterate, there was no evidence that he was ever aware of the Viterra Practices. Furthermore, when the issue of the Operational Practices was raised in late October 2013 by Cargill, Argent was not included by the Viterra Parties in discussions about how to respond to the issues that had been raised.[4345] Both of these matters were highly material to the evidence falling well short of establishing that Argent ever made any representation to the effect that the Undisclosed Matters did not exist.

X.125.5.6 Warranties

4949 For reasons discussed below,[4346] it has not been established that Argent represented that any of the Warranties he was asked to verify were true and correct. Accordingly, this issue need not be considered further.

X.125.5.7 Conclusion as to representations made by Argent

4950 In conclusion, the Viterra Parties have established Argent made representations that the Financial and Operational Information he conveyed was true and correct (not being all the information potentially encompassed by that term).[4347] Otherwise, the remaining representations alleged to comprise the Argent Representations have not been proven.[4348]

X.125.6 The Warranty verification process

X.125.6.1 General observations

4951 Given the significant overlap of issues which arise, it is convenient to deal with the Warranty verification process collectively.[4349] Before turning to the specific circumstances attending the Warranty verification process undertaken in relation to

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4345 He also did not attend the 15 October Meeting where Cargill received a briefing from some of the Joe White executives on the Operational Practices: see par 1103 above.

4346 See issue 125.6 below.

4347 See par 4928 above.

4348 See issue 125.6 in relation to the Warranty verification process.

4349 The substance of the Cargill Parties' submissions on this issue have already been set out in addressing issue 80: see pars 4417-4419 above. It is unnecessary to repeat them. The Viterra Parties' submissions are addressed in dealing with the topics relevant to this issue.

each Third Party Individual, some observations about the conduct of the Warranty verification process as a whole must be made.

4952 In setting out what follows, no personal criticism of Wilson-Smith is made. At the time, Wilson-Smith was a relatively inexperienced lawyer,[4350] unfamiliar with both warranty verification and the processes involved in mergers and acquisitions more generally. The evidence did not meaningfully disclose why it was that Wilson-Smith was left to perform the Warranty verification process essentially on his own.[4351]

4953 Wilson-Smith was a credible and forthright witness. He readily acknowledged the significant flaws in the process that he undertook. He endeavoured to answer questions posed to him (which were at times very pointed and critical) to the best of his ability. In a transaction involving hundreds of millions of dollars and a very tight timetable, Wilson-Smith was given the task of arranging for the verification of the Warranties, in circumstances where the finalisation of the transaction was imminent and where he had had limited involvement before that point.

4954 Wilson-Smith was fully aware of the pressure under which he had been placed. At various points in his evidence, Wilson-Smith agreed that he was "absolutely" under time pressure to complete the Warranty verification process; that he believed the signing of the Acquisition Agreement was "imminent"; and that the Warranty verification process was "extremely urgent".

4955 The Viterra Parties' suggestion, in closing submissions, that Wilson-Smith was "palpably overborne", "unnerved" or "confused" by the process of giving evidence to the court did not reflect what occurred. On the contrary, in what must have been a difficult subject matter for him to address, Wilson-Smith was composed and measured

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4350 Wilson-Smith commenced his employment with Viterra in July 2011, having been admitted to practice in South Australia on 11 September 2006. Wilson-Smith obtained a first class honours degree of bachelor of laws from the University of Adelaide in 2006. In July 2014, he obtained a masters of applied laws (in-house practice). On 1 March 2016, Wilson-Smith was appointed to the position of senior legal counsel at Viterra. At the time he gave his evidence he was no longer employed by Viterra, but was general counsel and company secretary of Land Services, South Australia.

4351 Lindner did not recall any discussion with the Viterra Parties about whom Mallesons would engage in the verification process on behalf of Glencore or the Sellers.

while giving his evidence. True enough, he made a number of concessions in the witness box that weakened the Viterra Parties' case.[4352] However, those concessions reflected Wilson-Smith's actual recollections, beliefs or state of mind and were, in the circumstances, properly made. It was not contended by any party, including the Viterra Parties, that Wilson-Smith was an untruthful witness.

4956 Turning to the events in 2013, and as a reflection of the time pressures involved, the Warranty verification process was effectively set in motion late on Wednesday, 31 July 2013.[4353] At 9.50pm, Lindner sent Fitzgerald and Wilson-Smith the following email:

> Damian, Josh,
>
> Attached is the definitions and interpretation and warranties sections of the current draft of the Acquisition Agreement.
>
> *During the course of Thursday*, could you please sit down with the appropriate people within the business and seek to verify each warranty? That is: (1) please discuss the warranty (*obviously having regard to the definitions and interpretation provision[s] around contracts*); and (2) to the extent the warranty is incorrect *and we have not made disclosure in the [D]ata [R]oom* in respect of the inaccuracy, include a note in the document and provide any relevant documents.
>
> We will *need to make a disclosure* in the [D]ata [R]oom to address any inaccuracy that we have not already made a disclosure about. To the extent the team think the issue was addressed in Q&A for [Cargill], perhaps note this in the document and we will confirm this.
>
> If you wish to discuss how best to approach this please give us a call.
>
> (Emphasis added).

4957 The email attached a copy of the Warranties and some relevant definitions (but only those contained in the "Interpretation" section of the draft acquisition agreement current at that time). By way of example, "Disclosure Material" was defined by reference to "information set out or referred to in Schedule 8". Schedule 8 was not attached to Lindner's email. Further, a number of Warranties referred to "the Share Seller's knowledge and awareness". No definition of that term appeared in the "Interpretation" section of the document.

4958 Wilson-Smith gave evidence that, at this point, he was working under time pressure.

4352 See further pars 4998-4999 below.

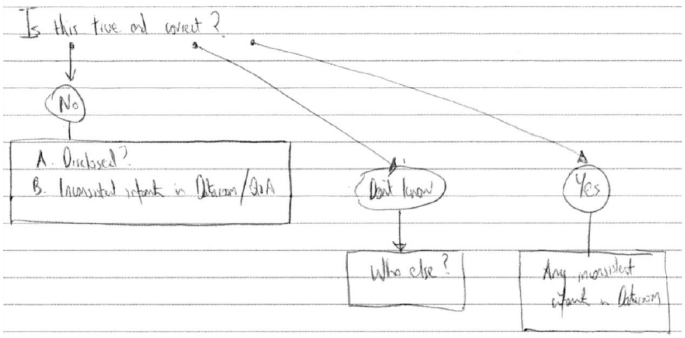
4353 There had been some minor steps taken before this time: see par 4974 below.

Lindner had only given him the following day to complete the task. He forwarded Lindner's email, without the attachments, to Hughes and Argent (copied to Fitzgerald) at 10.17pm the same night. Wilson-Smith's email stated:

> Hi Gary and Scott
>
> …
>
> We will need to discuss a plan in the morning to achieve this. This will likely take some time. If possible we will be looking to both of you to help us get all of your team on board to ensure we meet the deadline in verifying these warranties.

4959 Wilson-Smith had never conducted a warranty verification process before. He gave evidence about his approach to the task. When he received Lindner's email, he thought to himself, "What do I do?". The following morning he conducted a search on an internet search engine, and based on what he read he drafted a diagram of what he thought he had to do.

4960 The diagram that Wilson-Smith drew, in the nature of a very basic flowchart, was:[4354]



4961 Wilson-Smith gave evidence that he spoke to Lindner to confirm his approach. Lindner said that the above process was appropriate. For her part, Lindner gave evidence that she believed she had a "more fulsome discussion about how to go about the verification process" on the phone with Wilson-Smith after sending her initial email. What exactly was said in that discussion was not the subject of evidence. The Viterra Parties referred to Lindner's evidence as to what, in her professional experience, she would do in order to obtain the verification of warranties, and then

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4354 The first question was: "Is it true and correct?". If no, the next questions were: "Disclosed?" and "Inconsistent information in Data room/Q&A". If "Don't know" the next question was: "Who else?". If yes, the next question was: "Any inconsistent information in Data [R]oom?".

submitted that what Wilson-Smith set out to do was "little different" to what Lindner recommended. This submission overlooked Lindner's evidence that if she were undertaking the process she would either read each warranty to the person or have the person actually read the warranty. Nowhere in Wilson-Smith's proposed process were either of these steps provided for. Further, neither of them occurred.

4962 Returning to the steps taken, Wilson-Smith then went through the Warranties and assessed who *he* thought were the individuals within Joe White who were best placed to verify each Warranty, according to where *he* understood they would "fit" in the Joe White Business.

4963 Pausing here, the Joe White Business did not rely heavily on the legal department, and did not tend to engage the in-house lawyers at all on day-to-day matters of the Joe White Business. Generally, the only exceptions to this were when there was a requirement, by Viterra policy, to seek legal advice on large value contracts (over $200,000). Further, Wilson-Smith, who was employed by Viterra as 1 of Viterra's in-house legal counsel, was not overly familiar with the inner workings of the Joe White Business. Under cross-examination, Wilson-Smith agreed that his knowledge of the malting industry was "very limited"; he also agreed that his involvement in the proposed acquisition agreement and the sale of Joe White up until that point had also been "pretty limited".

4964 On 1 August 2013, Wilson-Smith commenced the Warranty verification process by meeting with some of the individuals he had identified. At the time he and the individuals were Viterra Ltd employees. Wilson-Smith believed that both himself and those he met with were performing duties "as employees of Viterra".[4355] He met with Hughes and Argent together. He also purported to verify certain Warranties with others, in individual meetings. Altogether, Wilson-Smith conducted a process of Warranty verification with 9 different people on 1 August 2013. On 2 August 2013, Wilson-Smith also purported to verify certain Warranties with Wicks and Vern Chubb

[4355] This evidence was given during cross-examination by Stewart's senior counsel about Stewart's position, but Wilson-Smith's belief clearly applied to the other Third Party Individuals as well.

("Chubb")[4356] by telephone.

4965 The individual circumstances of each of these conversations are set out in further detail below.[4357] It is appropriate to make some general observations about the circumstances that attended each.

4966 *First*, the meetings that Wilson-Smith held with the executives were short, relative to the amount of information to be discussed. Wilson-Smith did not dispute the meeting with Hughes and Argent was in the range of 20 to 30 minutes; and I find the meeting lasted approximately this long.[4358] Wilson-Smith gave evidence that this meeting was the "longest of all of them". Under cross-examination, Wilson-Smith agreed that there was not enough time in each meeting for him to read out the full text of the Warranties to the executives.

4967 *Secondly,* Wilson-Smith's evidence in his witness statement was that he told each person "the substance of what the warranty provided and asked them whether this was correct".[4359] What the "substance" of the Warranties meant in reality was not clear on the evidence. What was clear was that Wilson-Smith did not read the full text of the Warranties (or the relevant definitions) to any of the executives. Having acknowledged that he did not do this, Wilson-Smith could not recall how he described each Warranty, nor could he recollect the executives' responses. Further, neither of the 2 versions of his notes of the meetings[4360] recorded what he said to each executive about the Warranties he was asking them to verify, nor each executive's exact response. On the evidence, it was simply not possible to determine what Wilson-Smith actually said to each executive when he put the Warranties to them, or even what he considered to represent the substance of the Warranties. It follows that the court has no meaningful way of assessing whether Wilson-Smith's statements as to the "substance" of the Warranties in fact accurately conveyed the meaning of each of

4356 Viterra's property services manager.
4357 See pars 5001-5032 below.
4358 See further par 5002 below.
4359 Although this evidence was not in admissible form, no objection was taken by the Third Party Individuals to it on the basis that they submitted it should be afforded little weight.
4360 See pars 4993-4994 below.

those Warranties.[4361]

4968 *Thirdly*, it must follow that if, as has been found, it was not possible to be satisfied that what Wilson-Smith said to the executives sufficiently resembled the text of the Warranties or the substantive meaning of the Warranties, there can be no basis to find that the executives, in turn, represented that the Warranties as they appeared in the Acquisition Agreement were true and correct.

4969 *Fourthly,* Wilson-Smith did not provide Hughes, Youil, Stewart or Wicks with a copy of either the Warranties or the definitions in advance of, or during, the meetings that he held with them (Youil); (Wicks); (Stewart); (Hughes). With respect to Argent, the position was less clear, but there was no proper basis to find Argent was provided with the materials before he met with Wilson-Smith (and Hughes).[4362] Thus, no executive was given the opportunity to read or digest the Warranties or the definitions, or to make sure he understood the actual words and terms comprising the Warranties.

4970 *Fifthly,* the Viterra Parties did not prove Wilson-Smith had a copy of the definitions referred to in the Warranties with him when he conducted any of the Warranty verification meetings. Whilst describing the conduct of the Warranty verification process in his evidence in chief, Wilson-Smith never referred to the definitions or said anything to suggest that he had a copy of the definitions available. During cross-examination, Wilson-Smith stated several times that he could not recall whether or not he had a copy of the Warranty definitions. In another instance, he agreed that "to the best of his recollection", he did not have a copy of the definitions with him when conducting the Warranty verification process with Hughes and Argent.[4363]

4361 In closing submissions, the Viterra Parties contended that the evidence suggested Wilson-Smith described the Warranties in layman's terms and what Wilson-Smith said was his interpretation of what the Warranties meant. Wicks' senior counsel submitted this effectively amounted to a concession that what Wilson-Smith did was fundamentally different to conveying the terms of the Warranties; there was considerable force in this submission.

4362 Wilson-Smith emailed Argent a copy of the Warranties and the definitions (as had been emailed to him by Lindner) at 10.24am on 1 August 2013, with the message "As discussed". The evidence did not indicate whether this was before or after Wilson-Smith's meeting with Argent.

4363 See also par 5015 below in relation to Youil.

4971 Further, not only was there no basis for positively finding that Wilson-Smith had the definitions with him when speaking with each of the executives, but on the balance of probabilities, and taking into account the other defects that attended the Warranty verification process, it was substantially more likely than not that Wilson-Smith in fact did not have a copy of the definitions with him when conducting the Warranty verification process with any of the Third Party Individuals. In addition to the evidence referred to in the preceding paragraph, a principal reason for this finding was that Wilson-Smith took a "hard copy document" containing the Warranties to each meeting. In fact there were 2 such documents. The first of them commenced at a first page which was page 16 of the document Lindner had emailed through late on 31 July 2013.[4364] It contained notations on it, including the date of 1 August 2013 in Wilson-Smith's handwriting. Wilson-Smith accepted it was the first page of *that* document, being the document he used as part of the verification process. The second of them was substantially the same as the first, except the footer of the first page referred to page 1 (and following on the subsequent pages) rather than page 16 (and following).[4365] Neither of these documents contained the definitions.

4972 The Viterra Parties submitted the court should conclude that Wilson-Smith did have a copy of the definitions with him, and that he was willing to explain them if asked, during the verification interviews. The first thing to note about this submission was there was no suggestion that Wilson-Smith actually explained the definitions, but merely that he was willing to do so. This reflected the fact that Wilson-Smith gave no probative evidence that he did in fact explain them.[4366]

4973 Further, insofar as this submission was directed to whether he was in actual possession of the definitions at the time of the interviews, it was made on the basis that none of the Third Party Individuals gave evidence (other than Stewart, who was called by the Viterra Parties). Somewhat presumptively, it was submitted this was

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4364 The footer of the page was numbered 16. The first 15 pages of the original document sent by Lindner to Wilson-Smith contained the draft of the definitions from the interpretation section of the document: see par 4956 above.

4365 This document also contained typewritten notes purporting to record the position of Hughes and Argent in relation to some of the Warranties.

4366 See pars 4983-4990 below.

telling as the Third Party Individuals had not given evidence about any failure of Wilson-Smith to explain the definitions. Furthermore, with respect to Stewart, it was said that the only evidence he gave concerning Wilson-Smith was by reference to a brief meeting concerning "how we should behave … prior to the sale of the business" and also "about [whether there were] any impending risks to the business".[4367] The Viterra Parties noted that Stewart's counsel chose not to ask any questions of Wilson-Smith about the meeting. Significantly, however, in adducing evidence in chief from Stewart, neither did the Viterra Parties.[4368]

4974 The Viterra Parties relied upon Wilson-Smith agreeing under cross-examination that he adverted to the importance of the definitions as part of his discussions with the executives. They also relied upon the fact that Wilson-Smith sent an email to Hughes, Argent and Stewart on 30 July 2013, in which he referred to a Warranty concerning "ISO Standards" and expressly referred to the definition of that in the Acquisition Agreement, as well as identifying the particular standards in question.

4975 The Viterra Parties also made a number of general submissions which, it was contended, suggested Wilson-Smith had the definitions with him at the relevant times. They relied upon the fact that the diagram Wilson-Smith had prepared[4369] expressly contemplated an executive responding that they did not know the position with respect to a Warranty and then having to enquire as to who else might be asked to verify the Warranty.

4976 Next, the Viterra Parties suggested there was no basis to conclude that any of the senior executives had in some way been overborne by Wilson-Smith with pressure to say something was true and correct when it was outside their knowledge. (No such allegation in this regard was made in the proceeding.)

4977 Finally, it was suggested that the cross-examination of Wilson-Smith was "crafted with razor-sharp hindsight", and that any concessions made, including that with the

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4367 This evidence was given by Stewart under cross-examination by the Cargill Parties' senior counsel.
4368 See par 5023 below.
4369 See par 4960 above.

benefit of hindsight Wilson-Smith would have conducted the process differently, did not alter "the fact" that he followed the process recorded in the contemporaneous documents.

4978 These submissions failed to grapple with the substance of Wilson-Smith's evidence.[4370] Wilson-Smith's own evidence, considered in light of the numerous other deficiencies that attended the Warranty verification process, did not come close to establishing that he brought the definitions with him to any of the meetings.

4979 The fact that Wilson-Smith adverted to the definition of "ISO Standard" in an email to Hughes, Argent and Stewart was equivocal at best. It did not establish that it was more probable than not that he had the definitions with him when speaking with the executives and did not fill the material gaps in Wilson-Smith's evidence in relation to the definitions as detailed in the preceding paragraphs.

4980 Further, Wilson-Smith's diagram contemplating that a possible response from the executives would be that they did not know whether a Warranty was true and correct was similarly equivocal. Wilson-Smith's evidence was that he did not in fact test the answers given by the executives. Furthermore, there was no suggestion any executive positively stated he did not know the answer in response to any purported description of a Warranty. Accordingly, as a matter of fact, the scenario the Viterra Parties adverted to never arose.

4981 To repeat, in light of the way in which the Warranty verification process was conducted generally, it was not possible to conclude that it was more likely than not that Wilson-Smith brought the definitions into his meetings with the executives.

4982 This conclusion has not been reached as a result of viewing the Warranty verification process with "razor-sharp hindsight" or holding the evidence given by Wilson-Smith to an inappropriately high standard. Instead, this finding was the result of inconclusive evidence about whether or not Wilson-Smith brought the definitions

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4370 See par 4970 above.

with him, considered in the context of a process that was materially deficient overall.

4983 *Sixthly,* even if, contrary to the finding above, Wilson-Smith did have a copy of the definitions with him when conducting the Warranty verification process, he certainly did not draw the attention of any of the Third Party Individuals to the details of them. Wilson-Smith gave clear and unequivocal evidence under cross-examination with respect to his meetings with each of the executives that "I didn't go to the definitions and I know I didn't do that". This evidence cannot be doubted. Not only was it uncontradicted but, given the timeframe in which each meeting of the Warranty verification process was conducted, it would not be realistic to conclude Wilson-Smith went through the text, or even the substance meaningfully, of all of the relevant definitions. The Warranties referred to by Wilson-Smith contained approximately 44 definitions in total, used on over 220 occasions. Although Wilson-Smith did not go through all the Warranties with all the executives, Wilson-Smith discussed a Warranty with 10 employees as part of the verification process on 254 separate occasions.[4371] The sheer volume of information involved could not have been traversed in a manner that could have been properly understood in the time available.[4372]

4984 Wilson-Smith's failure to refer to the definitions in any substantive way fundamentally undermined the efficacy of the Warranty verification process, rendering significant aspects of it virtually meaningless.[4373]

4985 By way of example, each of Hughes, Argent, Youil and Wicks were alleged to have verified Warranty 12. This allegation was maintained despite the fact that this Warranty was amended subsequent to each of Wilson-Smith's meetings with the executives, and was not re-verified by anyone in its final form.[4374] In any event, the

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4371 This calculation was based on the final version of the typed notes Wilson-Smith emailed to Mattiske, Fitzgerald, Rees and Mann on 3 August 2013: see par 996 above. As Hughes and Argent met together, when Wilson-Smith referred to a Warranty with them, it has only been included once as part of the total of 254.

4372 This conclusion includes definitions in cl 29, which clause was referred to in Wilson-Smith's typed notes.

4373 Further, technically, the only manner in which to properly understand the meaning of the definitions was to read them in their context, because the meanings given to them in the Acquisition Agreement only applied to the extent that a contrary intention did not appear: see par 1022 above.

4374 See further par 4996 below.

original text of Warranty 12 read:

> Disclosure Material
>
> The Disclosure Material has been collated and disclosed in good faith and with reasonable care. To the Share Seller's knowledge and awareness, no material information has been omitted from the Disclosure Material.

4986 In order to be able to understand each of the terms "Disclosure Material" and "Share Seller's knowledge and awareness", it was necessary to have access to other parts of the Acquisition Agreement. "Disclosure Material" was defined as "the information set out or referred to in Schedule 8". Cross-examined by counsel for Youil, Wilson-Smith acknowledged he did not possess a copy of Schedule 8 during his meeting with Youil; further, he could not recall what his understanding was of what was contained in Schedule 8 at the time. Notably, Schedule 8 had not been forwarded by Lindner at the time she emailed the proposed Warranties.[4375]

4987 "Share Seller's knowledge and awareness", as described by clause 31.15 of the Acquisition Agreement, was limited to the actual knowledge of Rees, Fitzgerald, Mann or Mattiske or facts, matters or circumstances of which they would have been aware had they made reasonable enquiries on either 4 August 2013 or 31 October 2013. This clause was not included in the materials Lindner attached in her original email to Wilson-Smith. He had no memory of what he understood the term to mean at the time he conducted the Warranty verification process. Further, he agreed that it was a "ridiculous idea" to have asked Youil[4376] to verify the Warranty by reference to what he understood about what Fitzgerald (for example) knew.

4988 Self-evidently, without the benefit of the meanings of "Disclosure Material" or "Share Seller's knowledge or awareness", none of the executives was capable of properly understanding, and therefore properly verifying, Warranty 12 (in its original form).[4377] Because of the manner in which "knowledge and awareness" of the Share Seller was encapsulated in the Acquisition Agreement, it was an open question as to whether any

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4375 See par 4957 above.

4376 This reflected the particular cross-examination, but the point applied to the other Third Party Individuals.

4377 Cf *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145, 159 [32] (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

of the executives with whom Wilson-Smith met were in fact capable of verifying the Warranty even had they understood it. In any event, there was nothing to suggest that, without this additional information, Wilson-Smith was even capable of accurately and exhaustively summarising that Warranty in his exchanges with the executives in question. Further, when it was raised in closing submissions as to whether, for example, Hughes could possibly verify all of the matters the subject of, say, Warranty 4.2,[4378] the response was that Hughes would only be liable "[t]o his knowledge". This was not how this part of the case was pleaded in the Third Party Claim.

4989 A further point must be made on this issue. The fact that "Share Seller's knowledge and awareness" in clause 31.15 included the knowledge of Mattiske was not the position when Wilson-Smith carried out this verification process. It was not until 3 August 2013 that Mattiske was informed of, and acceded to, being a knowledge individual for the purpose of this clause.[4379] There was no evidence to suggest Wilson-Smith was aware this was going to occur or that he had any understanding of whether Mattiske's knowledge was to be included or otherwise with respect to this clause. In short, "Share Seller's knowledge or awareness" had a different meaning in the Acquisition Agreement as executed to that which was proposed at the time of the verification process.[4380]

4990 Numerous other examples could be given as to why an explanation of the definitions would have been integral to any meaningful verification process.[4381]

4378 See further fn 4381 below.

4379 See par 999 above.

4380 See also par 992 above; the draft circulated late on 2 August 2013 made the first reference to the possibility of Mattiske and Mann being included in what became cl 31.15 of the Acquisition Agreement.

4381 Without being exhaustive, Warranty 4.2 referred to "the Records", a defined term that was extensive, and included 10 subparagraphs, and which was so broad it would seem highly unlikely that any individual would be capable of having the requisite knowledge to verify the accuracy of the Warranty. Further, the definition itself contained an additional 5 defined terms. Warranty 7.3 referred to "Share Seller's knowledge and awareness" (see par 4987 above) as well as the defined term "Material Contract". The definition of Material Contract consisted of 8 subparagraphs, some very specific and some very broad. It was not suggested any of this was explained. Moreover, the definition included an additional 6 defined terms: see pars 1022, 1034 above.

4991 *Seventhly*, Wilson-Smith agreed that, at the time he undertook the Warranty verification process, with the possible exception of Argent,[4382] he had not ascertained whether the executives had any familiarity with the Data Room. Wilson-Smith gave evidence that he had expected that the executives knew the Data Room's contents, given that they were the senior members of the business in charge of the sale. There was no suggestion he asked each of them the extent of their knowledge of what was in the Data Room. Further, as a matter of fact, all of them had not been involved in the Data Room's compilation and there was no evidence that any of them had a complete understanding of what had been included (or not included). Wilson-Smith also made no enquiry of any of the Third Party Individuals about any company policies that might have been relevant to any of the Warranties because he believed (incorrectly) that such matters had already been dealt with in the Data Room and the Q&A Process.

4992 *Eighthly*, although Wilson-Smith stated in his witness statement that he "said to each of the persons with whom [he] spoke [on 1 August 2013] that this was not a time to hide anything",[4383] he did not warn the Third Party Individuals that they needed to be careful in verifying the Warranties because, in the event the Warranties were incorrectly verified, they could be exposing themselves to legal liability. He could not explain why he did not do this. Further, Wilson-Smith did not advise the executives to seek independent legal advice.[4384]

4993 *Ninthly,* Wilson-Smith made notes of his meetings with the executives in 2 different forms, namely handwritten and typed notes. Neither version of Wilson-Smith's notes purported to record what Wilson-Smith said to the executives, but only their responses in a formulaic manner (rather than recording what was actually said).

4994 Wilson-Smith took handwritten notes of each meeting on 1 August 2013 as they

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4382 In answering a question on this issue, Wilson-Smith said Argent had been very heavily involved in the Data Room. It was not clear from his answer whether he knew the extent of Argent's involvement and knowledge of the Data Room at the time he conducted the verification process.

4383 This was reflected in a contemporaneous email (see par 996 above) but as detailed further below, Wilson-Smith clarified under cross-examination that he did not recall stating this to Wicks when he spoke to him on 2 August 2013: see par 5025 below.

4384 Compare par 997 above.

occurred. Subsequently, he transposed those notes into a typed document, which he emailed to Mallesons. The typed document took the form of the draft Warranties, with Wilson-Smith's annotations below each Warranty in red text. Wilson-Smith followed the same process for his conversation by telephone with Wicks the next day, taking handwritten notes and then updating the original typed document. As explored further below, there were differences, in some cases significant, between the responses recorded by Wilson-Smith in the handwritten and typed notes. At trial, Wilson-Smith was not able to say which version of his notes correctly recorded what the executives said to him.

4995 *Tenthly*, Wilson-Smith did not challenge any of the Third Party Individuals about the responses provided, and he did not follow up with the Third Party Individuals to confirm their responses (for example, by email) after his meetings with them.

4996 *Eleventhly,* as referred to above,[4385] Warranty 12 was altered following Wilson-Smith's meetings with the executives. The original text of proposed Warranty 12 has been set out above. The altered Warranty 12, in the form that it was included in the executed Acquisition Agreement, read:

> Data Room Documentation
>
> (a) The Data Room Documentation has been collated and disclosed in good faith and with reasonable care.
>
> (b) To the Share Seller's knowledge and awareness, no material information has been omitted from the Data Room Documentation.
>
> (c) To the Share Seller's knowledge and awareness, the Data Room Documentation is true and accurate in all material respects.

4997 By reason of the new version of Warranty 12, "Disclosure Material" was replaced with the new defined term "Data Room Documentation", which naturally Wilson-Smith would not have referred to when purporting to verify this Warranty. Further, Warranty 12(c) was omitted from the text used by Wilson-Smith and thus was not verified in its altered form by any of the executives.[4386]

4385 See par 4985 above.

4386 See further pars 5035-5039 below.

4998 *Twelfthly*, Wilson-Smith agreed, under cross-examination, that generally the process that he undertook was "deficient in a number of ways". With respect to Hughes and Argent, Wilson-Smith accepted "any opaqueness or lack of clarity in the Warranty verification process … [arose] directly out of the rushed and slipshod way in which that process was conducted". When cross-examined, Wilson-Smith accepted he "could have done a lot more"; that "in hindsight, [he] would have done it differently"; and that he "did what [he] could do in the timeframe". He observed: "It doesn't sound good and I appreciate that".

4999 This evidence represented acknowledgements by a lawyer being honest and open to the court, and fairly reflected the inadequacies in the process. As already stated, Wilson-Smith showed no signs of being overborne or confused when giving his evidence; on the contrary, he was attentive throughout his evidence and, where appropriate, made sure he fully understood the questions being put to him before he answered. Further, when confronted during cross-examination with a proposition with which he disagreed, he lucidly stated his response in rebutting what had been put.

5000 For the most part, the preceding paragraphs largely describe the serious problems that attended each meeting or phone call that Wilson-Smith undertook with each of Hughes and Argent, Youil, Stewart and Wicks. It is also instructive to briefly recount each instance of the Warranty verification process to draw out circumstances that were individual to each.

X.125.6.2 Hughes and Argent

5001 On 1 August 2013, Wilson-Smith met with Hughes and Argent together. They had very different roles. Argent's role was focused on financial matters, and he did not have direct knowledge of many aspects of the operational affairs of Joe White.[4387]

[4387] Argent's role was the subject of a position description issued by Viterra Ltd in February 2012. That document recorded that Argent reported to Viterra Ltd's finance director for Australia and New Zealand. It stated that Argent's primary responsibility was to manage the delivery of timely, accurate and cost-effective financial reporting and management information and related financial services "for the Malt and NZ Feeds" business units of Viterra. The primary responsibility also extended to other

5002 The meeting took between around 20 and 30 minutes.[4388] This timing was significant. Wilson-Smith's notes record that Hughes or Argent, or both, verified a total of approximately 60 Warranties over the course of this meeting. If the meeting was 20 minutes long, each Warranty verification would have had to have taken around 20 seconds on average. If the meeting was 30 minutes long, that timeframe extends to approximately 30 seconds per Warranty. In the circumstances of such a "quick" process, Wilson-Smith accepted he could not have been satisfied that each Warranty had been properly understood in the context of what it actually meant in the Acquisition Agreement. It was little wonder Wilson-Smith could not be so satisfied. No lawyer of any proper standing, considering the circumstances objectively, would have been. No doubt, Wilson-Smith proceeded on this basis as he was doing the best he reasonably could in the very limited timeframe that he had been afforded.

5003 Wilson-Smith's initial handwritten notes of the meeting listed the Warranty numbers under a heading that read "GH/SA" (meaning "Hughes/Argent"). Next to the Warranty numbers, Wilson-Smith handwrote a single response. Wilson-Smith was not able to say who out of Hughes or Argent provided the responses that he recorded. His witness statement states:

> I cannot now recall which of [Hughes] or [Argent] said what has been recorded in those instances, but in each instance one of them said what has been recorded and the other either expressly agreed, indicated agreement nonverbally (such as by a nod) or remained silent (from which I understood that he agreed with what he had just heard).

5004 Under cross-examination, Wilson-Smith agreed he could not recall with respect to which of the individual Warranties that Hughes or Argent had "indicated agreement nonverbally". Further, he could not recall which of the individual Warranties Hughes or Argent had indicated agreement with by staying silent, acknowledging it being equally possible that silence in that context could have meant a lack of knowledge on

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matters directed to financial plans and policies. It was not part of Argent's responsibility to negotiate or be involved in the administration of customer contracts, or to be aware of specific customer specifications, or the reporting of any such specifications. Further, it was no part of Argent's role to conduct any technical analysis of malt, or to make decisions with respect to how that might be done or reported.

4388 See par 4966 above.

the subject, rather than agreement. Wilson-Smith confirmed it was not possible for him to tell the court which of the Warranties were verified by Hughes and which were verified by Argent.

5005 Wilson-Smith also acknowledged that Hughes and Argent had defined areas of expertise and skill sets within the Joe White Business, and therefore that it had not been a good idea to meet with them together. He agreed that had he not met with them together, the confusion arising out of who had ostensibly verified which Warranties would not have occurred.

5006 Further compounding these problems were inconsistencies between the different versions of Wilson-Smith's notes, which purported to record Hughes' and Argent's responses. General deficiencies in Wilson-Smith's notetaking have been set out above.[4389] In addition to these issues, Wilson-Smith's typed document recorded, in some instances, different or inconsistent responses to those recorded in his contemporaneous handwritten notes. A number of examples may be given.

5007 *First,* Wilson-Smith's witness statement stated that Hughes or Argent, or both, had stated to him that Joe White was potentially in breach of the Co-Operative Bulk Agreement, but that this had been disclosed in the Data Room. However, a discrepancy existed between what Wilson-Smith's handwritten notes recorded and what Wilson-Smith wrote in the typed document he sent to Mallesons in the evening of 1 August 2013. In Wilson-Smith's handwritten notes, he wrote next to the number "7.3" the words "Potentially [Co-Operative Bulk] Agreement disclosed – may be in breach". In Wilson-Smith's typed document, under Warranty 7.3 he wrote "GH/SA – Potentially in breach of [Co-Operative Bulk] Agreement – has been disclosed". In cross-examination, Wilson-Smith correctly agreed that these 2 sets of notes "don't say the same thing". When pressed by counsel for Argent, Wilson-Smith was unable to say which version of his notes was correct. He could not provide an explanation for the difference between the 2 statements as recorded. He agreed that his typed notes could be wrong. When it was put to Wilson-Smith that neither Hughes nor Argent

4389 See pars 4993-4994 above.

had said what was recorded in his typed document, he responded, "That's not what my notes say, no"; "my notes" in this answer being a reference to his handwritten notes.

5008 Ultimately, Wilson-Smith agreed that he could not be "as definite" as he had been in his witness statement that either Hughes or Argent had told him that the potential breach of the Co-Operative Bulk Agreement had been disclosed.[4390] As a matter of fact, it had not been disclosed.[4391] This, of itself, created serious doubt that both Hughes and Argent together positively represented, or at least acceded to the proposition, that it had. Further, on no view could a response identifying a particular agreement with respect to an enquiry as to whether there were any "Claims" equate to it being represented that it was correct that there were no Claims.

5009 *Secondly*, Wilson-Smith wrote the words "only Perth silo agreement"[4392] next to the number "9.2" in his handwritten notes. However, in his typed document, Wilson-Smith merely wrote "Correct" under Warranty 9.2. He could not explain the difference between the 2 recorded responses. He was unable to say which response was correct.

5010 *Thirdly*, in his handwritten notes, Wilson-Smith wrote "no" next to numbers "13.1" and "13.3". However, in his typed notes, Wilson-Smith attributed the response "Correct" to "SA" (meaning Argent) under both Warranty 13.1 and Warranty 13.3. Wilson-Smith speculated that he might have intended to write "no issues" in relation to 13.1 instead of "no", but could not explain the difference between the recorded responses and was unable to say which response was correct.

5011 *Fourthly*, the particulars of the allegation concerning Warranty 13.4 alleged Wilson-Smith asked Argent whether Warranty 13.4 was true and correct (to which it was

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4390 Wilson-Smith's witness statement reflected his typed note rather than his handwritten note.

4391 Only the Co-Operative Bulk Agreement itself had been disclosed. Wilson-Smith gave evidence that at the time of the verification process he believed the dispute had been disclosed based on a litigation report he had read.

4392 In deciphering his note in the witness box, Wilson-Smith thought this sentence could read either "only Perth silo agreement" or "only Perth sub agreement". Undoubtedly, it was a reference to the Co-Operative Bulk Agreement, which had also been referred to in response to Warranty 9.1(a).

alleged Argent said yes) and also whether there was any information inconsistent in the Data Room (to which Argent said there was not). However, Wilson-Smith's handwritten note adjacent to "13.4" simply stated "yes". Similarly, under Warranty 13.4 in Wilson-Smith's type notes appeared nothing more than "[Scott Argent] - Correct". In short, neither version of Wilson-Smith's notes substantiated the allegation that 2 questions were asked and 2 responses were given to the effect alleged. In circumstances where Wilson-Smith had no memory at all of what was said, there was a complete absence of evidence upon which the Viterra Parties might have sought to make out this allegation. Indeed, the limited evidence that was available supported a conclusion that Argent was not asked questions in the form alleged.

5012 *Fifthly*, in his handwritten notes, Wilson-Smith wrote "no" next to the number "17(b)". However, in his typed notes, under Warranty 17(b), he wrote "GH/SA – correct". He could not explain the difference between the 2 responses.

5013 Wilson-Smith agreed that it would have been a lot clearer if he had adopted the same terminology across both his handwritten notes and the typed document. Further, he accepted that, as a result of failing to adopt consistent terminology, he was not in a position to know whether he had correctly transposed the answers or gotten them wrong.

X.125.6.3 Youil

5014 After meeting with Hughes and Argent, Wilson-Smith met with Youil in Youil's office. He had with him his handwritten notes from his meeting with Hughes and Argent. Immediately below those notes he recorded notes of his meeting with Youil.

5015 According to Wilson-Smith's handwritten notes, he raised approximately 50 different Warranties with Youil. There was no direct evidence as to the length of the meeting between Wilson-Smith and Youil but, as set out above, Wilson-Smith's evidence was that his meeting with Hughes and Argent was the longest of those he conducted. Wilson-Smith's failure to advert to the Warranty definitions in his meeting with Youil was effectively established in cross-examination with respect to a number of Warranties (being Warranties 4.2, 7.3, 9.2, 12 and 17(a); (Warranty 4.2); (Warranty 7.3);

(Warranty 12); (Warranty 17(a)).[4393]

X.125.6.4 Stewart

5016 After his meeting with Youil, Wilson-Smith met with Stewart in Stewart's office without giving Stewart any advanced notice. He described "the whole meeting [as] short". Wilson-Smith understood Stewart had a technical role, and his responsibilities did not include commercial or operational areas. He did not check whether Stewart had been involved in the Data Room or the formal Q&A Process.

5017 Wilson-Smith recorded his handwritten notes of his meeting with Stewart below his handwritten notes of his meetings with Hughes and Argent, and with Youil. His handwritten notes record that he raised 13 Warranties with Stewart, which Warranties were confined to contracts,[4394] intellectual property,[4395] and compliance with "Laws".[4396] However, as with Hughes and Argent, Wilson-Smith's handwritten notes of his meeting with Stewart differed in significant respects from the typed document he later prepared.

5018 *First,* the typed document prepared by Wilson-Smith records an additional response by Stewart from those recorded in Wilson-Smith's contemporaneous handwritten notes. In the typed document, Wilson-Smith wrote "DS – Correct" under Warranty 25, headed "Disclosure Material". However, Wilson-Smith's handwritten notes recorded no responses by Stewart past a response to Warranty 17(c); and immediately below that response appeared 2 lines that extended horizontally across the page. Under cross-examination, Wilson-Smith agreed that the double underline he made in his handwritten notes indicated there had been no further discussion as to Warranties between himself and Stewart beyond Warranty 17(c). Wilson-Smith was unable to account for the difference between these 2 sets of notes.

5019 Wilson-Smith properly accepted that if Stewart had had no involvement in connection

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4393 Wilson-Smith answered the relevant questions during cross-examination based on the supposition that he did not have the definitions with him rather than having a specific recollection.

4394 Warranties 7.1(a) and (b) to 7.6.

4395 Warranties 8.1 to 8.3.

4396 Warranty 17(a) to (c).

with the Data Room or the Q&A Process (as was the fact), he would have been in no position to say whether Warranty 25 was correct in any event.[4397]

5020 *Secondly*, when it was put to Wilson-Smith in cross-examination that he did not methodically go through the Warranties with Stewart by way of a checklist, but rather had an informal and fluid discussion with him, Wilson-Smith could not dispute the proposition and could only state that he could not recall.[4398] This answer raised serious doubt concerning the generic and conclusory evidence given in Wilson-Smith's witness statement[4399] about the manner in which he conducted his interview with Stewart.

5021 *Thirdly*, Wilson-Smith's handwritten notes recorded responses of either "Yes" or "No" by Stewart. However, Wilson-Smith's typed document attributed the response "Correct" to Stewart under several Warranties. Thus, Wilson-Smith's handwritten notes recorded Stewart's response to Warranties 7.2, 7.3, 7.4, 7.5, 7.6, 8.2, 17(b) and 17(c) as "No", however, in the typed document Stewart's response was recorded as "Correct" under each of these Warranties. Given the contents of these Warranties, an answer of "no" was entirely consistent with an indication that the Warranty was correct. However, the matter was not free from doubt. Given the brevity of the note recording the response, there was quite a realistic possibility that Wilson-Smith's typed note did not accurately record Stewart's actual response.

5022 *Fourthly*, with respect to Warranty 7.3, concerned with whether Joe White was "in material default of any Material Contract", Wilson-Smith did not recall whether he explained what that language meant by reference to any definitions or sales documentation, or even if he used that language. He accepted he did not ascertain whether Stewart was familiar with the contractual terms of the "Material Contracts".

4397 Warranty 25 concerned the collation and disclosure of specific types of documents and contained warranties relating to good faith, reasonable care, the absence of material omission and being true and accurate.

4398 Earlier on in his evidence, Wilson-Smith had agreed with the suggestion that in meeting with Stewart he adopted an informal style.

4399 See par 4967 above. See also par 5027 below.

5023 Stewart was called as a witness by the Viterra Parties. As noted above,[4400] he was not questioned by them about this meeting with Wilson-Smith. In circumstances where Stewart willingly gave evidence on issues asked of him, including making serious concessions as to the inappropriateness of, or at least aspects of, the Operational Practices, the only appropriate inference to draw was that the Viterra Parties considered it would not have assisted their case to ask questions on this topic.[4401]

X.125.6.5 Wicks

5024 Wilson-Smith did not discuss the Warranties with Wicks until the next day, 2 August 2013. He did so via telephone, as Wicks was travelling.

5025 At the time the call took place, Wicks was about to get on a plane. In response to a question that the call might have been about 5 minutes, Wilson-Smith agreed that it was "brief, yes". He said he "took an 'informal approach' to get [it] done", stating that at that stage he "had to get it done". Not only could Wilson-Smith not recall saying to Wicks that it was not a time to hide anything, but when it was put to him that he did not say it, Wilson-Smith said his evidence in his witness statement on this issue was confined to the people he spoke to in person, and then stated "No, I can't recall saying that to Rob [Wicks]". In light of this evidence, and mindful of the very brief and informal nature of the call, I find that no such statement was made to Wicks notwithstanding the contents of Wilson-Smith's email sent 3 August 2013.[4402]

5026 Wilson-Smith took handwritten notes of the call with Wicks on a printed copy of the Warranties. As already noted,[4403] this print-out also did not include the definitions.

5027 The notes appear to record responses from Wicks to 22 Warranties. However, under cross-examination, Wilson-Smith agreed that he had no recollection of putting the "substance" of these Warranties to Wicks. (This was contrary to his witness statement which was filed in December 2017 and adopted by Wilson-Smith as his evidence in

4400 See par 4973 above.
4401 See pars 1989-1990 above concerning inferences that might be drawn in such circumstances.
4402 See par 996 above.
4403 See par 4971 above.

chief, which positively stated that he had put the "substance" of the Warranties to the Third Party Individuals in his meetings with each of them.[4404] Wilson-Smith acknowledged that at the time of giving his evidence the whole of his knowledge of what he said to Wicks was based on his handwritten and typed notes.

5028 In the afternoon of 2 August 2013, Wilson-Smith sent an updated typed document to Lindner and Allan, which purported to record Wicks' responses (alongside those of Chubb, with whom Wilson-Smith had also spoken that day regarding the Warranties). Wilson-Smith stated in that email that there did "not seems (sic) to be any material issues relating from the warranty verification".

5029 As with the other executives, Wilson-Smith's handwritten and typed notes concerning Wicks were inconsistent.

5030 *First*, the typed notes recorded responses by Wicks to certain Warranties when no equivalent response was recorded by the handwritten notes. This was the case in relation to Warranties 4.1, 6.2(b), 12, 17(c)(ii) and 25, where no response at all from Wicks was recorded in the handwritten notes, but the typed document recorded "RW – Correct" ("RW" meaning Wicks) in relation to each.[4405] Next to Warranty 7.2, the handwritten notes recorded some text about Lion Nathan (which was difficult to understand), but there was no response attributed to Wicks directly. Nevertheless, in the typed document, the words "RW – Correct. Already disclosed Lion Nathan contract in [D]ata [R]oom" were recorded under Warranty 7.2.

5031 *Secondly*, the handwritten notes recorded some responses by Wicks that did not appear in the typed document. Both Warranties 7.6 and 29 had the response "RW – No" set out next to them in the handwritten notes. However, in the typed document, no response was attributed to Wicks under either Warranty.

5032 *Thirdly*, as was the case in relation to the other executives, the nature of the response attributed to Wicks in the handwritten document was in some instances different to

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4404 See par 4967 above.

4405 As to the practical incapacity of Wicks to verify Warranty 25, he was in the same position as Stewart: see par 5019 above.

that recorded in the typed document. Wicks' responses to Warranties 4.2(a), 4.2(b), 4.2(c) and 17(a) were recorded as "Yes" in the handwritten notes, whilst the response in the typed notes was "Correct". Conversely, his response to Warranties 7.3, 7.4, 7.5, 8.2(a), 9.1(a), 9.1(b) and 17(c)(i) was recorded as "No" in the handwritten notes but "Correct" in the typed notes. In cross-examination, Wilson-Smith agreed that the records were different and that he did not know which version of his notes was correct. Again, given the contents of these Warranties, the answers of yes and no respectively were consistent with an indication that the Warranty was correct (with the exception of Warranty 4.2(b), which was put in the negative and noted with a "Yes" response). But again, the matter of whether the typed notes accurately recorded the responses given to whatever description Wilson-Smith gave of these Warranties was not free from material doubt. Given the numerous flaws in the process, such a level of uncertainty meant it was not possible to form a view that it was more probable than not that what was ultimately recorded was correct.

5033 Before leaving Wicks, his apparent response to Warranty 9.2 (concerning the absence of any claims or disputes) should be noted.[4406] Although the wording was slightly different, in both sets of Wilson-Smith's notes he recorded Wicks saying, in addition to "no" (handwritten note) or "correct" (typed note), that there was the odd quality claim from a customer, but that was usual in the business. Not only did this create some real doubt about the meaning of "no" in the handwritten note, but on either version it raised further doubts about whether this Warranty was verified by Wicks or was the subject of a material proviso.

X.125.6.6 Summary and further findings

5034 Without being exhaustive, some of the key points to emphasise are:

(1) Wilson-Smith was a relatively junior lawyer (compared to Fitzgerald) tasked with conducting the Warranty verification process alone.

(2) Wilson-Smith was not very familiar with the Joe White Business.

4406 See issue 44 above.

(3) Wilson-Smith had never conducted a warranty verification process before and was generally unfamiliar with how to conduct such a process properly.

(4) The discussions with the Third Party Individuals were short or extremely short relative to the information alleged to have been conveyed during them.

(5) Wilson-Smith did not provide or refer to the content of the definitions intrinsic to the meaning of the Warranties during his discussions with the executives.

(6) Wilson-Smith did not read out the full text of the Warranties.

(7) Wilson-Smith assumed a level of familiarity on the part of the executives with the transaction and related steps, which assumption was predominantly incorrect (as the steps taken in the sale process were confidential and some of the executives had had very little to do with it). He did not raise or clarify this with them.

(8) Wilson-Smith did not record what he said to the executives in either version of his notes, only the executives' purported responses or nothing at all.

(9) Wilson-Smith had no independent recollection at all of what he actually said to the executives in relation to each Warranty.

(10) There were inconsistencies (some fundamental) between the responses attributed to the executives in the different versions of his notes.

(11) The Viterra Parties never verified the purported responses with any of the executives.

(12) With respect to Warranty 12, it was materially altered after the verification process.

5035 As to the last of these points, the Viterra Parties submitted the court should find that there was only 1 "change of substance" to Warranty 12, which change was in effect subsumed by other Warranties purportedly verified by the executives. This submission must be rejected.

5036 The changes made to Warranty 12 are apparent from what is set out at paragraphs 4985 and 4996 above, but are identified here for convenience. The changes have the deleted text struck through and the added text underlined:

> 12 ~~Disclosure Material~~ Data Room Documentation
>
> (a) The ~~Disclosure Material~~ Data Room Documentation has been collated and disclosed in good faith and with reasonable care.
>
> (b) To the Share Seller's knowledge and awareness, no material information has been omitted from the ~~Disclosure Material~~ Data Room Documentation.
>
> (c) To the Share Seller's knowledge and awareness, the Data Room Documentation is true and accurate in all material respects.

5037 The Viterra Parties submitted that the replacement of the defined terms after the Warranty was purportedly verified was immaterial, as the term "Disclosure Material" encompassed the term "Data Room Documentation". As such, it was contended the amendment only limited the scope of the material requiring verification. In relation to the addition of subparagraph (c), they submitted that it should be read in light of the fact that the Third Party Individuals had already verified that the "Data Room Documentation" had been "collated and disclosed in good faith and with reasonable care" and "no material information [had] been omitted" (through the purported verification of "Disclosure Material"). It was also contended that it was relevant that the Warranty was limited to matters within the Share Seller's (ie Viterra Malt's) knowledge and awareness, which was the subject of clause 31.15 of the Acquisition Agreement.[4407]

5038 As is clear from the foregoing, the submissions rested heavily on technical constructions of, and interconnections between, the several defined terms utilised in

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4407 As to which, see pars 4988-4989 above.

each version of the Warranty's text. The submissions appeared to ignore a number of key matters. Wilson-Smith was not provided with the definition of "Disclosure Material".[4408] Further, there was no evidence to suggest he ever explained what that term meant. Furthermore, in these circumstances it was not possible for the Third Party Individuals to ascertain the true meaning of that term. In light of this, it was bordering on fanciful to suggest that the Third Party Individuals could be held to have represented that Warranty 12 in its final form was true and correct, inferentially reasoning backwards from their purported verification of the originally proposed Warranty 12. In addition, the Viterra Parties' submissions, dependent as they were on the exact text of the altered Warranty, did not sit comfortably with Wilson-Smith's evidence that he provided only the "substance" of each Warranty in raising them with the Third Party Individuals.

5039 Moreover, I do not accept that subparagraph (c) added nothing more to the meaning of the original version of Warranty 12. It is plain on their terms that in their final form subclauses (a) and (b) referred to the inclusion or otherwise of materials in the Data Room. Subclause (a) provided that the material had been "collated and disclosed" in good faith and with reasonable care, whilst subclause (b) provided that nothing material had been "omitted". Neither subclause referred at all to verification of the truth or accuracy of the content of the materials included in that documentation. In short, subclause (c) materially expanded the nature and effect of what would otherwise have been Warranty 12. Therefore, regardless of the findings with respect to Wilson-Smith's failure to advert to the definitions, subclause (c) was well outside of the scope of the Warranty purportedly verified by the Third Party Individuals in their discussions with him (and consequently well outside the scope of any representations allegedly made in those discussions).

X.125.6.7 Conclusion

5040 The circumstances attending Wilson-Smith's meetings with the Third Party Individuals are set out in paragraphs 4951 to 5039 above. Although the questions as framed by the parties invited a yes or no answer, the essential question was whether

4408 See pars 4957-4986 above.

or not the Viterra Parties established that representations were made to the effect that the relevant Warranties were true and correct.

5041 It will be apparent from what is set out above that the Warranty verification process was materially deficient in both scope and execution. The process undertaken with respect to each of the Third Party Individuals was so flawed as to render it completely inutile as a warranty verification exercise. It follows that there was no proper basis to find that Hughes, Youil, Wicks, Stewart or Argent represented to Glencore or Viterra that any of the Warranties that they were asked to verify were true and correct.

5042 As a result, it must also follow that if (contrary to the findings in issue 124 above) any of the Third Party Individuals were making representations on behalf of Joe White, the Viterra Parties have failed to establish that any such representations concerning the Warranties were made *by Joe White* to Glencore or Viterra.

5043 Finally, the Viterra Parties submitted the court should draw a negative inference from the fact that none of Hughes, Youil, Wicks, Stewart or Argent chose to give evidence as to their discussions with Wilson-Smith.[4409] No such inference will be drawn. Put simply, even putting Wilson-Smith's evidence at its highest, none of the Third Party Individuals had a case to answer in respect of the Warranty verification process. Further, it was telling that the Viterra Parties had every opportunity to adduce evidence from Stewart as to how Wilson-Smith conducted the verification process with him, and chose not to avail themselves of it.[4410] Quite the contrary, they essentially chose to avoid putting any detailed evidence before the court on the subject matter.[4411]

X.125.7 Summary of findings

4409 See also pars 2126-2133 above.

4410 See par 5023 above.

4411 In putting forward Stewart's witness statement as his evidence in chief, the paragraphs dealing with the Warranty verification process were removed by the Viterra Parties before the document was verified by Stewart in the witness box. Obviously, I have not read these paragraphs as they were not in evidence, but Stewart's closing submissions referred to the fact that these paragraphs addressed the subject and no opposing position was put by the Viterra Parties.

5044 In relation to the Joe White Executives' Representations, the Viterra Parties have not established any of the components of the Wicks Representations or the Stewart Representations.[4412] In relation to the Hughes Representations, some but not all of those representations alleged to comprise the Hughes Representations have been found to have been made.[4413] It has been found that Youil did not make the Youil Representations, except for the statements that were found to be made during the Operations Call insofar as he approved the summary of the Operations Call.[4414] Finally, in relation to Argent it has only been found he represented the Financial and Operational Information in a limited form was true and correct.[4415]

X.126 Were the Joe White Representations or the Joe White Executives' Representations, or both, made in trade or commerce within the meaning of section 18 of the Australian Consumer Law?

5045 It has been found that the Joe White Representations were not made,[4416] and only some of the Joe White Executives' Representations were made.[4417] Therefore, in considering this issue, strictly it is only necessary to refer to the Joe White Executives' Representations to the extent it has been found that they were made. However, in case my approach to the pleadings is not correct,[4418] I will also consider the conduct of Hughes and Argent insofar as it has been found to have been engaged in by each of them making some, but not all, of the Information Memorandum Statements and the Management Presentation Statements.

5046 While the issue was phrased by reference to representations, section 18 requires consideration of the conduct by which those representations were made. As Hayne J observed in *Google Inc v Australian Competition and Consumer Commission*:[4419]

4412 See pars 4796-4797, 4914 above.
4413 See par 4884 above.
4414 See par 4909 above.
4415 See par 4950 above.
4416 See par 4775 above.
4417 See pars 5041, 5044 above.
4418 See pars 4791-4797 above.
4419 (2013) 249 CLR 435, 464-465 [89].

Section 52 and the identification of impugned conduct

> The generality with which s 52 was expressed should not obscure one fundamental point. The section prohibited engaging in *conduct* that is misleading or deceptive or is likely to mislead or deceive. It is, therefore, always necessary to begin consideration of the application of the section by identifying the conduct that is said to meet the statutory description "misleading or deceptive or ... likely to mislead or deceive". The first question for consideration is always: "What did the alleged contravener do (or not do)?" It is only after identifying the conduct that is impugned that one can go on to consider separately whether that conduct is misleading or deceptive or likely to be so.

(Emphasis in original.)

5047 A key case on the question of whether conduct was in trade or commerce is *Concrete Constructions (NSW) Pty Ltd v Nelson*.[4420] The plurality in that case held that the phrase "in trade or commerce" should be construed as:[4421]

> referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed, to borrow and adapt words used by Dixon J in a different context in *Bank of New South Wales v The Commonwealth*,[4422] the words "in trade or commerce" refer to "the central conception" of trade or commerce and not to the "immense field of activities" in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.

5048 The instances of conduct that have been found to have been engaged in, by which certain of the Joe White Executives' Representations were alleged to have been made, are as follows:

(1) Conduct by Hughes:

(a) Initialling the relevant cells in the Information Memorandum verification table.[4423]

(b) Involvement in drafting portions of the Management Presentation Memorandum.[4424]

4420 (1990) 169 CLR 594.
4421 Ibid, 603.4; see also 603.9-604.9 (Mason CJ, Deane, Dawson and Gaudron JJ).
4422 (1948) 76 CLR 1, 381.7.
4423 See par 4811 above.
4424 See par 4862 above.

(c) Making statements in the Management Presentation,[4425] the Operations Call[4426] and the Commercial Call.[4427]

(d) Approving the summaries of the Operations Call[4428] and the Commercial Call.[4429]

(e) Representing the Financial and Operational Information was true and correct to the extent he engaged in the conduct referred to in subparagraphs (a) to (d) above.[4430]

(2) Conduct by Youil: approving the summary of the Operations Call.[4431]

(3) Conduct by Argent:

(a) Initialling the relevant cells in the Information Memorandum verification table.[4432]

(b) Providing direct assistance in finalising the risk management section of the Management Presentation Memorandum.[4433]

(c) Making statements concerning risk management in the Management Presentation.[4434]

(d) Representing the Financial and Operational Information was true and correct to the extent he engaged in the conduct referred to in subparagraphs (a) to (c) above.[4435]

X.126.1 The Viterra Parties' submissions

4425 See pars 4863-4864 above.
4426 See pars 4838-4839 above.
4427 See par 4846 above.
4428 See par 4838 above.
4429 See par 4846 above.
4430 See par 4826 above.
4431 See par 4890 above.
4432 See par 4919 above.
4433 See par 4940 above.
4434 Ibid.
4435 See par 4928 above.

5049 The Viterra Parties submitted that the Joe White Executives' Representations were made in trade or commerce because they were made by the Joe White executives in order to describe the nature of the Joe White Business and the way Joe White carried on its commercial activities in the context of an ongoing sale process. They further submitted that such a description was properly characterised as a business activity of Joe White.

5050 The Viterra Parties submitted that the executives made the representations in circumstances where it was contended Joe White and its executives had always operated relatively autonomously,[4436] and in the context where, once Joe White was ultimately sold, the executives would no longer remain employees of Viterra. They submitted that the representations were not antecedent nor preparatory to conduct in trade or commerce, because at the time they were made the sale process was well advanced.

5051 The Viterra Parties submitted that it was not necessary for the Joe White executives to be engaged in their own trade or commerce when the representations were made. They relied for this point on *Firewatch Australia Pty Ltd v Country Fire Authority*.[4437] They submitted this case demonstrated that conduct which involved preparing a document for internal circulation could be in trade or commerce where the document was intended to have a consequence or impact on trading and commercial activities, and so had more than an internal character.

X.126.2 Hughes' submissions

5052 Hughes submitted that the conduct pleaded by the Viterra Parties was wholly internal to the companies owned by Glencore and Viterra, and was therefore not in trade or commerce but was antecedent to any commercial conduct.

5053 Hughes emphasised that the words "in trade or commerce" have a temporal element. Hughes submitted that conduct which preceded, was preparatory to or was incidental

4436 But see par 2655 above.
4437 (1999) 93 FCR 520, 544 [64] (Goldberg J).

to a corporation's trading or commercial activities was not in trade or commerce.[4438]

5054 Hughes submitted that internal communications that do not constitute conduct with the outside world are anterior to the conduct of the relevant entity ultimately engaged in trade or commerce. Hughes contended that any representations made were made as part of a process in which Hughes was required to participate by reason of his employment and at Glencore's direction that he assist in the sale of Joe White.

5055 Hughes also submitted that, because the representations relied on by the Viterra Parties were said to have been made to his employer, Viterra, or Glencore, or both, the conduct by which those representations were made was not in trade or commerce *as between* Hughes and the Viterra Parties. Hughes' submissions on this point appeared to be made on the premise that, where a party engages in trade or commerce involving 2 other parties, the conduct may be in trade or commerce for 1 of those 2 parties but not for the other. Further, Hughes submitted that to the extent any conduct was engaged in it was conduct of Glencore or Viterra, or both, but was not his conduct for the purposes of the Australian Consumer Law.[4439]

X.126.3 Youil's submissions

5056 Youil submitted that while his conduct may have been in connection with or in relation to trade or commerce, it was not, as between Youil and Viterra, in trade or commerce. In respect of the Operations Call, Youil submitted that the Viterra Parties had not articulated how they actually apprehended the pleaded representations, and highlighted that the Viterra Parties submitted in closing that the notes of the Operations Call were not reviewed by any witnesses in the proceeding apart from Engle (of Cargill). Youil submitted that this limited his ability to appropriately characterise the conduct.

5057 Youil further submitted that in making statements to Viterra, he acted in response to

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4438 See *Auswest Timbers Pty Ltd v Secretary to the Department of Sustainability & Environment* (2010) 241 FLR 360, 434-435 [156]-[157] (Croft J); *Robin Pty Ltd v Canberra International Airport Pty Ltd* (1999) 179 ALR 449, 460 [49] (Gyles J).

4439 See *Swiss Re International SE v Simpson* (2018) 354 ALR 607, 695 [527]-[529], 699 [561], [564]-[565], 701 [584] (Hammerschlag J).

a request for information from his employer in the ordinary course of his employment. Youil submitted that before the information conveyed by him to Viterra could be deployed in a trading or commercial context, it needed to undergo at least 1 necessary integer, being Viterra's reliance on the information when conveying it to Cargill.

X.126.4 Argent's submissions

5058 Argent submitted that for conduct to be in trade or commerce, it must be part of trade or commercial activities and not merely incidental to them. Argent submitted that the mere potential for trade or commerce preceding an instance of conduct was insufficient to render the conduct in trade or commerce.[4440]

5059 Argent's submissions drew a distinction between internal communications engaged in without persons present from outside the business, and communications made to persons outside the business and intended to have a consequence on trading and commercial activities. Argent submitted that the latter category would most likely be in trade or commerce, but that the former category would likely be antecedent to the relevant entity engaging in conduct in trade and commerce.[4441] Drawing on this distinction, Argent submitted that with the exception of communications with Deloitte, Merrill Lynch, Mallesons and any representatives of Cargill, his conduct during the sale process was wholly antecedent to any conduct of a commercial or trading character.

5060 Argent also submitted that he was acting in response to requests for information, which were made in the ordinary course of his employment. On the basis of his submissions, Argent contended that none of his conduct was in trade or commerce.

4440 Relying upon *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 604.5-605.2 (Mason CJ, Deane, Dawson and Gaudron JJ, with Toohey J in agreement). Reference was also made to *Murphy v Victoria* (2014) 45 VR 119, 143 [77], 148-149 [90]-[92] (Nettle AP, Santamaria and Beach JJA); *Auswest Timbers Pty Ltd v Secretary to the Department of Sustainability & Environment* (2010) 241 FLR 360, 434-435, [156]-[157] (Croft J).

4441 See *Vanguard Financial Planners Pty Ltd v Ale* [2018] NSWSC 314, [207]-[209] (Black J); *New Cap Reinsurance Corporation Ltd v Daya* (2008) 216 FLR 126, 135-137 [47]-[53] (Barrett J); *Firewatch Australia Pty Ltd v Country Fire Authority* (1999) 93 FCR 520, 543-544 [62]-[67] (Goldberg J); *Concrete Constructions Pty Limited v Nelson* (1990) 169 CLR 594, 604.5-605.2.

X.126.5 Analysis

5061 The possible distinction between conduct involving internal communications within a company and conduct involving external communications as part of a sale process is important in the circumstances of this case. It provides a useful starting point in considering the relevant conduct.

X.126.5.1 External communications

5062 Some of the instances of conduct identified as having conveyed certain of the Joe White Executives' Representations[4442] occurred in a context of external communications between Glencore or Viterra, or both, and Cargill. The statements made by Hughes on the Operations Call and the Commercial Call, and the statements made by Hughes and Argent at the Management Presentation, were all made to an audience that included not only representatives of Glencore and Viterra but also representatives of Cargill. Specifically, the Operations Call involved De Samblanx;[4443] the Commercial Call involved Viers, Eden and perhaps Hawthorne or Engle;[4444] and the Management Presentation was attended by a large number of Cargill employees.[4445] Further, on each of these occasions, Cargill was represented by Goldman Sachs.

5063 Given these audiences and the fact that each of the Calls and the Management Presentation occurred in the context of a proposed sale of a business, it must follow that each of the statements made during the Management Presentation, the Operations Call and the Commercial Call were made in trade or commerce. The decision of the High Court in *Houghton v Arms*[4446] shows it is not an impediment to a finding that the relevant conduct was in trade or commerce that it was not the trade or commerce of the person against whom the claim is brought.[4447] The fact that the trade or commerce being engaged in was that of Glencore or Viterra, rather than

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4442 See par 5048 above.
4443 See par 865 above.
4444 See par 910 above.
4445 See par 710 above.
4446 (2006) 225 CLR 553.
4447 Ibid, 565 [35] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

Hughes or Argent as individuals,[4448] did not change the fact that the making of the statements was conduct in trade or commerce.

5064 Consistent with this approach on the facts of this case, the suggestion implicit in Hughes' submissions that the same instance of conduct may be in trade or commerce for 1 of the parties present when the relevant conduct occurred but not for another of those parties cannot be accepted. As these instances of overt external communications with Cargill were conduct in trade or commerce between Glencore and Viterra and Cargill, they must also be treated as being in trade or commerce when considering the Viterra Parties' claims against the relevant Third Party Individuals.

5065 Of course, separate and distinct questions may arise as to what "conduct" was engaged in, and whose "conduct" it was. These questions will always be answered by considering the particular facts at hand. It may be readily envisaged that there would be occasions when it was clear that the "conduct" of an employee or other agent of a company would be treated as different "conduct" to that of the company. For example, a lengthy presentation given by a company which was attended by an employee for only a short period of time, during which the employee made a limited statement on a topic that was addressed by others as well in the employee's absence and about which the employee had no knowledge of what was actually said. In these circumstances, the making of the limited statement by the employee on the topic would necessarily be viewed as different conduct to the more extensive conduct of the employer in relation to the same topic; and further the limited statement by the employee may have conveyed a different representation (viewed as the employee's conduct) to the representation conveyed by the same statement in the broader context (viewed as the employer's conduct). The difference between the 2 positions may become even more apparent if the relevant conduct is alleged to include non-disclosure. In the confined scenario referred to, ordinarily it would be expected to be less likely that the employee's conduct would be seen to include non-disclosure if that employee was aware that others were addressing the same topic but was unaware of

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4448 Youil has not been referred to as part of this passage as it has not been found that he made any of the Operations Call Statements during the Operations Call: see pars 4839, 4885 above.

any lack of disclosure in that regard. However, the converse may be equally true if the employee knew that material information relevant to what she or he had stated was being withheld. In this latter scenario, the question would arise as to whether the employee's knowledge could be attributed to the company (which again would depend on the particular facts of the case). Similarly, in some circumstances the acts of an employee or other agent could only be characterised as "conduct" of the company if the employee or agent was acting strictly within the directions given by the company to that person in that capacity.

5066 However, in many cases the position will be less clear and all the circumstances would need to be considered in order to determine whether the employee or agent was engaging in "conduct" as well as the company and, if so, whether the "conduct" of the employee or agent was the same or different "conduct" to that of the company.

5067 Also, it is important to recognise the different relationships involved. In most cases, the conduct of an employee or agent of the company is the subject of a claim from some other person who has dealt with the company. This is to be contrasted with a claim by the company against its own employee or agent. It is the latter relationship that arose for consideration in this and related issues.

5068 Further, in the Third Party Claim the Viterra Parties did not simply replicate the allegations of Cargill Australia in identifying the conduct alleged to be misleading or deceptive in trade or commerce. To elaborate, the conduct which was alleged to contravene section 18 was the components of the Joe White Executives' Representations, which were different from the Financial and Operational Performance Representations and the Warranty Representations the subject of allegations in the Statement of Claim. In essence, the Viterra Parties identified conduct they alleged was engaged in by each Third Party Individual and alleged they relied upon that conduct in making the Financial and Operational Performance Representations and the Warranty Representations. Accordingly, the question that arose did not involve considering the same conduct in determining to whom it may be attributed, but rather involved different conduct to that alleged by Cargill Australia

to have been engaged in by the Viterra Parties.

5069 Following on from this, the facts in *Swiss Re International SE v Simpson*[4449] were readily distinguishable from those that arise in this case. Very broadly, that case involved a claim for losses suffered as a result of performance bonds being called upon after the collapse of a company. The performance bonds had been provided as security by insurers, with some of the bonds issued less than a month before the company's demise. Amongst others, 3 directors of the company were sued for misleading or deceptive conduct in trade or commerce. It was alleged that their conduct in approving certain submissions, alternatively in relation to a presentation given, resulted in the performance bonds being issued.[4450] Thus, the plaintiffs were entities that had dealt with the failed company, rather than being claimants who were the entities for whom the directors were acting.

5070 It is unnecessary to go through the extensive factual background of the case against each of the 3 directors. In essence, the relevant aspect of the case for present purposes was concerned with non-disclosure of information the insurers claimed ought to have been disclosed and, if it had been disclosed, would have resulted in the performance bonds not being issued.[4451] In dealing with 1 of the directors and in distinguishing *CH Real Estate v Jainran Pty Ltd*,[4452] including on the basis that that case involved positive acts,[4453] Hammerschlag J held that the director was not a principal of the company, was not its mind and was not directing it, but was merely answering questions and providing information known to him about the failed company *which did not call for disclosure of the particular matters identified*.[4454]

4449 (2018) 354 ALR 607 (Hammerschlag J).

4450 Ibid, 666 [341], [343].

4451 Ibid, 696 [534]-[536]. In addition to claims relating to non-disclosures, Hammerschlag J also addressed whether representations made by way of public announcement were the representations of 2 directors: see 699 [555]-[562].

4452 (2010) 14 BPR 27,361. In this case it was held that the individual, as the mind of the company, was personally directly liable for the misleading and deceptive conduct because he engaged in it and the liability was the product of his own conduct rather than merely accessorial liability: 27,378-27,379 [104]-[105] (Basten JA, with whom Beazley JA relevantly agreed).

4453 (2018) 354 ALR 607, 695 [528]-[529].

4454 Ibid, 695 [527], [530]. See also *Robinson v 470 St Kilda Road Pty Ltd* [2018] FCAFC 84, [50]-[51]

X.126.5.2 Internal communications

5071 The situation is less straightforward when considering the remaining conduct, which included initialling the relevant cells in the verification table by Hughes and Argent, assisting in the drafting of the Management Presentation Memorandum by Hughes and Argent, and the approval of the summaries of the Operations Call and the Commercial Call by Youil in relation to the former and by Hughes in relation to both. The immediate audience in relation to the relevant communications did not include individuals from outside the Glencore corporate group.

5072 In *Firewatch Australia Pty Ltd v Country Fire Authority*,[4455] the second respondent (who was the first respondent's manager of community risk management) circulated a bulletin, which was critical of a foam spray fire extinguisher that the applicant had introduced to the Victorian market.[4456] The bulletin was circulated through various offices and brigades within the first respondent.[4457] The bulletin contained a strong recommendation that "brigades not become involved in the distribution or recommendation" of the applicant's product, which recommendation was maintained despite complaint from the applicant.[4458] The bulletin was only sent internally, but it became the subject of wider circulation despite the fact that this larger distribution was never intended by the 2 persons responsible for its initial distribution.[4459]

5073 In his reasons, Goldberg J noted that "[a]n internal communication within an organisation which is intended to be read only by addressees within the organisation ordinarily is not a dissemination which has a trading or commercial character".[4460]

(McKerracher and Markovic JJ, with whom Rangiah J agreed) in which it was considered whether, in circumstances where the act of an individual is also the act of a company, this constitutes multiple acts (1 of each of the individual and the company) for the purposes of s 87CB(3) of the *Trade Practices Act* (this question was answered in the negative); *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211, 216-217 [19]-[20] (Finkelstein J), 225 [97]-[100] (Jacobson and Gordon JJ). More recently, in *Australian Securities and Investments Commission v GetSwift Ltd* [2021] FCA 1384 (Lee J), *Swiss Re International SE v Simpson* was distinguished in holding 2 individuals directly liable for misleading or deceptive conduct under s 1041H of the *Corporations Act* and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth): at [2121], [2124], [2126]-[2129].

4455 (1999) 93 FCR 520 (Goldberg J).

4456 Ibid, 521-522 [1].

4457 Ibid.

4458 Ibid, 523 [2]-[3].

4459 Ibid, 527-528 [21], 535 [38].

4460 Ibid, 543 [62].

However, his Honour held that although the bulletin was an internal document, it had more than an internal character, because it was intended to have a consequence or impact on trading and commercial activities.[4461] It was found that the intention of the bulletin was that in dealings or potential dealings with consumers, fire equipment maintenance servicing brigades would be influenced not to become involved in the distribution or recommendation of the product.[4462] This was in a context where these brigades had the right and opportunity to replace extinguishers, and the applicant's extinguishers were within the range of products which it was open to them to purchase.[4463] His Honour concluded that "if information is provided for the purpose of it being used for carrying out work in trade or commerce it has… a trading or commercial character".[4464]

5074 *Firewatch Australia Pty Ltd v Country Fire Authority* was considered by McCallum J in *Templar v Watt (No 3)*.[4465] In that case, her Honour was asked to characterise a specialist paediatrician's conduct in sending an email to a government department expressing concerns about a provider of hearing tests for primary school children. It was held the conduct was not in trade or commerce. In distinguishing *Firewatch Australia Pty Ltd v Country Fire Authority*, the following was stated about that case in relation to the bulletin sent to the offices and brigades:[4466]

> The bulletin was widely distributed, including to prospective customers of the applicants. The decision appears to have been influenced by his Honour's finding that the bulletin was sent to brigades that did maintenance servicing on fire equipment and so might become involved in the distribution of fire extinguishers … the bulletin expressly recommended to fire brigades that they not be involved in the distribution of the extinguisher as part of their own commercial activity. Those features distinguish it from the present case.

5075 The decision in *Firewatch Australia Pty Ltd v Country Fire Authority* and its consideration in *Templar v Watt (No 3)* demonstrate that close attention needs to be paid to the specific circumstances in which an internal communication is made,

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4461 Ibid, 544 [64].
4462 Ibid.
4463 Ibid, 544 [66].
4464 Ibid, 544 [67].
4465 (2016) 313 FLR 387.
4466 Ibid, 407-408 [99].

including the intention behind the communication. This intention should be determined objectively, looking both at the content of the communication and the context in which the communication was made.

5076 The decision in *Firewatch Australia Pty Ltd v Country Fire Authority* was also distinguished by Griffiths J in *National Roads and Motorists' Association Limited v Construction, Forestry, Maritime, Mining and Energy Union*.[4467] This was done on the basis that, amongst other things, what was done by the union in adopting a particular logo depicting the "NRMA" in less than positive terms in the context of a lengthy industrial dispute was not intended to encourage others to invest or continue investments, but was designed to secure improved working conditions.[4468]

5077 I will now turn to each of the relevant internal communications.

5078 *First,* the intention behind Hughes and Argent's initialling of the relevant squares in the Information Memorandum verification table can be surmised in large part from the email from Mallesons sent on 21 April 2013. In that email, the solicitor explained that the Information Memorandum did not "require 'prospectus type' verification", and explained that through the verification process they were trying to ensure the Information Memorandum was accurate by having the relevant persons focus on allocated sections going forward.[4469] Although far from determinative, it should be mentioned that in Mallesons providing the advice that it did, there was no suggestion to either Hughes or Argent that there might be any personal exposure to liability if the contents of the draft information memorandum were inaccurate in any way.[4470]

5079 Unlike the Information Memorandum itself, the verification table was not intended to be distributed widely outside those persons responsible for the sale of Joe White. The completion of the verification table was an internal exercise aimed to ensure that information which would eventually be provided to prospective purchasers was accurate. In this context, the conduct of Hughes and Argent in initialling the relevant

4467 (2019) 291 IR 28.
4468 Ibid, 68-69 [149]-[150].
4469 See par 447 above.
4470 Ibid.

squares in the verification table can be properly characterised as antecedent to or preparatory to trade or commerce, but not as being conduct in trade or commerce. Importantly, neither Hughes nor Argent was identified as making any particular representation in the Information Memorandum itself. With the distribution of the Information Memorandum, the conduct in question was expressly stated to be the conduct of Glencore and its subsidiaries. Further, it was Glencore and its advisers that had the final say in what was stated in the Information Memorandum, not Hughes or Argent.

5080 *Secondly,* turning to the summary of the Operations Call, it has been found that both Hughes and Youil represented to Glencore and Viterra that the Operations Call Statements were true and correct by their conduct in reviewing and agreeing with the summary.[4471] The particulars of that conduct are relevant to the present analysis. On 24 July 2013, a representative of Merrill Lynch emailed Hughes and Youil, attaching draft notes from the Operations Call and stating, "We should be grateful if you were please able to let us know if you have any comments on the attached (in particular the items highlighted in yellow)".[4472] That email was copied to 2 other Merrill Lynch representatives. Youil replied 1 hour later, attaching an amended draft of the notes and stating "I have made some clarifications in Red font". Youil included Hughes in his reply and queried, "Gary [d]o you have anything to add?". A Merrill Lynch representative sent a follow up reply to Hughes on 25 July 2013, which did not copy Youil or the other Merrill Lynch representatives. Hughes replied to that email on the same day, stating "… all good, I am happy with Peter's [Youil's] comments". Hughes' reply was sent to this Merrill Lynch representative alone.

5081 In short, Hughes and Youil sent their emails to a small, identified group. Further, the emails sent by Hughes and Youil did not contain any comparable express recommendation (of the kind referred to in *Firewatch Australia Pty Ltd v Country Fire Authority*) which might have been acted on by the recipients. Furthermore, while the

4471 See par 4838 above.
4472 See par 4830 above.

summary of the Operations Call was ultimately annexed to the Acquisition Agreement,[4473] this eventual use was not foreshadowed in the request for review from Merrill Lynch, nor was its annexure to the Acquisition Agreement done at the instigation of Hughes or Argent. Indeed, there was no evidence to suggest either of them were aware that such a course was even contemplated. Taken together, these factors demonstrated that the emails sent by Hughes and Youil did not have more than an internal character, and consequently that their conduct in sending these emails with their responses was not done in trade or commerce.

5082 *Thirdly*, a similar analysis applies to Hughes' review of the Commercial Call summary. A representative of Merrill Lynch emailed Argent and Hughes on 30 July 2013, attaching the minutes for 3 calls and requesting a review.[4474] Argent replied on 1 August 2013, copying Hughes. Argent said in the body of the email, "Minutes of the commercial and barley calls – [Hughes] and I have reviewed". I accept Argent's submission that by this email, Argent undoubtedly meant to convey that he had reviewed the summary of the Barley Inventory Call and Hughes had reviewed the summary of the Commercial Call.[4475] The communication by Hughes (through Argent's email) was made to a limited group and contained no express recommendation intended to influence trade or commerce. Again, while the summary of the Commercial Call was annexed to the Acquisition Agreement,[4476] this was not foreshadowed in the request for review or prompted by Hughes. Accordingly, Hughes' conduct in reviewing the summary and providing his response was not done in trade or commerce.

5083 The *final* instances of conduct to be considered are those of Hughes and Argent assisting in the drafting and finalising of some sections of the Management Presentation Memorandum.[4477] The detailed drafting of the Management Presentation Memorandum was done by Merrill Lynch at the instruction of

4473 See par 884 above.
4474 See par 4931 above.
4475 See par 4932 above.
4476 See par 910 above.
4477 See par 4862 above.

Glencore.[4478] As part of the finalisation of the drafting, many people were given a chance to review the presentation as a work in progress and to provide feedback.[4479] Hughes and Argent were among those asked to review.[4480]

5084 The evidence did not indicate that Hughes or Argent distributed the Management Presentation Memorandum to any external recipient, or that they had control over the final version of the Management Presentation Memorandum which was distributed. King accepted that he had had a significant role in drafting the Management Presentation Memorandum, and that he had fastidiously reviewed it until he was satisfied with the final product.[4481]

5085 In the drafting and finalising of the Management Presentation Memorandum itself, Hughes and Argent did not have direct communication with the prospective purchasers. King's evidence supports the conclusion that he (in conjunction with Merrill Lynch) had final control over the content of any recommendations or representations made to potential purchasers through the Management Presentation Memorandum. While the ultimate distribution of the Management Presentation Memorandum was undoubtedly in trade or commerce, as was the giving of the Management Presentation itself, all the work done in preparing the Management Presentation Memorandum (such as circulating various drafts, discussing amendments that might be made and the making of amendments) was not conduct in trade or commerce. Rather, this work was antecedent and preparatory to conduct in trade or commerce.

5086 As already explained,[4482] to the extent Hughes or Argent represented the Financial and Operational Information was true and correct, that representation was only made by reason of the other representations that have been found to be made. Accordingly, it is unnecessary to consider this aspect of the case separately in determining this issue.

4478 See par 696 above.
4479 Ibid.
4480 See par 697 above.
4481 Ibid.
4482 See pars 4826, 4928 above.

X.126.6 Conclusion

5087 For the reasons set out above, the conduct of Hughes in making the Operations Call Statements and the Commercial Call Statements, and the conduct of Hughes and Argent in speaking to the Management Presentation Memorandum and making the Management Presentation Statements to the extent that they did respectively, was conduct in trade or commerce within the meaning of section 18 of the Australian Consumer Law. Otherwise, the remaining conduct by which some of the Joe White Executives' Representations have been found to have been made was not conduct engaged in in trade or commerce.

X.127 Did Glencore and/or Viterra rely upon the Joe White Representations and/or the Joe White Executives' Representations in making the Financial and Operational Performance Representations and the Warranty Representations, and did Viterra rely upon the Joe White Representations and/or the Joe White Executives' Representations in giving the Warranties?

X.127.1 Scope of the matters for determination

5088 While issue 127 as framed did not refer to the Australian Consumer Law, given the related issues and the manner in which this issue was raised in the Third Party Claim, it was clear that the question of reliance to be determined forms part of the causation element in the Viterra Parties' claim for compensation because of the alleged contraventions of section 18 of the Australian Consumer Law. As a result, it is only necessary to consider conduct identified in issue 126 to the extent that that conduct has been found to have been engaged in in trade or commerce.[4483] Further, insofar as this issue referred to the possibility of Glencore making the Warranty Representations, it did not accurately reflect the allegations made by Cargill Australia against the Viterra Parties.[4484] The Warranty Representations were made when the Acquisition

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4483 To be clear, as the Viterra Parties have not established the Joe White Representations were made, any determinations in relation to this issue may be confined to the extent to which findings have been made that the Joe White Executives' Representations were made in trade or commerce.

4484 Issue 127 was drafted by reference to pars 47 and 59 of the Third Party Claim, which both referred to "Glencore and Viterra" making the Warranty Representations. However, the allegations of Cargill Australia were confined to Viterra making the Warranty Representations: see issue 48 above.

Agreement was entered into (to which Glencore was not a party). Accordingly, it is only necessary to consider this issue in relation to Viterra having made the Warranty Representations.

5089 Therefore the questions to decide are whether Glencore or Viterra in making the Financial and Operational Performance Representations, and whether Viterra in giving the Warranties and making the Warranty Representations, relied on the conduct engaged in in trade or commerce that has been established against some of the Third Party Individuals, namely Hughes and Argent.

5090 To recapitulate, it has been found that the following conduct was in trade or commerce:[4485]

(1) Hughes making the Operations Call Statements and the Commercial Call Statements.

(2) Hughes and Argent making different statements which together, though not respectively, comprised the Management Presentation Statements.

It fell to the Viterra Parties to show that either Glencore or Viterra made the Financial and Operational Performance Representations in reliance on this conduct of either Hughes or Argent (or both) to the extent that each of Hughes or Argent respectively made the statements referred to immediately above. A like observation is made in relation to Viterra giving the Warranties and making the Warranty Representations. In other words, the Viterra Parties were required to prove their claims against each of Hughes and Argent separately based on the conduct engaged in in trade or commerce by the particular individual.

5091 The legal principles governing considerations of causation (including reliance) in relation to section 18 of the Australian Consumer Law have been set out above.[4486]

X.127.2 The allegation of reliance upon the Third Party Individuals having

4485 See par 5087 above.
4486 See issue 20.2 above.

represented that the Warranties were true and correct

5092 The allegations as pleaded by the Viterra Parties were that in relation to the Warranties the Viterra Parties relied on what they were informed as a result of the Warranty verification process managed by Wilson-Smith.[4487] The allegations were that 1 or more of Hughes, Youil, Wicks, Stewart and Argent informed Glencore and Viterra that each of the Warranties was accurate by verifying the accuracy of it.[4488] There was no suggestion in the Third Party Claim or the Viterra Parties' submissions that, in Glencore or Viterra making the Warranty Representations, any reliance was placed on any other conduct of the Third Party Individuals other than their participation in the Warranty verification process and the alleged verification of the various Warranties. As it has been found that there was no proper basis to conclude that any of Hughes, Youil, Wicks, Stewart or Argent represented to Glencore or Viterra that any of the Warranties that they were respectively asked to verify as part of the Warranty verification process were true and correct,[4489] it necessarily follows that the Viterra Parties could not make out their claim that they relied on any alleged representations by any of the Third Party Individuals concerning the accuracy or otherwise of the Warranties.

X.127.3 Submissions

5093 The submissions made by Wicks and Stewart only addressed the Warranty Representations and the giving of the Warranties, and so are not necessary to consider here given the findings made in relation to the Warranty verification process. While it has also been found that the Viterra Parties have not established that Youil made any of the Operations Call Statements *in trade or commerce* or any other Joe White Executives' Representation, his submissions went beyond the Warranty verification

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4487 A separate allegation was made in relation to each of the Third Party Individuals, which were then referred to collectively.

4488 The particulars to this allegation identified the specific Warranties each of the Third Party Individuals were alleged to have verified.

4489 See the specific Warranties referable to each Third Party Individual in the questions framed for issue 125 above, at 125(1)(g), (2)(c), (3)(b), (4)(b), (5)(f).

process and thus are referred to below.

X.127.3.1 The Viterra Parties' submissions

5094 The Viterra Parties relevantly referred to their factual submissions on the preparation of the Information Memorandum, the Management Presentation, the Operations Call and the Commercial Call. These factual submissions have been considered above,[4490] and it is not necessary to revisit them in detail here. The Viterra Parties contended that these submissions supported the conclusion that the Viterra Parties relied upon the Joe White Executives' Representations. The Viterra Parties also submitted that there was an asymmetry of knowledge between Joe White (including the Joe White executives) and the Viterra Parties, which meant that the reliance was significant. They further submitted that the actions of the Viterra Parties in the period following disclosure by the Joe White executives to Cargill in the 15 October Meeting were consistent with the Viterra Parties' reliance being genuine.

X.127.3.2 Hughes' submissions

5095 Hughes submitted that the Viterra Parties had failed to establish reliance because they had adduced no evidence of direct reliance and there was no available evidence from which any inference of reliance could be drawn.

5096 Hughes also submitted that the Viterra Parties' submissions regarding the asymmetry of knowledge between the Joe White executives and the Viterra Parties was made without a factual basis. He noted that the Viterra Parties had adduced no evidence to the effect that Mattiske or anyone else from Glencore had ever told Hughes that Glencore and its employees had no experience in the running of a malting company or in the malting industry generally. Hughes submitted that he was entitled to assume Glencore was familiar with the business it had purchased and that the Viterra Parties understood the industry in which they operated.[4491]

4490 For the factual background on these matters, see pars 421-424, 427-430, 433-439, 442-452 above in respect of the Information Memorandum, pars 708-742 above in respect of the Management Presentation, pars 865-903 above in respect of the Operations Call, and pars 910-921 above in respect of the Commercial Call.

4491 Implicit in this submission was the premise that persons that were familiar with the malting industry would anticipate the existence of the Viterra Practices or something similar. This submission is at odds

X.127.3.3 Youil's submissions

5097 Youil submitted that reliance had not been established in circumstances where Viterra had failed to call several key decision-makers as witnesses. In respect of the Operations Call Statements, Youil queried how the causational chain alleged by the Viterra Parties could operate, noting that the Viterra Parties would have to identify how any statement made by Youil to Cargill was relied upon by the Viterra Parties in making some other statement to Cargill.

5098 Youil accepted that the causational chain could potentially be made out where someone within Viterra had read the summary of the Operations Call and then went on to make further statements to Cargill, but submitted that there was no evidence of such a sequence of events. Youil highlighted that the Viterra Parties had not led evidence that anyone had read and comprehended the summary, but rather had admitted in their closing submissions that the summary was accessed by a single Cargill employee, Engle, and otherwise not reviewed by any of the persons who were witnesses in the proceeding.

X.127.3.4 Argent's submissions

5099 Argent referred to King's evidence to the effect that Glencore's intention was to present the Joe White Business in the best possible light in order to sell it for the highest price.[4492] Further, Argent submitted that there was no suggestion that any financial information provided by Argent was wrong other than by reason of the mischief created by the Viterra Practices underpinning Joe White's performance, about which there was no evidence that Argent had any knowledge. Argent referred to other evidentiary matters in submitting that he did not make the Financial and Operational Performance Representations.

5100 Further, he submitted that the notion that the Viterra Parties relied on Joe White's management to provide the Management Presentation was highly improbable in circumstances where the Viterra Parties expressly disclaimed that Cargill and any

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with the finding that the Viterra Parties have not established that the Alleged Industry Practices existed, nor that anything resembling such practices was common in the commercial malting industry: see par 2816 above.

4492 See pars 110, 402, 709 above.

other potential bidders could rely on the information conveyed by that presentation. Argent submitted it was perverse that the Viterra Parties sought the benefit of extensive disclaimers, but contrastingly then alleged that they relied on the accuracy of the information provided by management.

X.127.4 Analysis

5101 Given the limited number of representations found to have been made by the Third Party Individuals in trade or commerce (confined to only some of the conduct of only Hughes and Argent), the facts as found bore little resemblance to the manner the Viterra Parties alleged that either Glencore or Viterra relied on the Joe White Executives' Representations in making the Financial and Operational Performance Representations; or that Viterra relied on them in giving the Warranties or in making the Warranty Representations.

5102 Dealing with the matter strictly as it was pleaded, the allegations must be rejected as the Viterra Parties have failed to establish that the Joe White Executives' Representations as alleged were made. Specifically, in relation to the Third Party Individuals collectively, it was alleged that the Hughes Representations, the Youil Representations, the Wicks Representations, the Stewart Representations and the Argent Representations comprised the Joe White Executives' Representations. It was then alleged Glencore and Viterra relied on the Joe White Executives' Representations in their entirety in engaging in certain conduct. As some of the Joe White Executives' Representations have not been found to have been made, and much of the remainder found to have been made but not in trade or commerce,[4493] there was a significant evidentiary gap in this part of the Third Party Claim.[4494] If there were only a small number of aspects of the Joe White Executives' Representations which had not been established, then a finding of reliance may have been theoretically possible. As it stands, given the contrast between what was alleged to have been relied upon and

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4493 Only a relatively small subset of the Joe White Executives' Representations have been found to have been made in trade or commerce: see issue 126 above.

4494 See also pars 4791-4797 concerning the problems with proving the components of the Joe White Executives' Representations.

what has been proven, the allegation of reliance must fail at the threshold.

5103 In addition, no direct evidence of reliance on the particular representations found to have been made in trade or commerce was adduced. It is also not possible to infer reliance on these representations from the evidence available. Applying the test in *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq),*[4495] the Viterra Parties have not shown that "common sense dictates" that the limited representations found to have been made in trade or commerce by Hughes and Argent played at least some part in inducing Viterra to make the Financial and Operational Performance Representations to Cargill.[4496] This approach cannot be satisfied in circumstances where the representations were not calculated to induce Glencore or Viterra to make any further representations and where the relevant statements were a very small subset of the basis upon which it was alleged by the Viterra Parties that the Financial and Operational Performance Representations were made.

5104 To elaborate, the Viterra Parties made no attempt to link any particular statement or statements of the Management Presentation Statements, the Operations Call Statements or the Commercial Call Statements to any particular representation of the numerous Financial and Operational Representations alleged, or to identify any combination of statements of Hughes, or separately Argent, of the statements relied upon said to comprise a particular representation or particular representations. Indeed, regardless of any findings, mindful of the fact that the case against each of the Third Party Individuals had to be established separately and that their involvement was different such that none of them was involved in all aspects of the conduct the subject of claims by Cargill Australia, there was a flaw in this aspect of the Third Party Claim. That is, the Viterra Parties failed to identify particular statements alleged to have been made by each of the Third Party Individuals in the Third Party Claim against that person that were then said to have been relied upon in making any, some

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4495 (2010) 31 VR 575.

4496 Ibid, 603 [106] (Buchanan and Nettle JJA). See also *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 43 IPR 545, 556 [45] (Kiefel J, with whom Wilcox J agreed); *Ricochet Pty Ltd v Equity Trustees Executors and Agency Co Ltd* (1993) 41 FCR 229, 234.3 (Lockhart, Gummow and French JJ); *Gould v Vaggelas* (1984) 157 CLR 215, 238.5 (Wilson J).

or all of the Financial and Operational Performance Representations.

5105 A simple example may be given to illustrate the point. Stewart was alleged to have caused the Viterra Parties loss by reason that they were not informed of the Undisclosed Matters and that the Warranties were incorrect. In turn, in relation to the Stewart Representations said to form part of the Joe White Executives' Representations, this was based on allegations that Stewart represented that the Undisclosed Matters did not exist and that the Warranties were true and correct. The particulars of the Stewart Representations referred to the entirety of particulars earlier in the Third Party Claim which provided the basis upon which it was alleged that it was represented that each of the Information Memorandum Statements, the Financial and Operational Information, the Operations Call Statements, the Commercial Call Statements, the Management Presentation Statements and the Warranties were true and correct as well as why the Undisclosed Matters did not exist. Stewart had no involvement at all in any of the Information Memorandum Statements, the Operations Call Statements, the Commercial Call Statements or the Management Presentation Statements. Reflecting this lack of involvement, of the 10 pages of particulars referred to which were claimed to support these allegations against Stewart, in substance Stewart was only mentioned twice, and in a limited manner.

5106 *First*, it was pleaded that Stewart, along with the other Third Party Individuals, did not disclose the Undisclosed Matters in circumstances where there was a reasonable expectation that they would do so because of 5 matters which were identified. Four of these matters concerned events in which Stewart simply had no involvement. The other matter related to his involvement in the Warranty verification process.

5107 *Secondly*, his involvement in the Warranty verification process was relied upon separately, and even then not in relation to all of the Warranties that were alleged to have been verified by the Third Party Individuals. Quite the contrary, in relation to Stewart there were only 2 Warranties that were referred to, namely Warranty 7.3 (concerning material defaults of Material Contracts) and Warranty 17(a) (concerning compliance with Laws). No doubt this was because these were the only Warranties

Stewart was asked to verify that were relevant to the Warranty Representations. After referring to these matters, the Viterra Parties repeated the pleading that after the "respective verifications" and before the Acquisition Agreement was entered into, Stewart and the other Third Party Individuals did not inform the Viterra Parties that any of the Warranties was not accurate in circumstances where there was a reasonable expectation that they would.[4497]

5108 And yet, despite this very small fraction of involvement of Stewart in the overall conduct (being the entirety of the Joe White Executives' Representations) alleged to constitute the basis upon which Glencore and Viterra made all of the Financial and Operational Performance Representations, and Viterra gave the Warranties and made the Warranty Representations, it was alleged that those representations were made by the Viterra Parties because of Stewart's conduct.

5109 It follows that, in essence, there was only 1 relatively brief meeting on the cusp of the Acquisition Agreement being entered into[4498] that Stewart attended which was relied upon for the allegations that: (1) he represented the Undisclosed Matters did not exist; (2) he represented all the Warranties the subject of the Statement of Claim were true and correct; (3) the Viterra Parties made all the Financial and Operational Performance Representations; and (4) the Viterra Parties gave the Warranties and made all the Warranty Representations.[4499]

5110 Accordingly, even if the Warranty verification process had been properly conducted and Stewart had actually verified Warranties 7.3 and 17(a) as being true and correct (contrary to what has been found above),[4500] such a finding could not possibly have supported the allegation that the Stewart Representations were made; namely that *all*

4497 The Third Party Claim had previously included the words "despite having been requested to do so if any of the Warranties was not accurate", but these words were struck through in subsequent iterations. There was no evidence that would have supported any such request had this been maintained.

4498 See pars 4966, 5016 above.

4499 These 4 matters are a reference to par 59 of the Third Party Claim, which actually alleged Glencore also made the Warranty Representations (see par 5088 above), adjusted to reflect that it was only alleged by Cargill Australia that Viterra made the Warranty Representations.

4500 See issue 125.6 above.

of the Undisclosed Matters did not exist or that *all* of the Warranties giving rise to the Warranty Representations were true and correct.

5111 Dealing with the Undisclosed Matters first, there could not have been any reasonable expectation as alleged. At the time Stewart attended the brief meeting with Wilson-Smith without any prior notice on 1 August 2013, a large body of information had been provided by the Viterra Parties to Cargill on a confidential basis about which Stewart had not been informed. Accordingly, he did not know what had been stated to Cargill about the Viterra Practices or any other operational matters concerning the Joe White Business. Further, there was no allegation to suggest why Stewart would have assumed that Hughes would not have disclosed all relevant matters to the Viterra Parties as the chief executive officer involved in the sale process. In these circumstances, it was bordering on the fanciful to suggest that Wilson-Smith approaching Stewart without warning to discuss a very limited number of Warranties gave rise to a reasonable expectation that Stewart would have disclosed any, much less each, of the Undisclosed Matters.[4501]

5112 Equally, there was a complete absence of connection between Stewart's verification of 2 of the relevant Warranties and the remaining Warranties which were the basis of the claims concerning the Warranty Representations. By way of simple example, by Stewart allegedly verifying Warranties 7.3 and 17(a), such conduct could not possibly have touched upon the manner in which the Records were compiled or maintained (Warranty 4.2(a)), whether the Records were complete or up-to-date (Warranty 4.2(c)), whether the Data Room Documentation had been collated and disclosed in good faith and with reasonable care (Warranty 12(a)) and so on.

5113 Finally regarding Stewart, the Viterra Parties alleged *all* the Financial and Operational Performance Representations were made by reason of Stewart making the Stewart Representations on 1 August 2013. A fundamental difficulty with this was that many of the matters alleged by Cargill Australia to give rise to the Financial and Operational

4501 See pars 5016-5017 above.

Performance Representations occurred long before 1 August 2013 (and had nothing to do with Stewart).

5114 Returning to the matters relating to Hughes and Argent, there was nothing in the broader context around the making of the statements as found that was sufficient to support an inference of reliance being drawn. While Hughes' submissions disputing the asymmetry of knowledge between the Viterra Parties and the Joe White executives were not persuasive to the extent of their apparent reliance on the Alleged Industry Practices,[4502] he was correct to submit that any asymmetry (leaving Hughes' knowledge aside) would not without more be sufficient to establish reliance on any particular representations. Similarly, the actions of the Viterra Parties following the 15 October Meeting were not sufficient evidence of any reliance on the Management Presentation Statements, on the Operations Call Statements, or on the Commercial Call Statements. Further, given Hughes was a senior employee of Viterra Ltd and a senior executive of Viterra, the dichotomy sought to be established by the Viterra Parties concerning Viterra's knowledge and Hughes' knowledge was entirely artificial.

5115 In any event, with the exception of Hughes and Argent, no one from Glencore or Viterra attended the Management Presentation,[4503] the Operations Call[4504] or the Commercial Call,[4505] although each of these gatherings was attended by representatives of Merrill Lynch. The Viterra Parties' factual submissions did not identify any decision-maker within Glencore or Viterra who was influenced by and made any decision as a result of what was said by Argent in relation to his very limited statements during the Management Presentation or in relation to Hughes concerning the statements he made during the Management Presentation, the Operations Call or the Commercial Call. In contrast to the position with respect to the Information Memorandum, where it could readily be inferred that the Information Memorandum

4502 See issue 13 above.
4503 See par 710 above.
4504 See par 865 above.
4505 See par 910 above.

would not have been circulated until it had been duly verified,[4506] there was nothing of substance[4507] to indicate that the particular statements made by Argent at the Management Presentation, or by Hughes on the 3 occasions in question, had any causal connection with the actual decision of the Viterra Parties to make all the Financial and Operational Performance Representations or give all the Warranties, or for that matter proceed with the sale of Joe White.

5116 On the question of reliance on anything represented by Argent as alleged, the events in late October 2013 demonstrated that the Viterra Parties did not rely upon what Argent may have relevantly represented before that time in determining to proceed with the transaction. The fact that Argent was not approached at all by Mattiske or Fitzgerald (or anyone else on behalf of the Viterra Parties) indicated that it was appreciated by the Viterra Parties that the issues raised in the Cargill 22 October Letter did not concern the accuracy of the actual financial results achieved by Joe White from 2010 to 2013 from an accounting point of view, but rather concerned how operationally those results had been achieved. In this regard, as would be expected, the Viterra Parties turned to the Joe White executives that were involved in conducting Joe White's operational activities. Implicit in the fact that Argent was not approached at all to address the issues that had been raised by Cargill was that the Viterra Parties understood that Argent would have had little, if anything, of substance to convey concerning the existence and implementation of the Operational Practices. This circumstance presented another difficulty for the Viterra Parties in establishing any reliance upon any of the Argent Representations, at least insofar as they decided to proceed with Completion.

5117 Lastly, the Financial and Operational Performance Representations were alleged by Cargill Australia to be made based on particular conduct of the Viterra Parties. The particulars to the 10 representations were set out individually in the Statement of Claim. Although these allegations were denied by the Viterra Parties, for the purposes

4506 See pars 449-452 above.

4507 Including the provision of summaries of the Operations Call and the Commercial Call to Merrill Lynch: see pars 4838-4843 above.

of making the allegations in the Third Party Claim only,[4508] the Viterra Parties repeated these allegations. Importantly, with respect to every Financial and Operational Performance Representation, the particulars of the representation included numerous Information Memorandum Statements.[4509] Critically, as against neither Hughes nor Argent have the Viterra Parties established any conduct engaged in *in trade or commerce* for the purpose of any alleged contravention of section 18 of the Australian Consumer Law. In other words, none of the conduct of either Hughes or Argent engaged in with respect to the Information Memorandum was in trade or commerce, which necessarily meant an essential element of each Financial and Operational Performance Representation could not be established by the Viterra Parties to have been engaged in in trade or commerce against Hughes or Argent. Although the Viterra Parties alleged different conduct against Hughes and Argent to the conduct alleged against the Viterra Parties by Cargill Australia,[4510] it was significant that none of the conduct found to have been engaged in by Hughes and Argent in trade or commerce bore any resemblance to the composition of the acts alleged to comprise the conduct giving rise to the Financial and Operational Performance Representations.

5118 Accordingly, the answer to each of the questions raised in issue 127 is no.

X.128 Were the Joe White Representations and/or the Joe White Executives' Representations misleading or deceptive or likely to mislead or deceive and did Joe White and/or the Third Party Individuals thereby engage in misleading or deceptive conduct in contravention of section 18 of the Australian Consumer Law?

5119 As a result of the findings in issues 124 to 127 above, these questions do not arise.

X.129 Were the Third Party Individuals involved within the meaning of section 2(1) of the Australian Consumer Law in any misleading or deceptive

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4508 In par 52 of the Third Party Claim, Glencore and Viterra referred to and repeated "the matters pleaded in the [S]tatement of [C]laim" and proceeded in pars 53 to 64 to make allegations against each of the Third Party Individuals based upon the Joe White Executives' Representations.

4509 See pars 2835, 2856, 2872, 2877, 2882, 2889, 2896, 2907, 2910, 2914 above.

4510 See par 5067 above.

conduct by Joe White?

5120 As Joe White has not been found to have engaged in any misleading or deceptive conduct, this question does not arise. However, it cannot be passed over that in the Viterra Parties' closing submissions there was simply no attempt to identify how it was said that each Third Party Individual's conduct amounted to involvement in each of the Joe White Representations or each of the Joe White Executives' Representations. On the evidence, this was impossible as some executives were simply not present and had no knowledge of what other executives had done.

5121 When this was raised with the Viterra Parties' lead senior counsel, after yet again acknowledging that the case against each Third Party Individual had to be considered separately and that there was no attribution of knowledge between them,[4511] no attempt was made to fill the void. The response was simply that the court was only required to determine the case on the pleadings as dealt with in the submissions. This approach was consistent with an earlier exchange with another of Viterra Parties' senior counsel concerning the position of Argent. When the question was asked directly how it was being suggested that Argent was "involved" in any representations concerning the Viterra Practices when the Viterra Parties had only referred to 2 documents in seeking to establish Argent's knowledge,[4512] both of which on the Viterra Parties' case did not disclose the existence of the Operational Practices (as was the fact), the court was told:

> This is the only evidence we rely upon, and I'm dealing here, Your Honour, in relation to the breach of his duties to act in the best interests and to be ethical; that's all. The logic of the proposition I'm putting to you is that if we are liable, that is Mattiske and King are held to have the requisite knowledge, then Argent on the same logic must be. I put it no higher than that, Your Honour. Argent disputes his knowledge, and they are the only matters we put forward on that point.

Effectively, the point was conceded.[4513]

4511 To make clear the matter was not in issue, it was suggested by senior counsel that it had been said 50 times.

4512 See pars 375, 796-813 above.

4513 During oral closing submissions, after I had read all the written submissions, I enquired of the Viterra

X.130 Prior to entry into the Acquisition Agreement, by reason of the Joe White Representations and/or the Joe White Executives' Representations, were Glencore and/or Viterra not informed of the existence of any Undisclosed Matters or the inaccuracy of any Warranties?

5122 For the reasons given in issues 124 to 127 above, including that the Viterra Parties have failed to establish that either the Joe White Representations or the Joe White Executives' Representations were made in trade or commerce, these questions do not arise.

X.131 If Glencore or Viterra had been informed of the existence of any "Undisclosed Matters found by the court" (as defined in paragraph 49A(a) of the Third Party Claim) or the inaccuracy of any "Incorrect Warranties found by the court" (as defined in paragraph 49A(b) of the Third Party Claim) prior to entry into the Acquisition Agreement would Glencore and/or Viterra have taken steps to:

(1) Disclose to potential purchasers of Joe White, including Cargill Australia, the Undisclosed Matters?

(2) Amend the terms of the Acquisition Agreement, before it was entered into, including the Warranties?

(3) Investigate the Undisclosed Matters?

(4) Cause Joe White to cease any "Viterra Practices found by the court" (as defined in paragraph 49B(f) of the Third Party Claim)?

and, were Glencore and/or Viterra therefore deprived of the opportunities to:

(5) Take the steps set out in sub-paragraphs (1) to (4) above (or any of them) prior to entry into the Acquisition Agreement?

(6) Avoid any liability to Cargill Australia in respect of:

(a) Any misleading or deceptive conduct in which Glencore and/or Viterra are held to have engaged in contravention of section 18 of the Australian Consumer Law?

Parties whether they intended to maintain every claim against each and every third party. The question was taken on notice. When I revisited the issue, I was told that the Viterra Parties had given instructions that they maintained every aspect of the Third Party Claim. Given the obvious difficulties, including with respect to this issue, I responded directly. I said I would say candidly that such a position was surprising in light of the written submissions. Even after the exchanges referred to above, the Viterra Parties chose not to withdraw any claim the subject of the Third Party Claim.

(b) Any conduct amounting to deceit in which Glencore and/or Viterra are held to have engaged?
(c) Any conduct held to amount to breach by Viterra of the Acquisition Agreement?
(d) Any conduct amounting to negligent misrepresentation in which Glencore and/or Viterra are held to have engaged?

X.131.1 Refining the issue to reflect the findings made

5123 Strictly, it is unnecessary to answer the questions that arise under this issue.

5124 The allegations in paragraphs 49A, 49B, 49C and 50 of the Third Party Claim were premised on the basis that if, which was denied, the Financial and Operational Performance Representations and the Warranty Representations were made by the Viterra Parties to Cargill Australia, they were made *because Joe White made the Joe White Representations*. Further, by "reason of the matters pleaded" (which included the making of the Joe White Representations), the Viterra Parties alleged:

(1) In paragraph 49A, that before entering into the Acquisition Agreement they were not informed of the Undisclosed Matters or that the Warranties were incorrect.

(2) In paragraph 49B, that if Glencore or Viterra had been informed of the Undisclosed Matters or that the Warranties were incorrect they would have taken certain steps.[4514]

(3) In paragraph 49C, that "[b]y reason of the matters pleaded in paragraphs 44 to 49B", the Viterra Parties lost the opportunity to take those certain steps and avoid any liability to Cargill Australia.

(4) In paragraph 50, that "[b]y reason of the matters pleaded in paragraphs 44 to 49C", the Viterra Parties have suffered or will suffer loss or damage.

As it has been found that the Joe White Representations were not made, the underlying premise of this aspect of the Third Party Claim has not been established.

4514 See par 5128 below.

5125 Further, this issue was raised later in the Third Party Claim on the basis that the Joe White Executives' Representations were made in trade or commerce within the meaning of section 18 of the Australian Consumer Law. As this has also not been established,[4515] this other aspect of the Third Party Claim relevant to this issue was not made out.

5126 However, it is appropriate that certain factual matters that otherwise would have arisen under this issue be considered.[4516] Before doing this, there have been a number of further findings made that should be referred to in order to clarify the questions to be determined on this issue.

5127 The Undisclosed Matters (including the Viterra Practices) have been found to have existed and not to have been disclosed to Cargill Australia.[4517] Further, in relation to the Warranties, not only has it been found that Joe White did not make any representations in that regard,[4518] it has also been found that none of the Third Party Individuals made any of the alleged representations concerning the Warranties.[4519] Finally, for the reasons stated above,[4520] I am not satisfied that Mattiske did not know that Joe White's customers were ignorant of the Viterra Practices, at least in relation to the Varieties Practice and the Gibberellic Acid Practice. Also at the very least, Mattiske must have strongly suspected that customers had not been fully informed about the manner in which the Reporting Practice was being implemented.[4521]

X.131.2 The Viterra Parties' submissions

5128 In line with the pleaded allegations, the Viterra Parties submitted that because Glencore and Viterra were not informed of the existence of the Undisclosed Matters[4522] or the inaccuracy of any incorrect Warranties before the Acquisition Agreement was

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4515 See issue 126 above.
4516 See also issue 139 below.
4517 See issue 10 above.
4518 See issue 124 above.
4519 See issue 125.6 above.
4520 See pars 1537-1540 above.
4521 See pars 1541-1545 above.
4522 Necessarily, this submission was put on the basis that the knowledge of Hughes and the other Third Party Individuals was not the knowledge of Glencore or Viterra: see issues 11, 22 above.

executed, they lost the opportunity to take the following steps:

(1) Disclose the Undisclosed Matters to potential purchasers, including Cargill Australia.

(2) Amend the terms of the Acquisition Agreement before it was entered into, including the Warranties.

(3) Investigate the Undisclosed Matters.

(4) Cause Joe White to cease the Viterra Practices.

(Together, "the Alleged Steps".)

5129 The Viterra Parties acknowledged the onus of proving causation of loss would only be discharged by them if they could prove that "it was more probable than not that they would have received a valuable opportunity".[4523]

5130 The Viterra Parties submitted that, if they had been informed of the existence of any Undisclosed Matters or the inaccuracy of any incorrect Warranties prior to entry into the Acquisition Agreement, the following uncontradicted evidence from Mattiske should be accepted:[4524]

(1) If, before the Information Memorandum was provided to prospective purchasers, Mattiske had become aware of the Viterra Practices,[4525] "and

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4523 *Badenach v Calvert* (2016) 257 CLR 440, 455 [41] (French CJ, Kiefel and Keane JJ). This case concerned factual causation by reference to a "but for" test, pursuant to the *Civil Liability Act 2002* (Tas), s 13(1)(a): 454 [36].

4524 The manner in which the evidence was said to be uncontradicted is discussed below: see par 5157.

4525 In Mattiske's witness statement, he referred to the "alleged Viterra Practices, as defined in paragraph 19(a) of the [Statement of Claim]". Despite this, when asked during his cross-examination what he understood by "Viterra Practices" as that term was used in this proceeding, Mattiske gave a different meaning. In responding to this question, Mattiske referred to 3 separate practices, being the adjustment or changing of Certificates of Analysis by 2 standard deviations, the use of barley varieties that were "not specific within the customer contracts" and the use of gibberellic acid where contracts specifically requested that it not be used. Thus, although the Viterra Parties in their submissions correctly distinguished the Viterra Practices as defined in the Statement of Claim and those referred to in this oral evidence of Mattiske, by defining those "Viterra Practices" in their submissions as the "Mattiske Defined Practices", in substance, Mattiske accepted the definition as including the Reporting Practice (in saying this, I have assumed that Mattiske's evidence was a reference to changing the reported results by up to 2 standard deviations, though it would appear he was not aware that adjustments or changes

he had not known whether or not customers were aware of the [Operational][4526] Practices",[4527] he would have needed to investigate whether the Operational Practices were material or not.[4528] Further, reference was made to Mattiske's evidence that had he become aware of the Operational Practices and that customers were not aware of them, he would have done what the Glencore Group normally did; namely, rectify the situation by amending contractual arrangements with customers to ensure the contracts reflected what was actually happening.

(2) If, after the Information Memorandum had already been provided to prospective purchasers, Mattiske had become aware that Joe White was engaging in the Operational Practices and that customers did not know, he "probably would have stopped the process and investigated and probably halted the process until we could get to the bottom of what was going on".

(3) If, prior to the signing of the Acquisition Agreement, Mattiske had been told that Joe White was engaging in the "Viterra Practices"[4529] he would have taken certain steps to ensure that:[4530]

(a) An investigation was undertaken to determine whether, and to what extent, the Viterra Practices were actually occurring.

(b) Insofar as the Viterra Practices were occurring (and should not

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were made when results were greater than 2 standard deviations), the Varieties Practice and the Gibberellic Acid Practice; that is, in substance largely reflecting the Operational Practices as defined in these reasons (but acknowledging the language he used was not identical). In the circumstances, it is convenient in addressing this issue to continue to use the term Operational Practices (and the term Viterra Practices, when referring to the Operational Practices performed routinely) as those terms are defined in these reasons.

4526 The Viterra Parties' submissions referred to the "Viterra Practices" rather than the Operational Practices, but as they themselves submitted, by definition "Viterra Practices" encompassed the fact that Joe White's customers did not know about the Viterra Practices: see fn 4525 above.

4527 As to which, see pars 1537-1545 above.

4528 See par 1495 above.

4529 The Viterra Parties' submissions referred specifically to the Viterra Practices as pleaded rather than the Mattiske Defined Practices.

4530 See par 1494 above.

have been), the practices were immediately ceased.

(c) Glencore and Viterra obtained legal advice on what to do next, including in particular on how to disclose information to Cargill.

(d) A recommendation was made by him to his superiors that an acquisition agreement ought not be executed until the issues were resolved.

5131 The Viterra Parties submitted that because the Viterra Practices were part of the Undisclosed Matters, it should be found that, if Mattiske had been informed of the existence of *any* of the Undisclosed Matters prior to entry into the Acquisition Agreement, Mattiske would have taken the same steps as were pleaded.[4531]

5132 Further, the Viterra Parties submitted that as a result of Mattiske not being made aware of the existence of the Viterra Practices prior to the execution of the Acquisition Agreement, Viterra and Glencore lost the opportunity to:

(1) Ensure that practices that were occurring (and should not have been) ceased.

(2) Obtain legal advice on what to do next.

(3) Inform Cargill of the existence and extent of the Operational Practices.

(4) Reach a resolution in relation to these issues prior to execution of the Acquisition Agreement (including the amendment of any Warranties potentially relevant to the Viterra Practices).

(5) And thus avoid liability to Cargill Australia arising from any claims relating to any allegations of non-disclosure of the Viterra Practices.

X.131.3 The Cargill Parties' submissions

5133 The Cargill Parties took issue with the submission that, had the Viterra Parties not

4531 See par 5130(3) above.

been misled, they would have undertaken remedial steps. It was submitted that, if the court were to find the Viterra Parties had been misled, the evidence did not establish that Glencore or Viterra would have done anything other than what they did. Referring to issues 24 and 38 above, the Cargill Parties submitted that in October 2013 when the Operational Practices were raised, neither Glencore nor Viterra took steps to disclose the full truth to Cargill. They contended that this was because Glencore and Viterra's principal aim in that period was to complete the sale of Joe White to Cargill Australia.

X.131.4 Hughes' submissions

5134 Hughes submitted that the Viterra Parties' pleaded case[4532] was different to Mattiske's evidence.[4533] It was submitted that the pleaded case assumed that each of the relevant representations had been made out, in contrast to any 1 of those matters being found.[4534] It was contended if any 1 of those matters were found it would give rise to a different or alternative course of conduct for which an opportunity to pursue was lost. Therefore, it was submitted that insofar as issue 131 referred to "any" Undisclosed Matters, it went beyond the pleading.[4535] The pleading was confined to how Glencore and Viterra would have acted if either of them had known of *each* of the relevant matters, not simply any of them.[4536] In addition to this general submission, some further points were raised.

5135 *First,* it was submitted that Mattisske's witness statement was silent in relation to the actual steps that he claimed would have been taken in amending the terms of the

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4532 See pars 5123, 5128 above.

4533 In particular, see pars 5130(3), 5132(3) above.

4534 Mattiske's evidence concerned the Viterra Practices, which was only 1 of the matters that formed the Undisclosed Matters: see pars 1851, 5131 above.

4535 When asked why this had not been raised earlier when the list of issues was being settled in conjunction with the court, Hughes' senior counsel explained that the issue only surfaced for him and his junior when final submissions were being prepared.

4536 Hughes submitted that if a party alleges that it would have acted in a certain way because of matters not disclosed, it must prove that fact. Further, he submitted if evidence establishes that disclosure was made of 1 of multiple matters, but the evidence as to causation only goes to how a wronged party would have acted if it did not know of all the matters, the case must fail for want of proof, citing *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 329 [53]-[55] (French CJ), 353 [146]-[147] (Gummow, Hayne, Heydon and Kiefel JJ).

Acquisition Agreement and disclosing the Undisclosed Matters to potential purchasers. Hughes submitted that given there was no other evidence on how the Viterra Parties would have sought to amend the Acquisition Agreement had they learned of the Undisclosed Matters or the incorrect Warranties,[4537] this element of the case should be taken to have been abandoned. Consequently, Hughes contended that there could be no finding of any loss of opportunity to avoid liability by taking the Alleged Steps and ultimately the claim for causation was bound to fail.

5136 *Secondly,* Hughes submitted that the pleaded assertion that the Viterra Parties would have disclosed the matters to potential purchasers, including Cargill, was also contrary to other evidence at trial. It was submitted that Mattiske's subjective counterfactual evidence as to what he would have done if the conduct in question had not occurred should not be accepted in light of contemporaneous material and objectively credible evidence. Hughes noted that:

(1) Mattiske gave evidence that in October 2013 he did not consider there to be any real or material issues, creating the inference that he would not have conducted further investigations or made any disclosure had he discovered the information earlier.[4538]

(2) It was clear that various senior individuals in the Viterra Parties' wider business knew about the use of off-grade barley. King and Merrill Lynch knew that customers were not generally told about the use of off-grade barley.[4539] Further, it was contended the evidence demonstrated that Gordon told Joe White executives not to communicate with customers around contracts.[4540] Furthermore, Hughes referred to evidence that he had raised concerns with Gordon, Fitzgerald and Ross, and contended that as a result of these exchanges: (a) Joe White was being run in a

4537 Further, Hughes submitted that the prospect of Cargill agreeing to amendments was wholly unsupported by Cargill's evidence at trial.
4538 See par 1495 above.
4539 See par 805 above.
4540 See par 1299 above.

manner inconsistent with the Viterra Code; (b) the Viterra Practices and Viterra Policies had been enshrined in Viterra corporate documents; (c) the Viterra Policies were accessible on Pulse to all Viterra's employees who were all required to follow Viterra policies.[4541]

(3) The above matters supported drawing an inference that the Viterra Parties made a conscious decision not to communicate these details to prospective purchasers, including Cargill, during the sale process.

(4) In October 2013, the Viterra Parties did not disclose everything that they knew about the Operational Practices.[4542]

5137 Further, Hughes submitted that the Viterra Parties instructed Joe White executives to cease all communications with Cargill in relation to these matters.[4543] Clark gave evidence that he had been told that Glencore had instructed Joe White employees not to talk to Cargill and Viers gave evidence that both Hughes and Rees informed him that they could not discuss matters with him.[4544]

5138 *Thirdly,* the assertion that the Viterra Parties would have undertaken further

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4541 See par 278 above. However, see also pars 166, 287-292 above.

4542 It was submitted in particular that the following was not disclosed: (1) it was known that between October 2013 and March 2014, Joe White would not always have the barley that it required available to it the consequence of which "could be big dollars"; (2) the cost base for that year would be $1.5 million higher if Joe White had been using the correct barley varieties; (3) the impact on the Joe White Business by reason of ceasing the Gibberellic Acid Practice was possibly to move from 4 day germination to 5 days, but if Joe White had access to certain grain, that risk would be lower; (4) a Joe White survey of barley varieties used for a specific week found that on average there was 74 percent compliance with respect to barley variety, which was in line with the Malt Cost Reduction Transformation Project targets for off-specification barley usage; (5) it was estimated that there would be a 2.5 percent loss in production to achieve the appropriate malt quality in the absence of exogenous gibberellic acid, but it would decrease as new barley varieties with higher levels of vigour became available; (6) the Varieties Practice was an internal Viterra-driven initiative to improve profitability and it was stretching things to refer to it as an industry practice; (7) Joe White was short 29,500 tonnes of barley to meet the specifications for Lion Nathan and Heineken; (8) the 3 barley varieties permitted by Heineken were diminishing; (9) a new crop year of the barley required by Lion Nathan was available, but Lion Nathan would say Joe White was in breach if that crop year was provided; (10) the Tamworth and Sydney plants needed Gairdner or Commander and there was not enough barley in Australia to fill the shortfall; (11) Joe White was unable to supply malt only if it was required to supply exactly as specified; (12) Joe White would lose US$10 per tonne if it had to replace barley for someone else's; and (13) 70,000 tonnes would be affected by the Gibberellic Acid Practice for Heineken and Asia Pacific Breweries, and Admiral would solve the problem for that contract (but it was not the whole solution).

4543 See par 1268 above.

4544 See pars 1203, 1269 above.

investigations upon learning of the Undisclosed Matters and the incorrect Warranties was submitted to be undermined by the lack of response by King to the email sent 2 July 2013 coupled with Mattiske's position in October 2013.[4545]

5139 *Fourthly*, (on the basis that the Viterra Parties could establish they did not know of the Operational Practices before October 2013, which Hughes denied) Hughes submitted the Viterra Parties' reaction to the events of late October 2013 was indicative of how they would have reacted prior to 4 August 2013 if they had known of the Operational Practices at the time.

5140 *Fifthly*, no evidence was called from those within Glencore or Viterra who had the power to withdraw from the transaction and an inference should be drawn that those with authority would not have given evidence they would have taken the Alleged Steps.[4546]

4545 In relation to King, see pars 804-806 above. As for Mattiske, Hughes pointed to Mattiske's evidence that Mattiske: (1) did not ask the Joe White executives if an analysis had been undertaken of the scope of the Operational Practices and the extent to which they affected customers following the issues raised by Cargill (see pars 1267, 1338-1342 above); (2) did not cause enquiries or analyses to be made internally regarding the extent of the Operational Practices (see par 1313 above); (3) was responsible for driving the October 2013 investigation and he believed the size of the investigation was sufficient given what they thought was the size of the issue (see par 1357 above); (4) while not believing the Operational Practices were confined to an isolated instance, did not ask Hughes about the extent of the Operational Practices, which customers were affected by the Operational Practices, or investigate these matters (see par 1531 above); (5) upon being informed by Purser that Cargill disagreed with the idea that the Operational Practices were standard in the industry, relied on Fitzgerald, Norman and Rees to follow up with Hughes for a response about whether it was industry practice or not (see pars 1342, 1443-1445, 1447, 1450, 1535 above); (6) did not enquire as to whether customers were informed (see pars 1357, 1535, 1542, fn 819 above) in circumstances where he did not know what customers knew and it had crossed his mind that the Operational Practices could be wrongful (see pars 1357, 1542 above); (7) did not recall asking Fitzgerald to ask if Joe White had any documents recording the results of analyses (see par 1531 above); (8) did not raise with Purser the option of deferring the contract to enable a proper investigation to be carried out and was not sure if this was an option: (see par 3504 above); and (9) did not specifically want to defer the contract and while he agreed he could have alleviated the constraints regarding not having sufficient time to investigate by offering to extend the time for settlement, he did not want to take this course: see par 1485 above.

4546 Hughes submitted that the executives in the Netherlands and Switzerland were ultimately responsible for conducting the Acquisition: see pars 362-363 above. Had Mattiske discovered the Operational Practices before the contract was entered into, Hughes submitted it would have been ultimately the decision of the leadership of Glencore how to proceed with the transaction and Mattiske did not recommend deferring the transaction as he thought the issue was not serious could be resolved: see par 1485 above. He submitted the ultimate decision-maker short of the chief executive officer, namely Mahoney, was not called as a witness: see par 3830 above. This was despite Mahoney still being a Glencore employee and a witness statement having been filed on his behalf. In these circumstances, it was contended that an inference should be drawn that both Mahoney and Mostert would not have given evidence that Glencore or Viterra would have taken the Alleged Steps. For discussion on the principles relating to inferences to be drawn from the absence of witnesses, see pars 1988-1996 above.

X.131.5 Youil's submissions

5141 Youil adopted Hughes' submissions in contending that the Viterra Parties already knew of the relevant matters prior to the Acquisition Agreement and failed to avail themselves of an opportunity to take the Alleged Steps. Therefore, Youil submitted they were not deprived of any such opportunity.

5142 Alternatively, Youil submitted that in assessing Viterra's counterfactual, what the Viterra Parties may have done prior to entry into the Acquisition Agreement could be gleaned from what they actually did in the period between execution and Completion. It was submitted that the Viterra Parties wanted to sell Joe White for the largest sum of money, and in October 2013, being more fully apprised of certain matters, Viterra sought to withhold information from Cargill. Therefore, Youil submitted that the Viterra Parties' motivations and general attitude to complying with their legal obligations militated against a finding that, if Viterra had been informed of the Undisclosed Matters prior to 4 August 2013, it would have undertaken the Alleged Steps.

X.131.6 Wicks' submissions

5143 Wicks submitted that Mattiske's evidence about what Mattiske would have done if he was informed about the Viterra Practices did not establish the Viterra Parties' pleaded counterfactual, for a number of reasons.

5144 *First,* it did not follow from Mattiske's evidence of the steps he would have taken, outlined above (investigation, cessation of the Operational Practices, legal advice and recommendation to his superiors),[4547] that it was more likely than not that those actions would have occurred.

5145 *Secondly*, Mattiske's evidence did not identify how any 1 or more of the actions he identified would have avoided liability to Cargill.

4547 See par 5130(3) above.

5146 *Thirdly,* as mentioned above,[4548] Mattiske was not the ultimate decision-maker. Mattiske's evidence was not sufficient for the court to determine what the Viterra Parties would have done in the counterfactual and it was significant that none of the relevant decision-makers were called to give evidence.

5147 *Fourthly,* the counterfactual as pleaded was not established as it related to the Undisclosed Matters broadly and the Warranties, whereas Mattiske's evidence was directed to the Viterra Practices only. Wicks submitted that it did not follow that because the Viterra Practices "were part of" the Undisclosed Matters,[4549] it should be found that the existence of any of the Undisclosed Matters would have resulted in Mattiske taking the Alleged Steps.

5148 *Fifthly,* both the Undisclosed Matters and the Warranties comprised a number of different parts or components. Only a subset of the Warranties were the subject of allegations made against Wicks. The Viterra Parties rolled up the breaches relating to the Undisclosed Matters and the Warranties without differentiating between the impact of any purported breach by any executive or by Joe White itself. As a result, there was no evidence that the Viterra Parties would have taken the Alleged Steps if Wicks specifically had not engaged in the impugned conduct.

5149 *Sixthly,* in the context of the October 2013 correspondence, Mattiske did not consider the Viterra Practices to be serious or material,[4550] and the Viterra Parties proceeded with Completion, undermining any suggestion that Mattiske or the Viterra Parties would have been proactive in taking any steps other than what they in fact did.

5150 *Seventhly,* Mattiske's evidence in cross-examination was less definitive than what had been set out in his witness statement. Wicks highlighted that in cross-examination Mattiske said that if he had discovered the Viterra Practices before the Information Memorandum was disseminated, Mattiske would have needed to investigate the Operational Practices to assess whether they were material or not. Wicks contrasted

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4548 See fn 4546 above.
4549 See par 5131 above.
4550 See pars 1485, 1495 above.

this with Mattiske's evidence that if he had discovered the Viterra Practices were occurring after the Information Memorandum was disseminated to prospective purchasers, "we probably would have stopped the process and investigated and probably halted the process until we could get to the bottom of what was going on". Then Wicks referred to the fact that, when asked later in his cross-examination about what he previously said in the witness box about a discovery of the Viterra Practices before the Information Memorandum was provided, Mattiske stated "I would've needed to investigate the practices, find out what's going on, and try and resolve the issues. Beyond that, you know, I still don't have enough knowledge about the practices. So to say we would suspend the process as a result of something I'm not sure about, then, you know, I can't give you an unequivocal answer about that." Finally, when asked whether, if he knew of the Viterra Practices before 4 August 2013, he would have suspended the sale, Mattiske said "I honestly don't know what I would have done in that situation".[4551]

5151 For these reasons, Wicks submitted that, based on Mattiske's own evidence, it could not be concluded that it was more probable than not that the Viterra Parties would have taken any of the Alleged Steps.

5152 Finally, in addition to the Cargill Parties' submissions above,[4552] Wicks referred to and adopted submissions made by the Cargill Parties on other issues as follows:

4551 For further details on Mattiske's cross-examination, see pars 1485-1488, 1495-1496 above. Further, the questions as framed during cross-examination which gave rise to this referred to "these practices" without being clear as to whether reference was being made to the Viterra Practices or was being limited to the Operational Practices: see also fn 4525 above. For completeness, Mattiske was cross-examined about hypothetical matters based on the assumption that he was told before the Information Memorandum was disseminated that "the practices" were occurring and that Joe White's customers did not know about them. Mattiske gave evidence that he would have resolved the issue by speaking to the customers and renegotiated the contracts "to make sure that we could deliver product within those terms or we would have washed out the contract at the market price and delivered the malt to other customers". When he was asked whether that meant he would have disclosed to customers what had been occurring, his evidence was that he was not saying that exactly. He then gave further answers to the effect that he would have made sure that "we had resolved these practices" so that there would not have been an issue. This evidence was of limited probative value as the assumptions were not clearly defined and bore no resemblance to the facts, however it must be said that the events after 1 November 2013 indictated that resolving the issues that confronted Joe White by reason of the Viterra Practices would have been no easy matter if it had been attempted before May 2013.

4552 See par 5133 above.

(1) In relation to issue 127 above, Glencore and Viterra did not rely on any of the alleged representations, as they, *first,* would not have taken steps to disclose the full truth to Cargill, in circumstances where King set the example for Hughes and Argent that Glencore sought to disclose value enhancing information and not disclose value destructive information to the greatest extent possible (as set out in issue 80 above),[4553] and *secondly,* would not have taken steps to disclose the full truth to Cargill, Inc because in fact they did not do so in October 2013 as set out in issues 24 to 38 above.

(2) In relation to issue 134 below, that on no view could the alleged representations have caused Glencore and Viterra loss or damage as Joe White was the "product" for sale and the Viterra Parties' liability to Cargill Australia would merely return Glencore and Viterra to the position that they would have been in had Joe White been sold for its real market price in 2013.

X.131.7 Stewart's submissions

5153 Stewart submitted that the Viterra Parties did not establish that, by reason of any conduct of Stewart, Viterra lost the opportunity to take alternative steps to avoid liability to Cargill before entering into the transaction.

5154 Stewart submitted the legal principles for loss of opportunity required the Viterra Parties to establish, on the balance of probabilities, the existence of an opportunity and the loss of it caused by the respondent to the claim.[4554] Further, he noted damages for a loss of chance will not be awarded where the chance is purely speculative.[4555]

5155 To this extent, Stewart submitted that there was no direct evidence to support the proposition that the Viterra Parties would have taken the Alleged Steps but for

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4553 See issues 80.3 and 80.4 above.
4554 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 353.7 (Mason CJ, Dawson, Toohey and Gaudron JJ).
4555 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, 643.4 (Deane, Gaudron and McHugh JJ).

Stewart's conduct, rather than proceeding to enter the Acquisition Agreement, and the objective evidence pointed to the contrary. It was submitted that, as mentioned above,[4556] key decision-makers were not called to give evidence and the court should not infer that they would have given favourable evidence on the issue.[4557] Furthermore, it was submitted that Mattiske's witness statement was full of formulaic and self-serving hypothetical statements tainted by hindsight, with little probative value;[4558] and when tested under cross-examination Mattiske was unsure what he would have done if certain matters were disclosed to him prior to entry into the Acquisition Agreement.[4559] Moreover, it was submitted that, in contrast, Viterra's actions in continuing to pursue the transaction and deciding not to investigate or disclose information to Cargill in October 2013 indicated that it would not have taken the Alleged Steps.[4560] Stewart submitted there was ample evidence of careful strategic decision-making by Viterra in pursuit of the goal of completing the Acquisition.

X.131.8 Argent's submissions

5156 Similarly, Argent submitted that the events that transpired in October 2013 were inconsistent with a finding in favour of the Viterra Parties on this issue. It was submitted that those events demonstrated that Viterra would not have taken the Alleged Steps. When the Viterra Parties were informed by Hughes, Youil, Wicks and Stewart of the existence of the Undisclosed Matters and therefore knew of the inaccuracies of the Warranties, Argent submitted the Viterra Parties failed to make

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4556 See par 5146 and fn 4546 above.

4557 For discussion on the principles relating to inferences to be drawn from the absence of witnesses, see pars 1988-1996 above.

4558 *Fabcot Pty Ltd v Port Macquarie-Hastings Council* [2011] NSWCA 167, [186]-[187] (Sackville AJA, with whom Beazley and Campbell JJA agreed).

4559 See pars 5150-5151, including fn 4551 above.

4560 In relation to the lack of investigation, Stewart submitted that although Stewart met with Fitzgerald, Norman and Lindner on 23 October 2013 by telephone, provided a copy of the Viterra Certificate of Analysis Procedure at that time and prepared a memorandum which analysed the proportion of barley varieties used in a particular week's production (see pars 1335, 1387-1389 above), there were no further discussions with Stewart after that information had been provided despite a full week remaining before Completion. This lack of investigation included that there was no follow-up with Stewart after the Cargill 29 October Letter had been received: cf pars 1510-1511 above. In relation to the lack of divulging information, Stewart referred to the non-disclosure of the Viterra Certificate of Analysis Procedure itself, as well as the failure to provide to Cargill details of the estimated usage of gibberellic acid and the proportion of compliance with barley varieties in production.

any relevant disclosure or take any of the Alleged Steps besides commencing an internal investigation following the Cargill 22 October Letter and directing that the Gibberellic Acid Practice cease.

X.131.9 Analysis

5157 It must be said at the outset that some of the evidence relating to this issue was a little unclear and confusing. The invitation to Mattiske during cross-examination to give his own definition of the Viterra Practices,[4561] which was then adopted subsequently (at least to some extent), resulted in a level of uncertainty in relation to the substance of some of Mattiske's evidence. The Viterra Parties emphasised this uncertainty in contending that Mattiske's evidence in chief was uncontradicted and therefore ought to be accepted.[4562] In my view, they were correct to identify the distinction, and it was clear that on occasions Mattiske was only addressing, in substance, the Operational Practices rather than the Viterra Practices when giving evidence about what he would have done. However, the onus was on the Viterra Parties to establish that they would have adopted a course as pleaded if they had known of the Undisclosed Matters or the inaccuracy of the Warranties before the execution of the Acquisition Agreement. Thus, generally speaking, any lack of clarity with respect to some of the evidence did not necessarily advance this aspect of their case.[4563]

5158 In any event, even taking into account the uncertainty of the evidence in a manner favourable to the Viterra Parties, and proceeding on the basis that Mattiske was "sincere" when giving his evidence about what he would have done in certain circumstances,[4564] for a number of reasons I am not satisfied that Glencore or Viterra

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4561 See fn 4525 above.

4562 As discussed above, the absence of cross-examination does not mean the unchallenged evidence in question must necessarily be accepted by the court: see fn 2697 above.

4563 In their submissions, the Viterra Parties compared various pieces of evidence concerning what Mattiske would have done if he had known of the Viterra Practices. With reference to the third occasion on which the issue was raised, they submitted that it was "likely" that the evidence given by Mattiske was in contemplation of the hypothetical concerning the Operational Practices rather than the Viterra Practices.

4564 To adopt the language of the trial judge, Hammerschlag J, as referred to in *Fabcot Pty Ltd v Port Macquarie-Hastings Council* [2011] NSWCA 167, [186]-[187] (Sackville AJA, with whom Beazley and Campbell JJA agreed). See also fn 2383 above.

would have taken the Alleged Steps if Glencore or Viterra had been informed before 4 August 2013 that the Undisclosed Matters existed or that the Warranties were not true and correct.[4565]

5159 Although the circumstances were not directly analogous to what might have occurred on or before 4 August 2013, there were a number of informative matters that fell from the events of the last week or so of October 2013.

5160 *First*, Mattiske's approach to the issues raised in the Cargill 22 October Letter was instructive. Notwithstanding the obvious seriousness with which Cargill was treating the issues raised, which was emphasised in his discussions with Purser,[4566] Mattiske's actions between 22 and 31 October 2013 were not those of someone who earnestly wanted to understand and address those issues;[4567] nor of someone who intended to diligently oversee the necessary investigative process.[4568] So much was effectively acknowledged by Mattiske himself.[4569]

5161 *Secondly*, the approach Mattiske took did not afford sufficient weight to the views of Cargill with respect to the Operational Practices.[4570] Mattiske knew Cargill was an established and significant participant in the malting industry.[4571] However, Mattiske was apparently content to act upon what he was told by Hughes in the presence of other Joe White executives,[4572] and (perhaps to a lesser extent) others,[4573] concerning what was standard industry practice despite Purser unequivocally informing Mattiske that none of the Operational Practices was standard industry practice.[4574] This approach was taken even though Mattiske considered Cargill to be a very major

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4565 Naturally, this is premised on the assumption (contrary to what has been found) that Viterra did not know of the Undisclosed Matters despite the knowledge of Hughes. Obviously, there was also the knowledge of other senior Viterra Ltd employees, including Youil, Wicks and Stewart.
4566 See pars 1319-1322 above.
4567 See pars 1531-1546 above.
4568 See, for example, par 1342 above.
4569 See par 1485 above.
4570 See pars 1372, 1443-1446, 1473, 1535, 1541-1542, 1545, 1549 above.
4571 See, for example, pars 398, 1444 above.
4572 See, for example, pars 1250-1251 above.
4573 Including persons who were not maltsters: see, for example, pars 1337-1341 above.
4574 See pars 1443-1446 above.

player in the malting industry and to know far more about that industry than he or anyone at Glencore did. Mattiske effectively ignored what Cargill had stated about what was not industry practice and failed to reconcile that position with what Hughes had said.[4575] This reflected an attitude of seeking to deflect or minimise the issues raised rather than address them directly and properly.

5162 *Thirdly*, the investigation process itself, conducted in October 2013 by persons acting for both Glencore and Viterra, was wholly inadequate. A simple comparison between what Glencore and Viterra were told by Joe White executives and what was contained in the Reply Letters was a reflection of this.[4576] However, it was also demonstrated by the many issues that were raised that were not followed up or investigated on or shortly after 23 October 2013.[4577] These included the Viterra Parties being told Joe White was always struggling to meet specifications and that specifications were often outside contractual terms; if Joe White was required to supply in accordance with contractual specifications it would be commercial suicide and the brand would be decimated; Joe White could be exposed to big dollars concerning problems with supplying malt using the required barley varieties; and Joe White engaged in using gibberellic acid when it was prohibited routinely at all plants.[4578] The excuse given by Mattiske that he did not have time to investigate, including to follow up what Hughes had told him on 29 October 2013,[4579] did not account for the fact that Hughes and the other Joe White executives were available to be spoken to throughout the period following 22 October 2013 and that much more could have been done to get to the bottom of things if there had been a genuine desire to do so. Given the glaring deficiencies of the investigation in a situation of commercial significance and seriousness,[4580] it was far from apparent that Glencore or Viterra would have conducted a proper investigation before 4 August 2013.

4575 His suggestion to the contrary during cross-examination was far from convincing: see pars 1250, 1444-1446 above.

4576 See annexure C to these reasons. See also pars 1373-1375, 1402-1404, 1514-1523 above.

4577 See, for example, pars 1265, 1285-1288, 1312, 1314-1318, 1387-1389, 2419 and fn 3844 above.

4578 See annexure C to these reasons.

4579 See pars 1320, 1370, 1450, 1462, 1504 above.

4580 See, for example, pars 1470-1472, 1532, 1535 and fn 4545 above.

5163 *Fourthly*, not only was the investigation in October 2013 inadequate, but Mattiske's evidence suggested his understanding of what had been conveyed as a result of the investigation was lacking. On the assumption that his evidence accurately reflected what occurred, it need not be determined whether this position was because of inadvertence, a decision to keep things from Mattiske, or because Mattiske was willing to leave it to others to investigate and did not himself take a sufficient interest.[4581] The simple fact was that on Mattiske's account the internal reporting of the investigations conducted was materially inadequate. Further, it seems probable that Mattiske was not informed of everything that Fitzgerald had been told because, if he had been, he could not have plausibly formed the views about materiality that he says he did.

5164 *Fifthly*, the lack of transparency and meaningful communication to Cargill in relation to relevant matters uncovered in October 2013 militated against any finding that Glencore or Viterra would have disclosed the Undisclosed Matters to prospective purchasers, including Cargill Australia.[4582] This point was highlighted by the fact that the Viterra Parties did not even deign to disclose the Viterra Certificate of Analysis Procedure despite Fitzgerald and Mallesons being told directly of its existence and contents and it not being included in the Data Room.[4583] The document was incontrovertibly relevant and material to Cargill's queries, but remained hidden from its view.[4584]

5165 *Sixthly*, the direction given to certain Joe White executives (including Youil, Wicks and Stewart) not to have any further communications with Cargill demonstrated that the Viterra Parties were careful to ensure that only information provided by them was available to Cargill.[4585] This cautious approach, while in itself not inappropriate, demonstrated a desire to control information being provided and resulted in a possible method of meaningful disclosure to Cargill being thwarted.

4581 See pars 1276, 1373-1375 above and par 5167 below.

4582 See pars 1373-1375, 1402, 1514 above, annexure C to these reasons and fn 4542 above.

4583 See pars 1324-1333 above.

4584 Further, it was plainly relevant to Viterra's ongoing obligations pursuant to cl 13.8 of the Acquisition Agreement: see par 1029 above.

4585 See pars 1203, 1265-1269 above.

5166 *Seventhly*, despite all the information that was provided by Hughes, Youil, Wicks and Stewart (on Mattiske's evidence, only some of which was provided to Mattiske), Mattiske formed the view on behalf of both Glencore and Viterra that the matters raised were not material for the purpose of their dealings with Cargill. This view was not unqualified, as Mattiske perceived the real possibility of Cargill taking a different view of things.[4586] However, the fact that Mattiske was willing to form and act upon such a view when there were obvious deficiencies in the basis of his understanding (including apparently not knowing the extent to which Joe White's customers were aware of the Viterra Practices) was illuminating.

5167 *Eighthly*, both Mattiske's report to his superiors and their responses to that report demonstrated a willingness on the part of Glencore and Viterra to take the attendant risks on board and deal with any claims later, rather than seek to properly address the issues at hand.[4587] There was a clear mindset to complete the Acquisition despite the issues that had been raised.[4588]

5168 *Ninthly*, in the absence of any evidence from Fitzgerald, Norman or Rees and in light of the evidence given by Mattiske, it must be inferred that there were serious deficiencies in the reporting of the results of the investigation.[4589] Accordingly, there was no basis to infer that Mattiske's shortcomings in approach would have been ameliorated by anyone else at Viterra conducting a thorough investigation which would have resulted in the decision-makers of Glencore and Viterra being properly informed of the relevant circumstances.

5169 *Tenthly,* and going beyond the events of October 2013, this attitude towards risk was consistent with the approach taken before the sale process commenced. Glencore chose not to accept the advice of Merrill Lynch and did not carry out a vendor due diligence.[4590] In the context of declining the recommendation to do a vendor due

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4586 See pars 1475-1477 above.
4587 See pars 1467-1484, 1490-1493 above.
4588 See also par 1377 above.
4589 See also par 5163 above.
4590 See pars 387-393 above.

diligence, King stated at the time that Mattiske, as head of "Australia Agri", was very comfortable with the Joe White Business.[4591] This information was conveyed to Merrill Lynch, but did not change the advice given. Merrill Lynch persisted, and advised that Glencore was taking a decent risk in launching the sale process if no one had looked at the Joe White Business other than a "light touch vendor assist" and Mattiske saying it was all fine. Further, King had anticipated that, in Australia, Mattiske, Rees and Fitzgerald would have carried out some form of vendor due diligence. There was no evidence that King checked whether this had occurred. Mattiske did no such thing; and there was nothing to suggest that Rees or Fitzgerald did any form of vendor due diligence. As King acknowledged, a decision not to conduct a vendor due diligence was a decision to take a risk,[4592] and it was a risk that Glencore was willing to take.

5170 *Eleventhly*, Mattiske's general approach to the affairs of Joe White was somewhat offhanded. Despite being appointed as a director of Joe White in December 2012, as well as agreeing to the directorships for Viterra, Mattiske took very little interest directly in the operations of Joe White.[4593] Further, when it came to the sale process itself Mattiske largely left the responsibility to others.[4594] Mattiske considered his many other responsibilities meant that he could only devote a limited amount of attention to affairs concerning Joe White, including the sale. Accordingly, if the issue had been raised before 4 August 2013 it would have been unlikely that Mattiske would have been any more diligent in his approach to any investigation than the deficient level of care he gave the matter in October 2013.

5171 *Twelfthly*, and critically, no one with authority on the matters that were raised in addressing this issue was called to give evidence on behalf of the Viterra Parties. Mattiske's evidence itself was categorical that persons other than himself would have been responsible for any decision to halt the sale process before 4 August 2013.[4595]

4591 Mattiske was willing to make this assessment despite his own evidence that he was not very familiar with the operations of the Joe White Business: see further par 5170 below.

4592 See pars 390, 394 above.

4593 See, for example, pars 98-99 above.

4594 See par 392 above.

4595 See par 363 above.

Further, in contrast to the managerial structure of Cargill,[4596] there was no evidence to suggest that those at various levels of management had the authority to withdraw or delay the sale of Joe White.

5172 In summary, each of these matters weighed strongly against any finding that the sale process would have been stopped and the Alleged Steps would have been taken if the Viterra Practices or any of the other Undisclosed Matters had been brought to the attention of the Viterra Parties (that is, beyond the knowledge that Viterra already had because of the knowledge of Hughes and others). When viewed collectively, the prospect of the Alleged Steps having been taken in the hypothetical circumstances raised appeared extremely remote.

5173 In addition, the propensity of Mattiske to argue the Viterra Parties' case rather than confining himself to giving evidence directly responsive to questions put was relevant to this issue. Viewing Mattiske's evidence as a whole, he can be fairly characterised as a witness whose evidence was infected by his desire to argue the case on behalf of the Viterra Parties.[4597]

5174 For completeness, the circumstances surrounding the Other Bidders Representations cannot be ignored. By making the Other Bidders Representations in the misleading way in which he did, Mahoney, as a key decision-maker in the sale process, demonstrated a particular level of desire on the part of Glencore to obtain the highest price for the sale of the shares in Joe White and the steps he was willing to take to achieve this goal.[4598]

5175 Although the above findings deal with the issue raised, particular mention should be made of each of the Third Party Individuals. The positions of Youil, Wicks and Stewart are straightforward. Generally speaking, they were not involved in the relevant events leading up to 4 August 2013 in any significant way.[4599] They did not

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4596 See pars 297-299 above.

4597 See, for example, pars 1977-1979 above.

4598 See also par 766 above.

4599 The very minor exceptions to this being Youil's involvement in the Operations Call (overseen and largely conducted by Hughes) (see pars 865-884 above) and his attendance at some of the site visits in

make any representation that any Warranty was true or correct. In the circumstances, there was simply no foundation to allege that any of them deprived any of the Viterra Parties from the opportunity to take the Alleged Steps. To the extent that each of them was engaged in the implementation of the Viterra Practices, he was acting with the express approval of the person to whom they all reported, being Hughes. Further, in light of the issues concerning the Viterra Code in 2010,[4600] there could be no sensible basis for thinking that others in Viterra's senior management took a different view to Hughes with regard to the ongoing implementation of the Viterra Practices.[4601]

5176 Argent's position must also be singled out for mention, but for a different reason. Although he was far more involved in the events leading up to 4 August 2013 (including his participation in the preparation of the Information Memorandum, his involvement in the preparation of the Management Presentation Memorandum and the Management Presentation itself, and his role in the Barley Inventory Call), there was no evidence that he knew of any of the Undisclosed Matters. Accordingly, on the facts before the court, there was no basis to find that Argent deprived Glencore or Viterra of any relevant opportunity.

5177 Further, with respect to Hughes' submissions about Viterra's knowledge of the use of off-grade barley more broadly within the corporate group, that knowledge of itself did not indicate that Joe White was not complying with customer contracts.[4602] Furthermore, the submission to the effect that Gordon gave a direction not to communicate with customers in relation to the Operational Practices cannot be accepted for reasons explained above.[4603] Moreover, although Hughes was correct to point out that the Viterra Policies were part of Viterra's records and had been for a significant period of time, the fact that their materiality was masked by having them marked "obsolete" took much of the force out of this submission.[4604]

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late June 2013 (see pars 786, 788 above), and each of them participating in the deficient process of Wilson-Smith attempting the verification of the Warranties: see issue 125.6 above.

4600 See pars 156-167 above.

4601 See par 4903 above.

4602 See pars 919, 928 above.

4603 See pars 166, 1299 and fn 793 above.

4604 See pars 287-292, 1324, 1533, 2113, 4900 above.

5178 Of more substance was Hughes' submission concerning the absence of any evidence about what changes might have been made to any acquisition agreement if Glencore or Viterra had been informed of the Undisclosed Matters before 4 August 2013. If it had been found that Glencore and Viterra would have taken the Alleged Steps upon learning of the Undisclosed Matters or that the Warranties were incorrect, it was not readily apparent how any acquisition agreement might have been amended, including with respect to the Warranties; much less how, as a matter of causation, it would be found that prospective purchasers, including Cargill Australia, would have found any such amendments acceptable or would have remained interested in acquiring the shares in Joe White and related assets at a purchase price anywhere in the vicinity of $420 million.

5179 Some further observations should be made concerning the scope of the issue as pleaded. The Viterra Parties sought to make this particular third party claim on a premise which was variable in its scope. The case of the Viterra Parties was not premised on all the matters pleaded in paragraph 19 of the Statement of Claim being disclosed before 4 August 2013, but only "the Undisclosed Matters found by the court". Although all the Undisclosed Matters have been found to have existed, the case of the Viterra Parties included that any 1 of them would have triggered the Alleged Steps. In light of the limited evidence given on the topic, there were obvious problems with this.

5180 In a similar vein, the submissions concerning the difference between Mattiske's evidence in chief (which was confined to disclosure of the Viterra Practices) and the Third Party Claim addressing the broader issue of Glencore and Viterra being informed of potentially all of the Undisclosed Matters (of which the Viterra Practices was only 1 component) may also have had some materiality if (contrary to the findings made above) Mattiske's evidence as to what he would have done had been accepted.

5181 To explain, there was no issue that there was a difference between Mattiske's evidence and the potential scope of the Third Party Claim. The Viterra Parties' submission on

the point effectively acknowledged as much.[4605] Further, to the extent that this submission of the Viterra Parties addressed part of the issue, it ought to be accepted. That is, if, contrary to the findings set out above, Mattiske would have taken the Alleged Steps as pleaded upon being informed of the specific subset of the Undisclosed Matters about which he gave evidence, being the Viterra Practices, then it would have necessarily followed as a matter of common sense that he would have done so if he had been informed of the entirety of the Undisclosed Matters. However, it would not follow from that that he would have taken the Alleged Steps if any single component of the other Undisclosed Matters were drawn to his attention. In particular, the Viterra Policies were Undisclosed Matters. Regardless of the findings made above, the court would not have been satisfied that if the Viterra Policies alone had been drawn to Mattiske's attention he would have taken the Alleged Steps. Quite the contrary, Mattiske knew the practices relating to Certificates of Analysis (to put it neutrally) were documented, but did not even ask to see the relevant documents. Further, he was willing to accept Hughes' explanation of the Reporting Practice, including that it was a standard industry practice, despite Cargill's position to the contrary and with only limited enquiries on the issue. Furthermore, the events in late October 2013 resulted in the existence of the Viterra Certificate of Analysis Procedure being drawn to Fitzgerald's attention;[4606] and yet no disclosure of it to Cargill occurred before Completion.

5182 That said, in light of the findings made above, it is unnecessary to explore these matters any further.

X.132 If Glencore and/or Viterra have suffered loss as a result of any contraventions by Joe White and/or the Third Party Individuals of section 18 of the Australian Consumer Law, has Glencore and/or Viterra suffered that loss partly as a result of their failure to take reasonable care and ought their recoverable loss be reduced?

4605 See par 5131 above.

4606 See par 1324 above.

X.132.1 Introduction

5183 In light of the findings made concerning issues 124 to 131 above, and the resultant failure of the Viterra Parties to make out a claim based on either the Joe White Representations or the Joe White Executives' Representations, it is not strictly necessary to consider this issue. However, as it raises some factual matters, a brief reference to the submissions will be made, together with some factual conclusions.

X.132.2 The Cargill Parties' and the Third Party Individuals' submissions

X.132.2.1 Submissions made generally

5184 All the Third Parties submitted that if third party liability was established, then the Viterra Parties failed to take reasonable care and any damages should be reduced, pursuant to section 137B of the *Competition and Consumer Act*, to the extent that the court thinks just and equitable having regard to the Viterra Parties' share of responsibility for the loss.[4607]

5185 Further, the Third Party Individuals submitted that, pursuant to section 26(1) of the *Wrongs Act*, damages should be reduced having regard to the Viterra Parties' share in the responsibility for loss and damage.[4608] In accordance with the approach taken in *Angas Securities Ltd v Valcorp Australia Pty Ltd*,[4609] Hughes submitted that the court should proceed on the assumption that the *Competition and Consumer Act*, the *Wrongs Act* and the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) do not involve different legal tests. Furthermore, the Third Party Individuals each pleaded that, pursuant to section 7 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act*, damages should be reduced to the extent that the Viterra Parties' contributory negligence contributed to the harm.[4610]

5186 Broadly, the Cargill Parties, Youil and Wicks submitted that Glencore or Viterra failed to take reasonable care for the following reasons. *First,* Glencore or Viterra knew the

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4607 See par 4366 above.

4608 Stewart's principal position was that the laws of the Commonwealth and of South Australia were applicable, but he also relied on s 26 of the *Wrongs Act* if it applied.

4609 (2011) 277 ALR 538, 562 [144] (Besanko J).

4610 Ibid.

true position in relation to the matters alleged to have been withheld from Glencore or Viterra, or had grounds to suspect information was inaccurate or had been withheld. *Secondly*, Glencore or Viterra was exercising control over all the Joe White executives and could have ascertained the matters had they made enquiries. *Finally*, to the extent Glencore or Viterra did not know the true position prior to entry into the Acquisition Agreement, both were subsequently alerted to it and therefore bear all the responsibility for loss and damage arising from the October 2013 Responses and Pre-Completion Representations.

5187 Further, various Third Party Individuals made submissions regarding how the Viterra Parties failed to take reasonable care by reason of their own actions in the sale, including contending they failed to:

(1) Undertake a vendor due diligence despite being advised to do so.

(2) Disclose relevant information, including the substantial amount of information raised by Hughes, Youil, Wicks and Stewart in late October 2013.

(3) Properly engage in the Due Diligence to ensure all relevant policies were in the Data Room, including the Viterra Policies.

(4) Properly approach and administer the Warranty verification process.

(5) Properly investigate the Undisclosed Matters, including in October 2013 by Mattiske not treating the issues Cargill had raised as serious.

(6) Inform Cargill of a possible breach of Warranty as required under the Acquisition Agreement.[4611]

(7) Investigate the use of off-grade barley by Joe White.

(8) Make reasonable enquiries of the Joe White executives as to the accuracy of the contents of the Information Memorandum and the Management

4611 Pursuant to cl 13.8: see par 1029 above.

Presentation Memorandum, or what was disclosed during the Due Diligence, or otherwise before executing the Acquisition Agreement.

5188 Furthermore, Hughes submitted that the Viterra Parties failed to take reasonable care because of their knowledge of the Undisclosed Matters and the fact that they knew or should have known that the Financial and Operational Performance Representations, the Warranty Representations and the Warranties were false.

X.132.2.2 Stewart's additional submissions

5189 Stewart referred to the general principles of contributory negligence, and submitted that apportionment of contributory negligence was an evaluative exercise, with attention to relative culpability and causative potency of the conduct.[4612] Stewart submitted that any loss or damage Viterra suffered as a result of Stewart's conduct should be entirely or very substantially reduced because of Viterra's share of the responsibility.

5190 Further, Stewart submitted that, if he was liable, the conduct alleged involved a failure by Stewart to take care, by an omission to disclose information. He referred to the fact that it was not alleged that Stewart's conduct was deliberate or intentionally misleading, and was capable of being framed as "negligent wrongdoing". Stewart submitted that if such conduct caused loss to the Viterra Parties, then the Viterra Parties were contributorily negligent. It was contended that, even if those responsible for the sale process were ignorant of the relevant matters, the Viterra Parties failed to ascertain the existence of the Viterra Practices and Policies, and failed to disclose them in the Data Room or before Completion. It was submitted that culpability arose because the Viterra Parties ought to have exposed anything which purportedly ought to have been communicated by Stewart, for the following reasons:

(1) Viterra had responsibility for making disclosure to Cargill of all relevant

4612 Stewart cited the following authority: *Merost Pty Ltd v CPT Custodian Pty Ltd* [2014] FCA 97, [136]-[147] (North J); *Valcorp Australia Pty Ltd v Angas Securities Ltd* [2012] FCAFC 22, [114] (Jacobson, Siopis and Nicholas JJ); *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529, 532.5-533.2 (Gibbs CJ, Mason, Wilson, Brennan and Deane JJ); *Pennington v Norris* (1956) 96 CLR 10, 16.3 (Dixon CJ, Webb, Fullagar and Kitto JJ).

matters and failed to gather all relevant information.

(2) A large team of representatives from Viterra, Merrill Lynch and Mallesons worked extensively on the sale process.

(3) Viterra knew (by its company-wide corporate records and across its staff in the Viterra Malt division) of the Viterra Practices and Policies.

(4) The Warranty verification process was brief and not detailed, under-prepared, and did not allow for preparation or reflection by the "Viterra Malt Executives" (being a reference to the Third Party Individuals).

(5) Viterra did not fully inform Cargill in October 2013 of a possible breach of Warranty under the Acquisition Agreement.

5191 By contrast, Stewart submitted that he was an employee in a technical division with no involvement in or insight into the sale process, he was not consulted about what information to disclose in the Data Room, and only shortly before signing was subjected without notice to a quick and high-level meeting concerning the Warranties. Further, it was submitted that because evidence was not led from Stewart about the conduct of his meeting with Wilson-Smith, an adverse inference should be drawn against the Viterra Parties.[4613] It was submitted that there was only 1 brief meeting between Stewart and Wilson-Smith shortly before entry into the Acquisition Agreement, and that there was no evidence that any information Stewart could have given in that meeting would have led Viterra to make disclosure to Cargill on the eve of signing the Acquisition Agreement. Based on the communications between Stewart and Fitzgerald in October 2013,[4614] it was submitted that inferences should be drawn that *first,* Stewart was ready to provide detailed information when asked, and *secondly,* Viterra would only have responded in a limited way in the 3 days between the meeting between Stewart and Wilson-Smith and signing the Acquisition Agreement.

5192 Stewart submitted that Viterra's failures were more causally potent because they were

4613 See pars 1990, 4973, 5023 above.
4614 See pars 1296-1304, 1313, 1323, 1334-1336, 1387-1389, 1510-1511 above.

far wider (involving many different personnel and channels of information) and operated earlier in time, so that Viterra was in a better position to consider and address the information with Cargill.

X.132.3 The Viterra Parties' submissions

5193 The Viterra Parties submitted that the loss they alleged they suffered was not partly because of their failure to take reasonable care. Referring to their earlier submissions on various topics, the Viterra Parties submitted that during the relevant timeframe they did not have knowledge of the Undisclosed Matters and the asymmetry of knowledge between them and Joe White and the Joe White executives was such that it was not reasonable in the circumstances to expect they would conduct the sale process in any other way.

X.132.4 Analysis

5194 In circumstances where this issue does not arise, the relevant statutory provisions will not be discussed further. The remainder of the reasons on this issue will be confined to factual matters that would have been relevant if, contrary to the findings above, the Viterra Parties were entitled to an award of damages as a result of a contravention of section 18 of the Australian Consumer Law.

5195 Put simply, if an award of damages had been made in favour of the Viterra Parties against any of the Third Party Individuals, it would have been substantially reduced as a result of the Viterra Parties' failure to take reasonable care in the conduct of the sale of Joe White. Before turning to the conduct of the Viterra Parties, the position of the Third Party Individuals must be referred to.

5196 Dealing first with Youil, Wicks and Stewart, none of these persons was responsible for what had been disclosed during the sale process.[4615] Not only were they not involved in the preparation and dissemination of the Information Memorandum or the Management Presentation Memorandum, they were not part of any decision-making

[4615] See par 4782 above.

concerning how the sale process ought to be conducted, including what ought to be disclosed. They simply were not informed of what was disclosed or how the sale process was supposed to operate.[4616] Indeed, it was not apparent why they would have assumed that any material information had been withheld.[4617] The very limited involvement of Youil by reason of his participation in the Operations Call was not significant in this context when Youil was not familiar with what had otherwise been disclosed and was directed only to respond to questions asked (most of which were answered by Hughes).[4618]

5197 Additionally, Stewart's detailed submissions on this issue as summarised above fairly reflected the facts as found. In my view, for the reasons stated in those submissions, they properly characterised Stewart's role.

5198 Further, although Argent was familiar with the contents of the Information Memorandum and the Management Presentation Memorandum, and had direct involvement in aspects of the drafting of both, there was no evidence that he had any knowledge of the Viterra Practices (which were clandestine operational practices).[4619] Adding to this, there was nothing to suggest that Argent knew (or in the secretive circumstances ought to have known) that the contents of these documents or anything else communicated to Cargill during the sale process were inaccurate in any material respect.

5199 Furthermore, with respect to each of Youil, Wicks, Stewart and Argent, they were subjected to a Warranty verification process that was woefully inadequate.[4620] The process did not give them the opportunity to properly understand the Warranties they were being asked to verify or give rise to an occasion where it could reasonably have been expected that they would have disclosed the Undisclosed Matters (if, or to the extent that, they had known about them).

4616 See par 4899 above.
4617 See pars 4902-4905 above.
4618 See pars 865-884 above. See also pars 786, 788 in relation to Youil's attendance at 2 site visits.
4619 See pars 2561, 4900, 4944, 4947-4948 above.
4620 See issue 125.6 above.

5200 Moreover, the events of late October 2013 demonstrated that Youil, Wicks and Stewart were open and responsive to issues raised. There was no reason to infer that any of them would have acted otherwise if the issues had been raised before the Acquisition Agreement was entered into.

5201 In short, the context in which the conduct of Glencore and Viterra would be considered concerning their failure to take reasonable care such that their recoverable loss would have been reduced would be that no fault or want of care could have been attributed to any of Youil, Wicks, Stewart or Argent.

5202 In relation to Hughes, the position was substantially different. In his senior role, Hughes oversaw the implementation of the Viterra Practices for many years. His approval of such a regime, and his direction to others to adopt it, was inexcusable. Further, given his knowledge of the Viterra Practices, he could have been in no doubt that there were material inaccuracies in what was contained in the Information Memorandum and the Management Presentation Memorandum, as well as material non-disclosures during the Operations Call and the Commercial Call.[4621] However, in circumstances where it has been found that Hughes' knowledge was the knowledge of Viterra, this state of affairs could only be relevant to the questions raised in this issue as between Hughes and the Viterra Parties.

5203 Further, the events of October 2013 demonstrated that when Hughes was actually asked direct questions about matters relevant to the Viterra Practices, he was also open and responsive to the issues raised. In circumstances where Hughes did not give evidence, it was difficult to reconcile his position at the time he approved the Information Memorandum Statements and the Management Presentation Statements (to the extent that he did) with what he willingly disclosed in October 2013 (albeit, he sought to justify the Reporting Practice and at least to some extent, the Varieties Practice and the Gibberellic Acid Practice).[4622] However, as no ruling on issue 132 is

4621 See, for example, pars 3262-3264, 3278 above.
4622 See, for example, pars 1251-1254, 1279-1288, 1395 above.

required, it is unnecessary to explore these matters further.[4623]

5204 The position of the Cargill Parties has been discussed elsewhere.[4624]

5205 In relation to the Viterra Parties, there was a combination of matters which demonstrated a lack of reasonable care. They included:[4625]

(1) Glencore taking the risk of not conducting a vendor due diligence in circumstances where it had only owned Joe White for a very short period of time and was not familiar with the operations of the Joe White Business.

(2) The failure of the Viterra Parties (including the failure by Hughes) to take reasonable steps to ensure the contents of the Information Memorandum and the Management Presentation Memorandum were substantially accurate and that they did not have material misstatements or omissions concerning the financial and operational performance of the Joe White Business.

(3) The failure of Viterra up to December 2012 and then Glencore until August 2013 (in particular Mattiske as a Glencore employee and a director of Viterra and Joe White) to put in place adequate administration and procedures to prevent the Viterra Practices from being implemented (including in a concealed manner) with the result that the performance of the Joe White Business as stated during the sale process was materially underpinned by improper operational practices.[4626]

(4) Upon the Operational Practices being drawn to the attention of those responsible at Glencore and Viterra for the sale process on behalf of the Viterra Parties, the failure to properly investigate the Viterra Practices

4623 See also par 3280 above.
4624 See issue 80 above.
4625 For a more extensive analysis of the Viterra Parties' position, see issue 80 above.
4626 Compare *Merost Pty Ltd v CPT Custodian Pty Ltd* [2014] FCA 97, [140] (North J).

or to take the steps necessary to be able to give substantially accurate and informative responses to the Cargill 22 October Letter; or to cause such an investigation to be carried out or such steps to be taken.

(5) Implementing a Warranty verification process in a rushed manner and appointing an inexperienced person to oversee that process without proper instruction or supervision.

(6) Upon Cargill raising issues concerning the Operational Practices in October 2013, the failure to make reasonable enquiries so as to be in a position to inform Cargill that certain Warranties had been breached both at the time of the execution of the Acquisition Agreement and at the time of Completion.

5206 The content of the Sale Process Disclaimers did not alter the position. Whether or not care was taken was a matter of objective fact in the context of the surrounding circumstances.[4627] Specifically, the provisions which sought to reduce the Viterra Parties' liability for any failure to take reasonable care did not mean that for the purposes of the statutory regime this ceased to be a relevant factor.

X.133 Are Glencore and/or Viterra's claims for contravention of section 18 of the Australian Consumer Law apportionable claims within the meaning of section 87CB(1) of the *Competition and Consumer Act* and/or section 24AI of the *Wrongs Act* and/or section 8 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act*? If so, are Cargill, Inc,[4628] Joe White, the Third Party Individuals, Fitzgerald, Rees, Mattiske, King,[4629]

4627 These included the fact that it was a "Wall Street" deal involving hundreds of millions of dollars (see par 486 above), that there were certain reasonable and customary expectations regarding disclosure which were properly understood by the Viterra Parties (see pars 494-498, 619 above), the limited access Cargill had to certain information and the strictures imposed upon obtaining access to the Confidential Information (see, for example, pars 461-469, 639-644 above), as well as the other terms upon which the Confidential Information was disclosed: see pars 586, 590 above.

4628 Wicks was the only third party to allege concurrent wrongdoings by Cargill, Inc.

4629 Hughes and Argent were the only third parties to allege concurrent wrongdoing by King.

Viterra Malt, Viterra Operations, Viterra Ltd[4630] **and/or Glencore**[4631] **concurrent wrongdoers? If so, what proportion of the damage or loss claimed by Glencore and/or Viterra does the court consider just for each party to bear?**

5207 The questions raised by issue 133 were premised on the court finding Glencore or Viterra, or both, were successful in a claim against a third party for loss or damage because of a contravention of section 18 of the Australian Consumer Law. As the Viterra Parties have failed to establish this premise, these questions do not arise.[4632]

X.134 What, if any, damages or other relief is Glencore and/or Viterra entitled to against Joe White and/or the Third Party Individuals as a consequence?

5208 For the reasons in issues 124 to 131 above, the answer is none.

X.135 Were the Third Party Individuals parties with Viterra Ltd to the service contracts pleaded in paragraph 66 of the Third Party Claim?

5209 Paragraph 66 of the Third Party Claim stated that at all material times, until at least the date of Completion, each of Hughes, Youil, Wicks, Stewart and Argent was a party to a contract of service with Viterra Ltd.[4633]

5210 The service contracts were largely materially in the same form. Each contract set out the rights and obligations of the relevant executive. These included, amongst other things, the terms and conditions of employment, the code of conduct,[4634] and other clauses such as termination, remuneration, redundancy and leave.

5211 But for Hughes,[4635] the Third Party Individuals conceded this issue in their pleadings.

4630 The Third Party Individuals were the only third parties to allege concurrent wrongdoing by Viterra Operations and Viterra Ltd.

4631 Wicks, Stewart and Argent were the only third parties to allege concurrent wrongdoing by Glencore.

4632 See par 4484 above.

4633 It was alleged that the contract of service with: (1) Hughes was dated 1 November 2009; (2) Youil was dated 1 November 2011; (3) Wicks was dated 30 May 2011; (4) Stewart was dated 1 November 2011, signed by Stewart on 14 February 2012; and (5) Argent was dated 1 November 2011.

4634 This listed 8 matters and was separate to the Viterra Code: see par 5213 below.

4635 See pars 188-196, 1873 above in relation to the Hughes/Viterra Contract.

Hughes, on the other hand, initially contested the allegation that he was a party to the Hughes/Viterra Contract on the basis that the contract of service was not signed by Hughes himself.[4636] However, in closing submissions Hughes correctly conceded this issue,[4637] accepting that his employment by Viterra Ltd "was subject to the terms and conditions of the [Hughes/Viterra Contract] pleaded at paragraph 66 of the Third Party Claim".[4638]

5212 Thus, it was common ground each of the Third Party Individuals was the subject of a contract of service with Viterra Ltd as alleged.

X.136 Did the terms of the service contracts require the Third Party Individuals to behave ethically and honestly and act in the best interest of Viterra Ltd?

5213 Clause 2 of the contracts of service for each of the Third Party Individuals set out a code of conduct and stipulated as follows: [4639]

> In general, the employee is required to:
>
> (a) Behave ethically and honestly;
>
> (b) Act in the best interest of Viterra [Ltd];[4640]

4636 That said, Hughes acknowledged that he was provided with a copy of the draft contract of service and the accompanying cover letter dated 23 June 2010 with "Viterra" as the letterhead and the details of Viterra Ltd as its footer, signed by Gordon.

4637 If Hughes had not conceded this point, the Hughes/Viterra Contract would have been found to be in existence on the basis that a binding agreement can arise by conduct, the relevant conduct here being that Hughes acted in the role of Executive Manager – Malt at all times from late 2009 until Completion (see pars 1873-1875 above): see, for example, *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 177-178 [74]-[78], 179 [81], 181 [85] (Heydon JA), 197 [173] (Ipp AJA, with whom Mason P agreed).

4638 For completeness, Hughes also referred to his previous employment contract with Viterra. In that contract, Viterra was noted as having its address in Saskatchewan, Canada. Hughes was required to continue on the same terms and conditions that were already in place as "Executive Manager – Malt with Viterra Australia". He was also bound as an employee of Viterra, "to abide by the policies and procedures of Viterra Australia as varied and amended from time to time". The contract was signed by Hughes and by Malecha, as chief operating officer of Viterra.

4639 The code of conduct was set out in clause 2 of each service contract and also required that the relevant executive: avoid conflicts of interest; where conflicts of interests are unavoidable, declare the conflict in writing … and avoid further involvement without appropriate management authorisation; ensure that employment opportunities are dealt with in accordance with relevant legislation and on the basis of merit; avoid unlawful discrimination; avoid illegal behaviour; and comply with all legal and other compliance obligations.

4640 The contracts of service simply stated "Viterra" without identifying the specific entity, but it was plain this was a reference to Viterra Ltd.

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5214 The Third Party Individuals admitted, in substance, that their contracts of service contained the terms as set out above.[4641] Youil, Wicks and Argent simply accepted that this required them to behave ethically and honestly. Hughes and Stewart made further submissions in relation to the objective meaning of "to behave ethically and honestly" and "to act honestly" The obligations imparted by this code of conduct were not further defined in the contracts of service. Interpreting the meaning of these obligations is necessary for the determination of the issues that follow.

5215 As has been stated,[4642] construing the terms of a contract requires an assessment of the text, context and purpose of the obligations; the meaning must be assessed by reference to what a reasonable business person would have understood the obligations to mean in the context of the contract of service.

5216 Clause 2 prescribed certain uniform expectations of conduct on the relevant employee. It was provided that if the code of conduct was not complied with, it was considered a "serious disciplinary matter" which may have warranted termination.

5217 The Macquarie Dictionary defines "ethical" as "in accordance with the rules or standard for right conduct or practice" and imports notions of morality.[4643] Hughes relied upon the definition of "ethical" in Black's Law Dictionary, which referred to moral obligations owed to another and conforming to moral norms or standards of professional conduct.[4644] The term, much like the term "improper", is "indefinite" meaning it cannot be reduced to some exhaustively defined standard.[4645] Rather, the meaning of "ethical" should be determined by reference to the relevant executive's

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4641 Hughes accepted in closing submissions that his employment with Viterra Ltd was subject to the terms and conditions of the contract of service. Youil, Wicks and Stewart admitted, in their pleadings, that their respective contracts of service provided that, in general, they were required to behave ethically and honestly and in the best interest of Viterra Ltd subject to production of the contracts of service. Argent admitted that the contract of service provided that, in general, he was required to behave ethically and honestly and in the best interest of Viterra Ltd.

4642 See par 4549 above.

4643 *Macquarie Dictionary* (8th ed, 2020) "ethical" (adj, def 1), (n, def 2).

4644 Bryan A Garner (ed), *Black's Law Dictionary* (10th ed, 2009) "ethical" (n, def 1, 2).

4645 See *R v Byrnes & Hopwood* (1995) 183 CLR 501, 513.7-515.4 (Brennan, Deane, Toohey and Gaudron JJ).

duties, powers, authority and responsibilities. Deciding whether conduct is ethical requires an objective assessment, judged by the standard of a reasonable person in a similar position.[4646]

5218 In determining whether certain conduct has infringed upon a code of conduct, which sets out an obligation to act ethically, the whole of the relevant person's conduct must be considered.[4647] In *Office of Local Government v Toma*,[4648] the New South Wales Civil and Administrative Tribunal considered, in the context of a code of conduct prohibiting unethical conduct by city councillors, whether the respondent councillor's conduct was unethical. In so doing, it was considered unnecessary to state an exhaustive definition of unethical conduct. Rather, it was enough to note that the expression encompassed conduct which, viewed objectively, would be regarded by reasonable persons as falling below the standards of conduct to be expected.[4649] Further, in concluding that the respondent councillor's conduct "[fell] on the wrong side of line" and therefore breached the applicable code of conduct,[4650] the following passage in *Dallas Buyers Club LLC v iiNet Limited (No 3)* was relied upon:[4651]

> The difficulty in locating where a line is to be drawn is a well-known problem in legal discourse. But here, as in other contexts, it is best answered not by seeking to find where the line is but instead by asking which side of the line one happens to be on.

5219 In relation to the second component of subclause (a), to act "honestly", the ordinary meaning of the expression was described in *Australian Securities & Investments Commission v Healey (No 2)* as follows:[4652]

> … a person acts honestly, in the ordinary meaning of the term, if the person's

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4646 Ibid, 514.3, 515.4.

4647 Ibid, 514.7-516.4.

4648 [2016] NSWCATOD 21 (Renwick SC, SM).

4649 Ibid, [25].

4650 Ibid, [26].

4651 [2015] FCA 422, [5] (Perram J).

4652 (2011) 196 FCR 430, 442 [88] (Middleton J), noting that this meaning was provided for "the purposes of this proceeding" in the context of the *Corporations Act*. That being so, the way in which the term was described broadly fits with the ordinary meanings provided in dictionary definitions of "honest", which includes "honourable in principles, intentions, and actions", "showing uprightness and fairness", "open; sincere", "genuine or unadulterated", "truthful; creditable; candid" and "chaste or virtuous; respectable": *Macquarie Dictionary* (8th ed, 2020) "honest" (adj, def 1), (n, def 2), (n, def 4), (n, def 5), (n, def 6), (n, def 7).

conduct is without moral turpitude, that is:

(a) without deceit or conscious impropriety;

(b) without intent to gain an improper benefit or advantage; and

(c) without carelessness or imprudence that negates the performance of the duty in question.

Additionally, it was noted that in assessing whether a person has acted honestly, "the seriousness of the contravention and its potential or actual consequences, impropriety such as deceptiveness or personal gain, and contrition" were relevant considerations.[4653]

5220 Turning to subclause (b), "best interest of Viterra" was also not defined. The requirement to act in this manner reflected the crux of the relationship between each employee and Viterra Ltd.[4654] As was expressed by Jessup J in *Commonwealth Bank of Australia v Barker*, the obligation to act in the best interest of the employer is a critical feature of the relationship which means "the employee agrees to act for or on behalf of or in the interests of the employer in the exercise of a power or discretion which will affect the interests of the employer in a legal or practical sense".[4655] Thus, the assessment of whether the relevant employee acted in the best interest of the employer will turn on the facts of the case, including the nature of the position of the employee and the duties that she or he was required to perform.[4656]

5221 Therefore, in determining whether any of the Third Party Individuals breached their respective duties to behave ethically and honestly, and to act in the best interest of Viterra Ltd, the principles outlined above must be applied to the specific facts as they

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4653 Ibid, 442 [89]. Again, these observations were made in the statutory context (including whether a person ought fairly be excused), but are also applicable in this contractual context.

4654 For the avoidance of doubt, 2 points must be briefly made: (1) the duty to act in the best interest of the employer generally corresponds with the duty to act with fidelity: see *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312, 322 [51], 324 [57] (Kirby J); *Wessex Dairies Ltd v Smith* [1935] 2 KB 80, 84.6, 85.5 (Greer LJ), 88.5-90.1 (Maugham LJ), see also *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 72.8-73.1 (Starke and Evatt JJ); and (2) the employment relationship is an accepted category of fiduciary relationship: see *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450, 464 [101]-[102] (Jacobson and Lander JJ); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96.8-97.4 (Mason J, dissenting on the point).

4655 (2013) 214 FCR 450, 516-517 [300]. See also *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312, 317 [25] (Gleeson CJ, Gaudron and Gummow JJ).

4656 Ibid, 517 [302] (Jessup J).

apply to each of them individually.

5222 In any event, the answer is yes.

X.137 Have the Third Party Individuals (including Hughes) failed to act in the best interest of Viterra Ltd and/or failed to act ethically, and thereby breached their service contracts, by reason of the making of the Joe White Executives' Representations?

X.138 Further to issue 137, has Hughes failed to act in the best interest of Viterra Ltd, failed to act ethically and/or failed to act honestly, and thereby breached his service contract, by reason of the making of the Hughes Representations?

X.138.1 Overview

5223 It is convenient to consider these 2 issues together. The contractual breaches alleged by the Viterra Parties were said to have resulted from the making of the Joe White Executives' Representations. Each of Stewart and Wicks has been found not to have made any of the Stewart Representations and the Wicks Representations respectively.[4657] Accordingly, the claims against Stewart and Wicks for breach of contract necessarily fail.[4658]

5224 Further, the Hughes Representations, the Youil Representations and the Argent Representations have only been found to have been made in part.[4659] However, in contrast to the manner in which the claims alleging misleading or deceptive conduct based on the Joe White Executives' Representations were pleaded,[4660] the Viterra Parties relied upon each of the components of the representations individually, which altogether comprised the Joe White Executives' Representations, in alleging that at the time each of them was made it was a breach of the relevant service contract. In doing

4657 See issue 125.4 above.

4658 Thus, those claims need not be referred to any further beyond the extent necessary to address the claims for breach of contract against the remaining Third Party Individuals.

4659 See issues 125.2, 125.3, 125.5, 125.7 above and the summary at par 5048 above.

4660 See pars 4791-4796 above.

so against each Third Party Individual, the Third Party Claim largely followed the same format, but as there were differences in the case pleaded against each of Hughes, Youil and Argent some elaboration is required.

X.138.2 The allegations

5225 The allegations made with respect to breach of contract by each of the Third Party Individuals for not acting ethically or in the best interest of Viterra Ltd were made principally in 2 ways.[4661] *First*, as against all Third Party Individuals, it was alleged that each of them had acted in breach of contract to the extent that each of them made the Joe White Executives' Representations, which were misleading or deceptive or likely to mislead or deceive. *Secondly*, further or alternatively only as against Hughes, Youil, Wicks and Stewart (but not Argent),[4662] the Undisclosed Matters and the Cargill 22 and 29 October Letters were referred to.[4663] It was alleged that if Hughes, Youil, Wicks and Stewart disclosed the Operational Practices at the 15 October Meeting (which was not admitted),[4664] then each of the Operational Practices was known to 1 or more of Hughes, Youil, Wicks and Stewart in October 2013 and accordingly also at the time of making each of the Joe White Executives' Representations to Glencore and Viterra on or before 4 August 2013.

5226 In addition, in relation to Hughes alone, it was alleged that, in making the Hughes Representations, Hughes was not acting honestly and therefore was in breach of the

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4661 In the Third Party Claim, it was alleged that each Third Party Individual had "not acted in the best interest of Viterra Ltd and/or not acted ethically". Each contract of service provided the employee was required to behave ethically and honestly, and act in the best interest of Viterra: see par 5213 above. Accordingly, the order in which these matters were referred to in the contracts will be adopted rather than that used in the Third Party Claim.

4662 This was because these allegations were premised on the basis (which was not admitted in the Third Party Claim) that the court found the Operational Practices were disclosed at the 15 October Meeting (which Argent did not attend).

4663 For the purposes of the Third Party Claim only.

4664 In the Third Party Claim, reference was made in substance to the Operational Practices, but to be precise the practices as pleaded were: (1) issuing Certificates of Analysis to customers which represented that malt supplied to the customers met with particular specifications where the malt supplied did not meet those specifications; (2) supplying malt to customers which had not been produced from the specific barley varieties required by those customers; and (3) supplying malt to customers which had been produced from a malting process that involved the addition of gibberellic acid where those customers required that gibberellic acid not be used in the production of malt supplied to them. To avoid any confusion, the term "Operational Practices" will be used in addressing these issues.

Hughes/Viterra Contract. In support of this allegation, the Viterra Parties referred to the particulars of the Statement of Claim setting out Hughes' background, including: the various positions he held;[4665] his involvement in the Malt Cost Reduction Transformation Project;[4666] the introduction of the Viterra Code and the Viterra Practices and Policies;[4667] his "high level of responsibility in the sale process" (including as part of a working group);[4668] the email he sent on 16 January 2013;[4669] and his knowledge of the Undisclosed Matters.[4670]

X.138.3 The Viterra Parties' submissions

5227 The Viterra Parties submitted the contractual requirement to act ethically should be understood in the context of the Viterra Code.[4671] In particular, they referred to the Viterra Code providing that Viterra was committed to conducting its business with integrity in accordance with high ethical standards and in compliance with all applicable laws, rules and regulations. They submitted that the Viterra Code emphasised customer-oriented service, honesty, fairness and integrity and rejected improper or illegal business practices. Further, they submitted the Viterra Code encouraged employees to speak out when they observed unethical behaviour or activity, noting the Viterra Code contained express obligations to comply with all laws, be accurate and truthful in all dealings with customers and accurately represent the quality of Viterra products. Furthermore, reference was made to the express obligation not to create or condone the creation of a false record. Moreover, it was contended that by signing an acknowledgement form,[4672] an employee expressly declared she or he did not know of any unreported violations or possible violations of the Viterra Code.

5228 The Viterra Parties submitted that by failing to disclose the Viterra Practices and by

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4665 See par 47 above.
4666 See pars 136, 145, 163, 230 above.
4667 See pars 155-166, 199-206 above.
4668 See pars 440, 3097 and fn 2251 above.
4669 See par 375 above.
4670 See issues 11, 22 and pars 4874-4882 above.
4671 See pars 58-63 above.
4672 See par 63 above.

making the Joe White Executives' Representations, the Third Party Individuals had each violated the Viterra Code, including by failing to disclose violations of the Viterra Code. The Viterra Parties submitted that those violations constituted a breach of the contractual requirement to act ethically.

5229 Further, the Viterra Parties referred to their submissions regarding the Joe White Executives' Representations in issue 125 above, and relied on the disclosures made to Cargill at the 15 October Meeting to the effect that the Operational Practices were occurring.[4673] The Viterra Parties submitted that, in order for those disclosures to have been made, each of the Operational Practices must have been known to at least 1 or more of Hughes, Youil, Wicks and Stewart. It was submitted that the court should infer that these Joe White executives had the same knowledge 2 or so months earlier, in the period prior to the execution of the Acquisition Agreement. It was also submitted that the same knowledge could be inferred from these Joe White executives' senior roles within Joe White and their direct involvement in the Operational Practices themselves.

5230 Citing the definition of duty to act in the best interest of an employer set out in the Encyclopaedic Australian Legal Dictionary, the Viterra Parties submitted the duty to act in an employer's best interest required an employee to act in the employer's interest rather than in the employee's own interest. They submitted an employee who wilfully obstructed an employer during the course of its business would be in breach of the duty.[4674] It was submitted that by failing to disclose the Operational Practices and by making the Joe White Executives' Representations, the Joe White executives had exposed Viterra Ltd to 1 or more successful claims for misleading or deceptive conduct, deceit, breach of contract or negligent misrepresentation. They contended this occurred in circumstances where Mattiske would have taken various steps had he been properly informed: namely, to (1) cease the Operational Practices; (2) investigate their effect; (3) take advice on how to disclose them to Cargill; and (4) recommend to

4673 See pars 1102-1142 above.

4674 *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 QB 455, 491F-492B (Lord Denning MR).

his superiors not to sign an acquisition agreement.[4675] The Viterra Parties submitted that given this, it could not be said the Third Party Individuals had acted in Viterra Ltd's best interest.

5231 In respect of the contractual obligation on Hughes to act honestly, the Viterra Parties submitted that if the Cargill Parties were successful in their claim that Viterra had knowledge that the Financial and Operational Performance Representations were false, and therefore that Viterra's conduct (through the conduct of Hughes) was deceitful,[4676] it would follow that Hughes had breached his obligation to act honestly.

X.138.4 Hughes' submissions

5232 In addition to the submissions made above concerning the meaning of "ethically and honestly",[4677] Hughes submitted that the Viterra Parties' submissions relied upon an unpleaded allegation. Hughes noted that the Viterra Parties' submissions referred to the Joe White executives failing to disclose the Viterra Practices *and* to the making of the Joe White Executives' Representations having constituted violations of the Viterra Code, which allegations had not been pleaded in this manner. It was submitted that, in contrast to the pleaded case, what was stated in the Viterra Parties' closing submissions was the basis upon which it was asserted the Joe White executives had failed to act ethically.

5233 In relation to his position as an employee, Hughes referred to the obligation to comply with commands of the employer. He submitted that provided a command did not involve illegality and was reasonable according to established usages and common practices, then he was bound to comply.[4678] Further, he referred to the events in August 2010[4679] in contending that Viterra's response to the issues raised by Hughes

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4675 Reference was made to the Viterra Parties' submissions with respect to issues 130, 131 above and issue 139 below. It should be noted that these submissions did not precisely replicate the Alleged Steps: see par 5128 above.

4676 See issues 22, 23 above.

4677 See issue 136 above.

4678 *McManus v Scott-Charlton* (1996) 70 FCR 16, 21C (Finn J), quoting *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday* (1938) 60 CLR 601, 621-622 (Dixon J).

4679 See pars 155-166 above.

at that time was to enshrine "the practices of the [Joe White Business]"[4680] in corporate policies that Viterra employees were bound to follow in accordance with the terms of their service contracts. It was submitted that accordingly at all relevant times Hughes was entitled to assume that the Viterra Parties were familiar with and approved of the way in which the Joe White Business had been conducted. Thus, it was submitted, it was not open to the Viterra Parties to rely upon any conflict between the Viterra Code and the business practices of Joe White to make a claim for breach of the Hughes/Viterra Contract.

5234 In respect of the obligation to act honestly, Hughes referred to the statement of Middleton J in *Australian Securities and Investments Commission v Healey (No 2)*.[4681] Hughes submitted that the Viterra Parties had alleged no moral turpitude against Hughes and he contended that no moral wrongdoing was established. It was submitted that during the sale process Hughes acted in accordance with the directions and limited guidance he received from the Viterra Parties, including not to provide information that had not been requested. He further submitted that he was entitled to assume that his employer and corporate superiors were aware of the way in which the Joe White Business was run. In these circumstances, it was submitted that *as between Hughes and Viterra* no conscious impropriety could be found against Hughes. In this regard, it was noted that Hughes did not stand to benefit from the sale of Joe White in any relevant sense.

5235 Without going into the specifics of what was contended to be his knowledge, Hughes submitted that, to the extent that he had the knowledge as alleged and it was found he made the Hughes Representations, that did not indicate any moral wrongdoing or impropriety. This was put on the basis that the Hughes Representations to his employer and corporate supervisors were best characterised as no more than an expression of his opinion and belief.

4680 There was no attempt to specify precisely what this phrase encapsulated for the purpose of this submission.

4681 (2011) 196 FCR 430, 442 [88]. See par 5219 above.

5236 In respect of the contractual duty to act in the best interest of Viterra Ltd, Hughes submitted that the Viterra Parties had only referred to the same conduct relied upon for the misleading or deceptive conduct claim,[4682] and that his conduct, when viewed as a whole, could not be said to amount to any failure to act in the best interest of Viterra Ltd. Hughes submitted that at all times he was acting in good faith, honestly and with a view to the best interest of the corporation.

5237 In the alternative, Hughes submitted if he was not acting in the best interest of Viterra Ltd, an inference should be drawn that he intended to act in the Viterra Parties' best interest and believed that he was doing so, for the following reasons:[4683]

(1) Hughes had been involved in the Malt Cost Reduction Transformation Project at Viterra's direction,[4684] and the objective of that project was to achieve savings for Viterra and increase profits. Hughes had complied with a direction of his employer and assumed that doing so was in the best interest of Viterra. This was contended to be the position even if it was found by the court that the Malt Cost Reduction Transformation Project had the result of supplying malt that was not within customers' specifications.

(2) Hughes had sent the 10 August 2010 email to Gordon,[4685] and in doing so had acted in the best interest of Viterra by escalating employees' concerns, "identifying the practices that were being engaged in",[4686] seeking to ensure compliance with the Viterra Code, and ensuring savings could be made through the "Viterra-led" Malt Cost Reduction Transformation Project. He submitted that the Viterra Certificate of

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4682 See issue 125 above.

4683 In addition to the matters referred to, Hughes also relied on what he disclosed to other prospective purchasers. At management presentations to Co-operative Bulk and Sumitomo, Hughes referred to Joe White using off-grade barley and such use being consistent with industry practice. However, this information did not touch directly upon any of the Operational Practices.

4684 The submission referred to the Viterra Parties, but undoubtedly it was intended to be a reference to Viterra as Glencore had no involvement at the relevant time.

4685 See pars 162-163 above.

4686 Again, there was no attempt to identify precisely what practices that it was contended Hughes had specifically identified.

Analysis Procedure was introduced as Viterra's response to the issues raised by Hughes and was viewed by Viterra as a response which was in its best interest.

(3) The bonus that was offered by Glencore to Hughes for assisting in the sale process was payable at the discretion of Glencore, and was not dependent on the success of the sale.[4687] Accordingly, Hughes' participation in the sale was with a view to the best interest of the company (rather than his own self-interest).

(4) Hughes was always careful to answer only what was asked of him when providing responses to bidders during the sale process. This action was in accordance his instructions, and thus was in the best interest of Viterra.

(5) In the preparation of the Information Memorandum and the Management Presentation Memorandum, Hughes had deferred to the amendments and decisions of his superiors who were more experienced in sale processes, and accordingly was acting in the best interest of Viterra when doing so.

(6) Hughes had signed the Information Memorandum verification table, and discussed the Warranties raised by Wilson-Smith, believing that conduct to be in the best interest of Viterra because he was directed to do so. Hughes had not been advised about what "verification" entailed.[4688] He had also provided comments on the notes of the Management Presentation questions and answers, the Operations Call and the Commercial Call in good faith, honestly and in the best interest of Viterra, without being advised that those notes would subsequently form part of the transaction documents with Cargill or that he could

4687 See par 1876 above.
4688 See par 447 and issue 125.6 above.

expose himself to legal action by providing comments.

(7) Hughes' compliance with his employer's requests and directions, and that he was acting in his employer's best interest, was also evident from the fact that:

(a) The presentation given at the 15 October Meeting did not disclose customer-specific data, prices or volumes, and instead only provided information specifically requested by Cargill on practices and policies.

(b) Hughes had complied with Fitzgerald's direction to cease all communications with Cargill while the Viterra Parties assessed the implications of the Cargill 22 October Letter. Hughes' compliance had extended to emailing executives as directed,[4689] ceasing communications with Cargill in relation to preparation for conducting the Joe White Business after Completion, attending meetings with the Viterra Parties at which he disclosed what he knew or had learned about the Operational Practices and their extent,[4690] and reviewing draft responses.[4691]

X.138.5 Youil's and Argent's submissions

5238 Youil and Argent each submitted that they had not breached their service contracts because the conduct relied on by the Viterra Parties, being the making of the Youil Representations and the Argent Representations respectively, had not been proved. Argent submitted that Viterra Ltd had failed to identify precisely how he had failed to act ethically or in the best interest of Viterra Ltd. Argent also submitted the terms "to behave ethically" and "to act in the best interest of Viterra Ltd" were not only undefined in his contract of service, but were imprecise and vague. Argent further

4689 See par 1268 above.
4690 See pars 1277-1288 above.
4691 See pars 1395-1401, 1513 above.

submitted these terms should be considered in light of the preceding words, "in general", which augmented the issues associated with delineating the precise circumstances in which Argent ought to be held to these standards.

X.138.6 Analysis

X.138.6.1 Pleading issues

5239 As a matter of principle in construing contracts, the requirement in each of Hughes', Youil's and Argent's contracts to act ethically must be considered in the context of the Viterra Code.[4692] Obviously, the contracts in question must be construed in light of the surrounding circumstances.[4693] The Viterra Code was introduced to Viterra Ltd employees working at Joe White in 2010. Both Wicks' and Argent's employment contracts post-dated this introduction.[4694] Further, although the Hughes/Viterra contract was dated 1 November 2009, he did not sign it then; and he was not provided with a contract signed on behalf of Viterra Ltd until 23 June 2010 (which coincided with the introduction of the Viterra Code).[4695] Furthermore and in any event, whenever each of these contracts was entered into, each of them expressly provided that the Viterra Ltd employee in question was required at all times to comply with operational practices, procedures, policies and directions as made, amended or given from time to time.[4696] The Viterra Code plainly fell within this description. Moreover, Hughes' employment contract that preceded the Hughes/Viterra Contract also required him to comply with Viterra policies and procedures as varied and amended from time to time.[4697] In short, there could have been no real issue that each of Hughes, Youil and Argent were bound by the terms of the Viterra Code in 2013.[4698]

4692 For clarity, there was no express reference to the Viterra Code in the Third Party Claim. However, the allegations in the Statement of Claim were adopted generally by the Viterra Parties for the purposes of making the third party claims only, and the particulars to the Statement of Claim made express reference to the Viterra Code in the context of its introduction in 2010 to Viterra Ltd employees and the practices engaged in at Joe White. The Viterra Code was tendered at trial without any order sought for a limitation on its use.

4693 See pars 4549, 4650-4651 above.

4694 See fn 4633 above.

4695 See par 190 and fnn 70, 4633 above.

4696 See, for example, par 191 above.

4697 See fn 4638 above.

4698 For completeness, it was submitted by Wicks' senior counsel in closing that there was no evidence that

5240 The Viterra Code set out ethical standards for employees applicable across relevant fields of conduct, including the provision of products and services and the keeping of books and records.[4699] The primacy of the Viterra Code was emphasised by the requirement that Joe White employees complete a form indicating they had read and understood the Viterra Code (including the ongoing obligation to disclose any violation or possible violation of it), both at the commencement of employment with Viterra and each year during the employee's annual review.[4700] Given this importance and the relevance of the Viterra Code to the understanding of ethical conduct within Viterra at all times the 3 contracts of service in question were on foot, coupled with the term in each contract imposing an obligation to comply with operational practices, procedures, policies and directions as made, amended or given, it must follow that the Viterra Code informed the requirements of contractual obligations to act ethically.

5241 Further, as to the submission that the relevant allegations did not include an alleged failure to disclose the Viterra Practices, such an allegation was implicit in alleging the making of the Joe White Executives' Representations was in breach of contract because they were misleading or deceptive (including by representing that the Undisclosed Matters did not exist). Furthermore, after these breaches were alleged the very next allegation in the Third Party Claim was to the effect that by reason of the conduct alleged to give rise to the breaches, the Viterra Parties were not informed of the Undisclosed Matters and that the Warranties were incorrect. Therefore, the Third Party Claim made clear the substance of the circumstances of the alleged breaches, such that it could not be considered that the Third Party Individuals were taken by surprise in any material manner.

Wicks ever signed an acknowledgement form in accordance with the Viterra Code. This lack of evidence with respect to Wicks or any of the Third Party Individuals was of little moment. As demonstrated by a series of communications (see pars 59-64 above), all employees including the Third Party Individuals were repeatedly reminded of their obligations pursuant to the Viterra Code, including the obligation to sign the acknowledgement form. Any failure by Viterra Ltd employees to do so possibly may only have indicated a breach of an obligation under the employment contracts (though no such allegation was made) and was not evidence of any lack of an obligation of any such employees to comply with the Viterra Code.

4699 See pars 60-61 above.

4700 See par 63 above.

X.138.6.2 Hughes

X.138.6.2.1 Obligation to act ethically

5242 To reiterate, the Viterra Parties' case as closed was that making the Hughes Representations and not disclosing Joe White was engaging in the Viterra Practices amounted to a violation of the Viterra Code and thus a breach of the contractual obligation to act ethically. This was put on the premise that: (1) there had been a failure to disclose any violation or possible violation of the Viterra Code; (2) there had been a breach of the obligation requiring all employees to accurately represent the quality, features and availability of Viterra's products and services; and (3) what had occurred was contrary to directors and employees being forbidden from creating or condoning the creation of a false record.

5243 As against Hughes, each of these matters was substantiated. Starting with the Viterra Practices, their existence and implementation were glaringly inconsistent with each of these requirements, and of themselves they amounted to violations of the Viterra Code. As a result, by making the Hughes Representations, including by failing to disclose the Undisclosed Matters (including the Viterra Practices), Hughes did not comply with the disclosure requirement in the Viterra Code. Further, to his knowledge the conduct also resulted in a failure to accurately represent the quality, features and availability of Viterra's products and services, as well as creating or condoning the creation of false records. By acting incompatibly with the Viterra Code in these various ways, Hughes breached his contractual obligation to act ethically.

5244 This position was not affected by the events in or around August 2010. What Hughes disclosed to his superiors at that time did not result in them being informed of the Viterra Practices.[4701] While Viterra may have been aware that customers were being told that grade 1 malting barley was being used when it was not, this said nothing about the existence and prevalence of the Operational Practices.[4702] Further, the limited disclosure made to King about the use of off-grade barley not being disclosed to customers as part of the preparation of the Information Memorandum also did not

4701 See pars 156-166, 4874 above.

4702 Ibid.

alert Glencore to the existence of the Operational Practices.[4703] Furthermore, the Viterra Policies did not disclose all aspects of the Viterra Practices. The Varieties Practice and the Gibberellic Acid Practice were not recorded anywhere as being a policy of Viterra or Joe White, or referred to at all by Hughes in August 2010, much less being the subject of any response so as to be enshrined by Viterra.[4704] Moreover, the fact that the Viterra Policies were marked "obsolete" concealed that the Viterra Policies were operative documents.[4705]

5245 In any event, stripping back this contractual claim against Hughes to the more narrow way in which this third party claim might be construed, that is by confining it to the fact that he made the Hughes Representations to the extent it has been found that he did, that conduct alone was unethical. As explained elsewhere,[4706] Hughes knew there were numerous statements in the Information Memorandum that he had verified as being correct which were materially inaccurate. Further, as he made the later representations comprising the Hughes Representations as found, he must have also fully appreciated that what was being portrayed in relation to the operations of the Joe White Business was patently false in circumstances where, at the very least, the Viterra Practices were being concealed. There was simply no evidence (including in relation to the events around August 2010) that could have provided any basis for Hughes to have reasonably believed in 2013 that the Viterra Practices were known to Glencore or to those at Viterra who were engaged to assist in the sale (including Argent). Indeed, he knew full well that Glencore had no such knowledge.[4707]

X.138.6.2.2 Obligation to act honestly

5246 None of the bases upon which Hughes contended he was acting honestly in making the Hughes Representations can be accepted. The directions and "limited guidance" Hughes received did not suggest that Hughes should materially misrepresent financial and operational information concerning the Joe White Business or give him

4703 See par 805 above.
4704 Compare par 5233 above.
4705 See par 287 above.
4706 See, for example, par 3278 above.
4707 See par 1281 above.

some form of licence to mislead in that regard. Further, for reasons already explained,[4708] there was no reasonable basis upon which he could have assumed that his employer or corporate supervisors were properly informed as to the way in which the Joe White Business was conducted such that it might have been possible for him to have understood that they were sanctioning him knowingly misleading prospective purchasers in a material way. Even if such a view might possibly have been held based on how the Information Memorandum and other documents were drafted,[4709] from late April 2013 Hughes was directly informed that his role included verifying the substantial parts of the Information Memorandum allocated to him to confirm they were accurate.[4710]

5247 It has been found that Hughes had a complete understanding of each of the elements of the Viterra Practices, including their concealment.[4711] The evidence demonstrated that Hughes had this knowledge prior to the execution of the Acquisition Agreement. There was nothing to suggest that Hughes gained any knowledge of the Viterra Practices after 4 August 2013 of which he had not previously been fully aware. While it may be accepted that Hughes did not stand to benefit materially from the sale of Joe White (that is, to a level that might have induced him to act in the manner that he did), it did not follow from this that Hughes' conduct in making the Hughes Representations was honest or likely to be honest.[4712]

5248 Further, to the extent that it might have been said that some of the Hughes Representations were expressions of Hughes' opinion or belief,[4713] it was instructive that there was no attempt in Hughes' closing submissions to identify precisely what statements fell within this description or how it could be put that Hughes had reasonable grounds for making them. As no attempt was made to identify the

4708 See pars 4874-4882 above.
4709 See, for example, pars 436, 536, 805-815 above.
4710 See par 447 above.
4711 See issues 11, 22 above.
4712 See issue 23.4 above.
4713 See, for example, *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486, 506-507 [38] (French CJ, Gummow, Hayne and Kiefel JJ); *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 321 [33] (French CJ).

opinions or beliefs being referred to, it suffices to say that Hughes knew much of what was being said as part of the Hughes Representations was patently false and that the ongoing non-disclosure of the Viterra Practices meant the information being provided was materially misleading.[4714]

5249 In summary, at the time of making each of the Hughes Representations as found, Hughes knew they were misleading, not least because he continued to ensure that the Viterra Practices were concealed from those responsible for the sale of the Joe White Business. As a result, Hughes breached his contractual obligation to act honestly.

X.138.6.2.3 Obligation to act in the best interest of Viterra Ltd

5250 Although the Viterra Parties have not established that Hughes preferred his own interest above Viterra Ltd's interest in the sense that he acted with the intention of obtaining a benefit for himself, for the same reasons that Hughes has been found to have acted unethically and dishonestly, it must follow that in making the Hughes Representations to the extent found, he was not acting in the best interest of Viterra. It barely needs to be said that an employee or agent facilitating the employer or principal to engage in deceitful conduct without disclosing that fact could rarely (if ever) be considered to be in the best interest of the employer or principal.

5251 Turning to the facts at hand, by Hughes making the Hughes Representations in the manner in which he did without informing the Viterra Parties of the Undisclosed Matters (and in particular the Viterra Practices), he was acting contrary to their interests by continuing to conceal that Joe White was operating unlawfully, in breach of customer contracts and in a manner that was not consistent with the way in which the Joe White Business was being presented to the market. Whatever Hughes may have thought about managing Joe Whites' risks by implementing the Viterra Practices,[4715] on no view could it have been reasonably thought that secretly making materially misleading statements about the Joe White Business in the context of its sale by his employer and related entities could have been in Viterra Ltd's best interest. By this conduct, Hughes was exposing Viterra Ltd and other entities to claims that the

4714 See par 3278 above.
4715 See par 1284 above.

subject matter of the proposed sale had been fraudulently misrepresented.

5252 In relation to each of Hughes' submissions concerning his belief that he was acting in the best interest of Viterra Ltd,[4716] those submissions must also be rejected. Addressing each of them in the order in which they were made: (1) Hughes' involvement in the Malt Cost Reduction Transformation Project, and the directions given by Viterra in that regard, did not provide any basis for Hughes to assume that Viterra approved of customers' contracts being breached or their specifications not being met; (2) there was no evidence that anything disclosed by Hughes in or around August 2010 gave rise to Viterra signifying to Hughes and others involved in operations at Joe White that the Viterra Practices (including the Viterra Certificate of Analysis Procedure being disguised as "obsolete" and being hidden from auditors) had been approved or were considered to be in any way in the best interest of Viterra; (3) any incentivisation of Hughes gave no imprimatur to mislead, or for Hughes to have assumed that should he have done so he would have been acting in the best interest of Viterra; (4) the direction only to answer what was asked of him during the Due Diligence was not a direction to mislead or to conceal clandestine operations fundamental to the performance of Joe White; (5) the fact that ultimate responsibility for the amendments and decisions with respect to the Information Memorandum and the Management Presentation Memorandum rested with Glencore provided no basis for Hughes to believe that withholding material information from the Viterra Parties was acceptable or in the best interest of Viterra, particularly in circumstances where Hughes appreciated what was being stated by the Viterra Parties was materially misleading in the absence of any disclosure of the Viterra Practices and Policies;[4717] (6) leaving aside the flawed verification process in relation to the Warranties, the communication by Mallesons to Hughes about verification of the Information Memorandum requiring confirmation of its accuracy for the parts allocated to him could have left him with no doubt that he was only to verify those parts of the

4716 See par 5237 above.

4717 Of course, the events in October 2013 demonstrated that, it was most likely that if Hughes had been asked directly about the existence and details of the Viterra Practices and Policies, it was highly likely he would have been forthcoming: see par 3529 above.

Information Memorandum that were accurate as a matter of fact; and (7) the extent to which Hughes complied with directions concerning communications (and cessation of communications) with Cargill in October 2013 did not address the serious shortfalls in Hughes's conduct in failing to act in the best interest of Viterra for the reasons set out above.

X.138.6.2.4 Conclusion

5253 For these reasons, on each occasion Hughes made the Hughes Representations in the circumstances that he did, he breached the Hughes/Viterra Contract, as such conduct was not ethical, honest or in the best interest of Viterra Ltd.

5254 For completeness, the finding above that Hughes acted in breach of his service contract was not dependent in any way on what Mattiske or anyone else may or may not have done if the Viterra Practices (or more broadly the Undisclosed Matters) had been disclosed in 2013 by any of the Third Party Individuals to Glencore or to others involved in the sale process.[4718] Either the impugned conduct was in breach or it was not. How Viterra Ltd would have responded to the breach was an entirely separate and independent question, the answer to which could not have been determinative of whether a preceding breach had occurred.

X.138.6.3 Youil and Argent

5255 Dealing with the submissions concerning the alleged uncertainty of the obligations imposed, they are rejected. Although there may be circumstances in which uncertainty might exist as to whether certain conduct was ethical or in the best interest of a corporation, the possibility of such uncertainty did not mean the clauses in question can have no meaningful operation.[4719]

5256 The Viterra Parties' claim that Youil and Argent failed to act ethically by making the Youil Representations and the Argent Representations respectively was premised on a submission that Youil and Argent acted inconsistently with the Viterra Code by failing to disclose the Viterra Practices. This premise cannot be accepted in relation to

4718 See par 5230 above.
4719 See par 5218 above.

either of them.

5257 With respect to Youil, his involvement was extremely limited. As explained in more detail above,[4720] Youil was not informed about what Cargill had been told with respect to the operations of the Joe White Business. Further, everything that was said in the Operations Call was either said by or in the presence of Hughes, Youil's immediate superior and someone far more involved in the sale process.[4721] In the circumstances of this limited forum, where Youil was instructed not to give any information other than that the subject of enquiry and did not do so, it has not been established that he acted unethically in conducting himself in the manner in which he did.

5258 In relation to disclosure to the Viterra Parties, there was no suggestion that Youil did anything other than fairly and accurately disclose the substance of what was said during the Operations Call. Further, in addition to Youil being entitled to proceed on the basis that Hughes was fully aware of the Viterra Practices and the way in which the Joe White Business was conducted generally (as was the fact), such that Hughes was in a position to properly disclose anything to the Viterra Parties that was required to be disclosed, there was no evidence to suggest that Youil had any grounds for suspecting that Hughes had withheld relevant information from others at Viterra (or from Glencore as part of the sale process) or that the Viterra Parties were not otherwise properly informed.[4722] Accordingly, to the extent it has been found that the Youil Representations were made, it has not been established that Youil acted unethically in making them.[4723]

5259 In relation to Argent, his involvement was far more extensive than Youil. However,

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4720 See pars 4896-4907 above.

4721 This, of course, was in addition to Merrill Lynch managing the lead up to the Operations Call with Hughes (see pars 870, 872 above) and being present for the entirety of the Operations Call.

4722 See pars 4903-4905 above. In making this finding, the evidence at par 1293 has not been overlooked. The statement by Youil on 23 October 2013 that Mattiske was not aware of these issues was entirely consistent with Youil simply recounting what Mattiske had said the previous day: see par 1255 above. The remainder of Youil's statement that he had no idea why Mattiske was unaware in circumstances where the "[p]ractice" had been acceptable for years and that it was business as usual demonstrated he was not aware of any lack of disclosure within Viterra before that time.

4723 For completeness, it was not part of the Viterra Parties' case against the Third Party Individuals that, even if the Undisclosed Matters (or only the Viterra Practices) had been disclosed, then the making of the Joe White Executives' Representations would still have been in breach of contract.

in light of the fact that it has not been established that Argent had any knowledge of the Viterra Practices or Policies, or that anything that Argent disclosed by way of financial or other information did anything other than reflect what had actually been achieved by the Joe White Business (albeit improperly, but not to Argent's knowledge), to the extent that it has been found that the Argent Representations were made, it has not been established that Argent behaved unethically in making them.

5260 For much the same reasons, it has not been established that either Youil or Argent failed to act in the best interest of Viterra Ltd. There was no evidence either Youil or Argent preferred their own interest to that of Viterra Ltd, or that either wilfully obstructed the business of Viterra Ltd. Further, in circumstances where their conduct was not unethical (or dishonest) and they were not doing anything more (or less) than they had been instructed to do, there was simply no basis to find that either of them was acting other than in the best interest of Viterra Ltd in making the relevant representations.

X.139 Was Viterra Ltd deprived of the opportunity to avoid liability to Cargill Australia because:

(1) As a result of the breaches of the service contracts, Glencore and/or Viterra were not informed of the existence of any Undisclosed Matters or the inaccuracy of any Incorrect Warranties?

(2) As addressed in issue 131 above, if Glencore and/or Viterra had been informed of the existence of any "Undisclosed Matters found by the court" or the inaccuracy of any "Incorrect Warranties found by the court" prior to entry into the Acquisition Agreement, then Glencore and Viterra would have taken the Alleged Steps?

5261 The answer to the first question of this issue is straightforward. As it has been found that none of the Third Party Individuals made any representation that any of the Warranties were true and correct, no issue arose concerning any breach of any service contract concerning any of the Warranties being incorrect. However, it follows from

what is set out in addressing issues 137 and 138 above that Glencore and Viterra were not informed of the Undisclosed Matters, including the Viterra Practices, as a result of Hughes breaching the Hughes/Viterra Contract by making the Hughes Representations to the extent it has been found that he did.[4724]

5262 In contrast, the answer to the second question of this issue is far from straightforward. In most cases it would be expected that if an established corporate group were informed that a significant part of a group member's operations were being conducted in an improper manner by reason of practices of the kind encapsulated in the Viterra Practices, that group would take steps to properly investigate the practices and, in the context of an impending sale, obtain advice on how to appropriately disclose the product of such an investigation to prospective purchasers. However, for the reasons explained in issue 131 above, Mattiske's evidence on this subject did not establish that the Alleged Steps would have been taken by him,[4725] or that he would have recommended such a course to his superiors. Further, as already explained, Mattiske was not a decision-maker for the purposes of deciding whether or not the sale of Joe White would proceed. Arising from the fact that the Viterra Parties chose not to call any of the decision-makers,[4726] there was simply no probative evidence upon which the court could be satisfied that Glencore or Viterra would have taken the Alleged Steps in 2013 if Hughes had disclosed to the Viterra Parties the existence of the Undisclosed Matters (or of only the Viterra Practices).

5263 Accordingly, while for a period of time Viterra Ltd was undoubtedly deprived of the possibility to avoid liability to Cargill Australia by Hughes making the Hughes Representations (and not disclosing the Undisclosed Matters, or at least the Viterra Practices), on the limited evidence put before the court I cannot be satisfied it would have taken the Alleged Steps. Rather, the evidence available strongly pointed to a conclusion that an opportunity to avoid liability would not have been availed by

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4724 See par 5048(1) above.

4725 Obviously, a level of investigation was carried out in October 2013, but the alleged step concerned with investigating the Undisclosed Matters (which formed part of the Alleged Steps) could only be sensibly understood as a reference to an investigation being conducted that was not totally inadequate: see par 5128(3) above.

4726 See par 1987 above.

Glencore or Viterra taking the Alleged Steps as Glencore was willing to take the risk that the benefits to be derived from securing a sale agreement and concluding the Acquisition Agreement would outweigh any detriment that might be suffered if Cargill Australia decided to take legal action as a result of the Viterra Practices and related matters. I so find.

5264 Accordingly, although Hughes' conduct in breach of the Hughes/Viterra Contract was a "necessary pre-condition" to Cargill being misled, such that but for his conduct the liability of the Viterra Parties to Cargill Australia could not have arisen, in circumstances where the Viterra Parties were informed extensively of matters related to the Viterra Practices and chose to take a calculated risk as described, Hughes' antecedent conduct cannot be properly characterised as the cause of the loss suffered.[4727]

X.140 Is Viterra Ltd vicariously liable for the conduct of Hughes and/or Stewart and required to indemnify them in respect of loss and damage arising from, caused by or otherwise attributable to their actions or conduct carried out in the course of their employment?

5265 In closing submissions, this issue was not pursued.

X.141 Is Hughes entitled to be indemnified by Viterra Ltd as its employee in respect of any loss and/or damage arising from, caused by or otherwise attributable to his actions or conduct carried out in the course of his employment and/or pursuant to the terms of the indemnity agreement between Viterra Inc and Hughes dated 8 August 2012?

5266 In closing submissions, this issue was not pursued.

X.142 Are Viterra Ltd's claims for breach of the service contracts apportionable claims within the meaning of section 24AE of the *Wrongs Act* and/or do they

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4727 Cf *Mallesons Stephen Jaques v Trenworth* [1999] 1 VR 727, 736-737 [25]-[28] (Kenny JA, with whom Callaway and Buchanan JJA agreed); *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310, 315B (Glass JA, dissenting), 359B, 362A (McHugh JA).

give rise to an apportionable liability with the meaning of section 3(2) of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act*? If so, are the Third Party Individuals, Fitzgerald, Rees, Mattiske, King, Glencore, Viterra Malt, Cargill, Inc, Joe White and/or Viterra Operations concurrent wrongdoers? If so, what proportion of the damage or loss claimed by Viterra Ltd does the court consider just for each party to bear?

5267 It was agreed that any submissions concerning the actual apportionment of Viterra Ltd's claims, if any, would be dealt with after these reasons were delivered, based on submissions made on the facts as found. In light of the findings made, it appears that there will be no need for the parties to avail themselves of this opportunity.

X.143 What, if any, damages or other relief is Viterra Ltd entitled to against the Third Party Individuals as a consequence?

5268 As a result of the findings made, this issue only arose in relation to Hughes. In these circumstances, it would seem to be appropriate that either judgment be awarded for nominal damages in favour of Viterra Ltd in relation to the breach of the Hughes/Viterra Contract or some other order be made reflecting the fact that a breach of contract has been found.[4728] The Viterra Parties and Hughes will be directed to make submissions on this issue upon these reasons being delivered.

X.144 Are clauses 8.3(a), 8.3(c), 10.2 and/or 10.3 of the Confidentiality Deed void and/or unenforceable, and is Cargill, Inc thereby entitled to a declaration to that effect?

X.144.1 Legal principles regarding declaratory relief

5269 The court has inherent and statutory power to grant declaratory relief.[4729] The power is discretionary. It is neither possible nor desirable to fetter the manner of its

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4728 See *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd (No 2)* (2015) 48 VR 558, 624 [42], 625 [44] (Redlich, Whelan and Santamaria JJA); *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286, 300.6-301.8, (Latham CJ), 311.3 (Dixon J), 312.6 (McTiernan J).

4729 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581.9-582.5 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Supreme Court Act 1986* (Vic), s 36.

exercise.[4730] However, the power while wide is not unlimited. The exercise of the discretion is confined by considerations that mark out the boundaries of judicial power. Such considerations include:

(1) Declaratory relief must not be directed to answering abstract or hypothetical questions, but instead must be directed to the determination of legal controversies.[4731]

(2) A person seeking declaratory relief must have "a real interest" in seeking the relief.[4732]

(3) The power to make a declaration will not be exercised "when the court is called upon to answer a question that is purely hypothetical" or if relief is "claimed in relation to circumstances that had not occurred and might never happen".[4733]

(4) Declaratory relief may not be appropriate where the "declaration will produce no foreseeable consequences for the parties".[4734]

(5) Declaratory relief is generally inappropriate if it would leave unresolved issues likely to require further litigation.[4735]

(6) A declaration must be expressed in clear and precise terms, and be intelligible without reference to extrinsic material.[4736]

4730 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437.9 (Gibbs J).

4731 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 267.2 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

4732 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437.9-438.1 (Gibbs J).

4733 *University of New South Wales v Moorhouse* (1975) 133 CLR 1, 10.2, 10.5 (Gibbs J).

4734 *Gardner v Dairy Industry Authority (NSW)* (1977) 18 ALR 55, 69.7 (Mason J, with whom Jacobs and Murphy JJ agreed). See also 60.7 (Barwick CJ), 71.6 (Aickin J).

4735 *Commonwealth of Australia v BIS Cleanaway Ltd* (2007) 214 FLR 271, 279-280 [28], 282 [34]-[35] (Brereton J); *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286, 307.3 (Barwick CJ and Jacobs J, with whom Stephen J agreed).

4736 *Sidameneo (No 456) Pty Ltd v Alexander (No 2)* [2012] NSWCA 87, [29] (Young JA, with whom Beazley and Basten JJA agreed); *Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR 122, 136F (Young J).

X.144.2 The Cargill Parties' submissions

5270 The Cargill Parties referred to their earlier submissions,[4737] contending that clauses which purported to prevent Cargill, Inc from pursuing a claim for fraud, deceit, or contravention of section 18 of the Australian Consumer Law were unenforceable because they went against public policy. This was put on the premise that a contract associated with or in furtherance of unlawful purposes, insofar as giving effect to the exclusion clauses, would cut down the statutory norm prohibiting misleading or deceptive conduct. On this basis, by a counterclaim to the Third Party Claim, Cargill, Inc sought a declaration that any obligation of Cargill, Inc under clauses 8.3(a), 8.3(c), 10.2 and 10.3 of the Confidentiality Deed[4738] was void or unenforceable. In their submissions, the Cargill Parties phrased the declaration sought in narrower terms, being that any obligation of Cargill, Inc under the relevant clauses was void or unenforceable insofar as those clauses purported to exclude the operation of section 18 or bar or prevent legal proceedings for contraventions of section 18 against Glencore or its related bodies corporate.

5271 The Cargill Parties submitted it was a nonsense for the Viterra Parties to accept (correctly) that the operation of section 18 of the Australian Consumer Law could not be excluded or modified but also to contend that Cargill, Inc could be held liable for a proceeding commenced under that provision by Cargill Australia. They submitted that the effect was to oust the statutory protection which existed as a matter of public policy and could not be excluded.

X.144.3 The Viterra Parties' submissions

5272 The Viterra Parties submitted that Cargill, Inc breached all or any of clauses 8.3(a), 8.3(c), 10.2 and 10.3 of the Confidentiality Deed in causing or permitting Cargill Australia to bring this proceeding,[4739] and that in respect of these breaches the Viterra

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4737 See issue 100 generally. In respect of clauses 10.2 and 10.3 of the Confidentiality Deed specifically see issue 100 and in respect of clauses 8.3(a) and 8.3(c) of the Confidentiality Deed see issue 105.

4738 See par 590 above.

4739 The Viterra Parties referred to their submissions in issues 102, 105, 108 above.

Parties sought damages or alternatively that Cargill, Inc be ordered to procure that Cargill Australia not continue with this proceeding.[4740]

5273 The Viterra Parties submitted that the clauses were not void or unenforceable, and submitted that Cargill, Inc was not entitled to a declaration to that effect.

5274 The Viterra Parties accepted that parties to a contract cannot by agreement exclude liability for misleading or deceptive conduct.[4741] However, the Viterra Parties referred to the terms of clauses 8.3(a), 8.3(c), 10.2 and 10.3 of the Confidentiality Deed and submitted that these terms made no "direct" attempt to exclude or modify section 18 of the Australian Consumer Law and did not "expressly" do so, rather they formed the foundation for a separate claim by the Viterra Parties for breach of the provisions.

5275 The Viterra Parties submitted that if Cargill Australia had an entitlement to sue for the contravention of section 18 and was permitted by Cargill, Inc to do so, Cargill, Inc had caused the right of action to be commenced by not preventing the proceeding as required under the Confidentiality Deed. They submitted that Cargill, Inc did not have to promise to prevent someone else from suing, but having made a promise and having failed to stop Cargill Australia from commencing this proceeding, Cargill, Inc was liable. Further, it was submitted that this was not contrary to public policy as it did not prevent an action being successful under section 18.

5276 Further, the Viterra Parties submitted that non-reliance clauses have been found to be effective where they reflected the fact of non-reliance which was otherwise established by other evidence.[4742] In this regard it was submitted that the courts have been more willing to allow parties to rely on disclaimer clauses[4743] where the relevant transaction

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4740 See issues 88, 99.2, 103, 106, 109 above.

4741 The Viterra Parties cited *MBF Investments Pty Ltd v Nolan* (2011) 37 VR 116, 168 [217] (Neave, Redlich and Weinberg JJA); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 561.2 (Lockhart J, with whom Burchett J agreed and Foster J relevantly agreed).

4742 The Viterra Parties referred to the following authorities: *Henderson v Purairclean Pty Ltd* [2013] NTSC 29, [49]-[52] (Riley CJ); *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd* (2005) 220 ALR 211, 232-233 [100]-[105] (Branson, Nicholson and Jacobson JJ), referring to *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1989) ATPR 46-048, 53,147, 53,151 (Morling and Wilcox JJ).

4743 The Viterra Parties referred to *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 851B (Lord Diplock).

involves 2 sophisticated commercial parties.[4744]

X.144.4 Analysis

X.144.4.1 Substantive issues

5277 As may be seen from the submissions, there was no real controversy that as a matter of public policy a contract will not be enforced by the court if the effect of doing so would be to prevent a person bringing a claim for loss suffered because of misleading or deceptive conduct in trade or commerce which was in contravention of section 18 of the Australian Consumer Law. Generally speaking, what has been contractually agreed between the parties, whether written or oral, must be considered as part of a determination of whether or not misleading or deceptive conduct has been engaged in. However, once it has been decided that such conduct has occurred, any loss that has been suffered because of that conduct is recoverable subject to the provisions of the statutory regime more generally.

5278 The Viterra Parties characterised this proceeding as a case which concerned the allocation of risk. In the opening paragraph to the Viterra Parties' written submissions, they stated that this case was about whether an experienced, highly sophisticated and expertly advised commercial party could succeed in claims which were precluded by the detailed contractual arrangements into which it willingly entered, and by doing so disturb the parties' agreed allocation of risk.[4745]

5279 Whatever might be agreed between properly advised commercial parties, no agreement can effectively permit a party to that agreement to engage in misleading or deceptive conduct in trade or commerce.[4746] In other words, even if the risk associated with the transaction has been contractually allocated to a purchaser rather than a seller before the sale is completed, that circumstance does not obviate or obscure the need for the court to determine whether there was any relevant conduct that was

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4744 The Viterra Parties referred to *Orix Australia Corporation Ltd v Moody Kiddell & Partners Pty Ltd* [2006] NSWCA 257, [70]-[75] (Ipp JA, with whom Spigelman CJ and Basten JA agreed). The Viterra Parties submitted that Cargill purchased a large business after the Due Diligence and the Q&A Process, that it was part of an international group that was well versed in the industry and it was advised by appropriate professional advisors.

4745 See also pars 3005, 4683 above.

4746 See pars 3003, 3023, 3027, 4610-4614 above.

misleading or deceptive or likely to mislead or deceive. This determination requires the court to identify the conduct involved, and then to determine, in all the relevant circumstances (including the terms of any agreement before, at the time or after the conduct was engaged in), whether that conduct was misleading or deceptive. Having decided this, it is also necessary to determine whether the loss claimed to have been suffered was because of the impugned conduct.[4747]

5280 In short, the question of whether or not there has been a contravention of section 18 of the Australian Consumer Law is a question of fact. That question cannot be answered merely by consideration of what the parties agreed to contractually, albeit any such agreement may be highly relevant to the question of fact.

5281 Also on the question of the allocation of risk, the Viterra Parties contended that the position adopted by Cargill in this proceeding ignored the asymmetry of knowledge and experience between the parties concerning running a malting business, and the position the parties had agreed to adopt in this context.[4748] As part of this overarching submission, the Viterra Parties submitted that this case was analogous to the facts in *Osborne v Iris Diversified Property Pty Limited*,[4749] which Pembroke J described as a case about the "unwillingness of an investor to accept responsibility for his own actions".[4750] This submission cannot be accepted.

5282 The plaintiff in that case was found to have displayed a "cavalier attitude [that] was best explained by the probability that he was either wholly unconcerned or surprisingly careless" about the details of his investment, a property leased by a restaurant business.[4751] He "chose not to ask any questions or pursue any enquiries" about the profitability of the business of the long term lessee of the property he was acquiring or about the expansion plans of the group with which the business was associated,[4752] and rejected an invitation to be put in contact with the lessee's financial

4747 See issue 73.1 above.
4748 With respect to the contention about asymmetry of knowledge, see fn 2123 above.
4749 [2014] NSWSC 1488.
4750 Ibid, [1].
4751 Ibid, [20].
4752 Ibid, [37].

controller.[4753] Additionally, in that case it was found that there was no misleading or deceptive conduct on which the plaintiff could have relied, and indeed that "any reasonably astute investor who considered carefully the [i]nformation [m]emorandum would have recognised that the [lessee's] business plan was pregnant with uncertainty and risk".[4754]

5283 Further, although the information memorandum in that case required prospective purchasers to rely solely on their own enquiries and obtain their own independent advice in order to verify the information made available, and the sale contract contained various disclaimers concerning the ability to rely upon any representations,[4755] the case did not involve an elaborate and strict confidentiality regime that placed a limit upon the information to which a prospective purchaser could obtain access.[4756]

5284 Furthermore, to accept the submission that *Osborne v Iris Diversified Property Pty Limited* was analogous to this proceeding would be to ignore the steps taken by Cargill both before the Acquisition Agreement was entered into and shortly before Completion. It would also be inconsistent with the finding that the Cargill Parties did not fail to take reasonable care.[4757] The case was also readily distinguishable more fundamentally. Not only has substantial misleading or deceptive conduct been found to have occurred in this proceeding,[4758] but deceit on the part of the Viterra Parties has also been established.[4759]

5285 The Viterra Parties also referred to Pembroke J's comment that "[p]ersons who make allegations of misleading conduct, and contend that they relied on the allegedly misleading conduct, should not lightly be permitted to ignore the clear words of their own solemn disclaimer of reliance".[4760] Counsel for the Cargill Parties submitted that

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4753 Ibid, [20].

4754 Ibid, [35]. The contents of the information memorandum in that case were referred to by Pembroke J as including "[e]xpansion plans", and suggested that such plans were often pregnant with uncertainty.

4755 Ibid, [13], [15], [21].

4756 See, for example, pars 468, 586-590, 643-644, 650-651, 746, 750, 827 above.

4757 See pars 4434-4452 above.

4758 See issues 15, 16, 25, 26, 48, 50, 54, 55 above.

4759 See issues 22, 23, 59, 60 above.

4760 [2014] NSWSC 1488, [31].

to the extent this comment carried with it the implication that a contractual disclaimer should be considered to have in and of itself some force or priority in the assessment of the factual circumstances governing reliance, that implication was inconsistent with the principles enunciated by the High Court. For the reasons set out above, including in issues 20, 95 to 99 and 123, it has been found that the Sale Process Disclaimers and the Acquisition Agreement Liability Terms were not determinative in this case of either the specific issue of reliance or the ultimate issue of which parties should bear the loss that was caused because the Viterra Parties engaged in misleading or deceptive conduct.

5286 Also related to the question of allocation of risk was the Viterra Parties' submission that Cargill, Inc did not have to agree to prevent its Representatives from suing. It was contended that in those circumstances claiming damages against Cargill, Inc to recover any loss arising out of Cargill Australia's claims for contravention of section 18 was permissible. For reasons already discussed,[4761] to allow the Viterra Parties to claim this loss would effectively create a mechanism by which the consequences that would otherwise flow from engaging in misleading or deceptive conduct in trade or commerce in Australia could be averted.[4762] Even if it was accurate to say that there had been no *direct* attempt to exclude or modify section 18, if the position contended for by the Viterra Parties were accepted it would be directly contrary to the public policy underlying the Australian Consumer Law.

5287 Accordingly, to the extent that the release pursuant to clause 10.3 or any other clause of the Confidentiality Deed may have given the Viterra Parties a cause of action to claim damages arising out of the loss to be suffered by the Viterra Parties because of the successful claims of Cargill Australia for the Viterra Parties' contravention of section 18 of the Australian Consumer Law, that cause of action will not be enforced by the court. For like reasons, any right of Viterra to seek an indemnity from Cargill, Inc for any non-compliance with the terms of the Acquisition Agreement by Cargill

4761 See issue 100.4 above.
4762 See also pars 3033, 4614 above.

Australia,[4763] which would have the effect of indemnifying Viterra for the amount that was awarded against it in this proceeding because of Cargill Australia successfully prosecuting its claim for contravention of section 18, will also not be enforced. Finally, the release could not give rise to a successful defence to a claim for misleading or deceptive conduct if, despite the existence of the release, the Viterra Parties in fact engaged in misleading or deceptive conduct.

X.144.4.2 Declaratory relief

5288 The declaration as sought in accordance with the pleadings was that any obligation of Cargill, Inc under clauses 8.3(a), 8.3(c), 10.2 and 10.3 of the Confidentiality Deed was void or unenforceable. A declaration that the clauses of this nature were void or unenforceable in their entirety would be significantly broader than justified by any substantive finding that the clauses were unenforceable to the extent they purported to exclude operation of section 18 of the Australian Consumer Law. As a result, the pleaded prayer for relief was inappropriate.[4764]

5289 In any case, the relief in the terms sought in submissions[4765] should be refused for the following reasons.

5290 *First*, where necessary to be decided, the question of whether the clauses in question were unenforceable as a result of purporting to exclude the operation of section 18 of the Australian Consumer Law has been resolved and the conclusions reached in this regard will be reflected in the final orders made in this proceeding. As a result, the declaration would not have any foreseeable consequence for the parties.[4766] The Cargill Parties made no submissions as to why declaratory relief was necessary in addition to the other relief sought.

5291 *Secondly*, as sought, the declaration simply restated the case law that establishes that contracts are unenforceable to the extent they purport to oust the operation of section

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4763 See issue 123 above.

4764 Cf *OXS Pty Ltd v Sydney Harbour Foreshore Authority* [2016] NSWCA 120, [242]-[243] (Gleeson JA, with whom Macfarlan and Leeming JJA relevantly agreed).

4765 See par 5270 above.

4766 *Gardner v Dairy Industry Authority (NSW)* (1977) 18 ALR 55, 69.7 (Mason J, with whom Jacobs and Murphy JJ agreed).

18 of the Australian Consumer Law. This was not seriously in issue between the parties.

5292 *Thirdly*, Cargill, Inc has not been found to have breached clause 8.3(a), 8.3(c) or 10.2 of the Confidentiality Deed. In the absence of a breach being established, the declaration sought in relation to these clauses was directed to a hypothetical question and not the determination of legal controversies.

5293 Accordingly, no declaratory relief will be granted.

X.145 What is the effect, if any, of clause 15.4(b) of the Acquisition Agreement on Cargill Australia's claims?

X.145.1 Introduction

5294 In November 2019, the Viterra Parties sought leave to re-open their case to raise new defences to Cargill Australia's claims in this proceeding.[4767] The parties were informed at the conclusion of argument that the ruling on whether or not leave would be granted would form part of this judgment. In circumstances where the events giving rise to the application only occurred shortly before the application was made and where, for the reasons stated below, there was real substance in the new defences sought to be raised, leave will be granted to the Viterra Parties to file the summons and amend their defence as sought.

5295 The Viterra Parties' application relied upon clause 15.4(b) of the Acquisition Agreement, which was enlivened after a change in Joe White's ownership. It is convenient to set out clause 15.4(b) again here:[4768]

> **15.4 Seller not liable**[4769]
>
> No Seller is liable to the Buyer (or any person deriving title from the Buyer) for any Claim under or in relation to or arising out of the Transaction Documents:
>
> …

4767 By way of summons dated 4 November 2019.
4768 To view cl 15.4(b) in context, see par 1030 above.
4769 Headings were for convenience and were not to affect the interpretation of the Acquisition Agreement: cl 1.5.

(b) if the Buyer Guarantor has ceased after Completion to Control the Company or the Business;

…

5296 Claim was defined in the Acquisition Agreement as follows:[4770]

> **Claim** means any allegation, debt, cause of action, Liability, claim, proceeding, suit or demand of any nature howsoever arising and whether present or future, fixed or unascertained, actual or contingent, whether at Law, in equity, under statute or otherwise.

5297 The Viterra Parties sought to raise a new defence to Cargill Australia's claims for:[4771] (1) breach of the Acquisition Agreement;[4772] (2) breach of the Australian Consumer Law;[4773] and (3) deceit.[4774]

X.145.2 Circumstances leading to the application for leave to re-open

5298 Shortly after this trial originally concluded,[4775] Cargill, Inc completed the sale of its entire malting business to Copagest NV; settlement occurred on 31 October 2019. The shares in Joe White and the entirety of the Joe White Business formed part of the assets sold.[4776]

5299 This was the factual basis for the Viterra Parties' application. The Cargill Parties conceded that the sale of Joe White and the Joe White Business triggered clause 15.4(b).

X.145.3 Construction of clause 15.4(b) of the Acquisition Agreement

5300 The issue to be considered was whether, once triggered, clause 15.4(b) operated to extinguish any liability Viterra may have had for Cargill Australia's claims in this proceeding. Answering this question was purely a matter of construction. Specifically, did clause 15.4(b) operate to extinguish liability for claims that existed before the change of control (the Viterra Parties' submission), consequently

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4770 For the remaining defined terms in cl 15.4(b), see par 1022 above.

4771 There were also submissions made with respect to Cargill's claims for negligent misrepresentation, but as the Cargill Parties did not press these claims there is no need to consider them.

4772 The effect of cl 15.4(b) on the Acquisition Agreement claims is considered at pars 5324-5325 below.

4773 The effect of cl 15.4(b) on the Australian Consumer Law claims is considered at pars 5326-5331 below.

4774 The effect of cl 15.4(b) on the deceit claim is also considered at pars 5326-5331 below.

4775 Being 21 August 2019. Since then, there have been further hearing dates based on applications unrelated to this issue.

4776 See par 1846 above.

extinguishing any of Cargill Australia's claims within the scope of clause 15.4(b) of the Acquisition Agreement? Alternatively, did the operation of clause 15.4(b) only affect claims that arose after the change of control (the Cargill Parties' submission), thereby preserving Cargill Australia's claims in this proceeding?

5301 For the reasons that follow and subject to issues concerning enforceability, the Viterra Parties' construction of clause 15.4(b) of the Acquisition Agreement must be preferred. In short, clause 15.4(b) applied to all Claims within the scope of the provision, whether arising before or after Cargill, Inc ceased to control Joe White and the Joe White Business.

5302 As has been referred to above,[4777] interpretation of a commercial contract is an objective exercise.[4778] The court must consider the meaning of a term by reference to its text, context and purpose or objects, and consider what a reasonable business person would have understood the term to mean.[4779] The genesis of the transaction, the background, and the market must be understood to identify the commercial purpose or objects of the contract, to arrive at a business-like interpretation.[4780]

5303 Looking first to the text, the words of the provision were clear: "No Seller [Viterra] is liable to the Buyer [Cargill Australia] … for any Claim". Clause 15.4 applied to "any Claim" and there was nothing in the words of clause 15.4(b) which indicated that it was or might have been limited to certain types of Claims.

5304 Further, the word Claim was defined broadly and explicitly included Claims "whether present or future". Furthermore, when Claim was used elsewhere in the Acquisition Agreement, including within clause 15.4, it necessarily included any

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4777 See par 4549 above.

4778 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116-117 [46]-[49] (French CJ, Nettle and Gordon JJ). See also *McKenzie v Heathscope Operations Pty Ltd* [2020] VSCA 309, [37] (Beach, Kyrou and Osborn JJA).

4779 Ibid; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-657 [35] (French CJ, Hayne, Crennan and Kiefel JJ); *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392, 401 [51] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

4780 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-657 [35]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 160 [8] (Gleeson CJ).

Claim which had already arisen. For example, subclauses (e), (f) and (g) of clause 15.4[4781] referred to a Claim that "arises or is *increased*" (emphasis added) in certain circumstances. As such, in that context Claim must encompass claims that were already in existence and would have otherwise increased had the circumstances for the increase not fallen within the exceptions in clause 15.4(e), (f) or (g). Moreover, although clause 15.13 of the Acquisition Agreement required that each qualification and limitation be construed independently,[4782] clause 1.1 required a consistent meaning be applied for defined terms, unless a contrary intention appeared. Construing "Claim" consistently in the chapeau of clause 15.4 was the correct approach as a matter of contractual construction and in no way infringed clause 15.13.

5305 The Cargill Parties submitted that clause 15.4(b) was ambiguous and the correct construction was that the scope of clause 15.4(b) was limited to Claims arising after the change of control. However, their submissions failed to demonstrate why a subsequent point in time when a Claim might arise was the critical moment for the application of clause 15.4(b), as opposed to another point in the progress of a Claim (such as when notice of a Claim was given pursuant to clause 15.1 of the Acquisition Agreement or when a proceeding was commenced).

5306 Furthermore, it should be noted that the Cargill Parties' submissions were different in relation to when clause 15.4(b) would extinguish liability for the Seller. They identified both Claims arising "after the change in control" in their written submissions, and claims "not yet notified [pursuant to clause 15.1]" as at the change in control in their oral submissions.

5307 The Cargill Parties argued that the ambiguity stemmed from the phrase "No Seller [Viterra] is liable". Precisely how the construction contended for by the Cargill Parties hinged on these words specifically was not clear. The Viterra Parties conceded that the wording "is liable" may be "a little awkward". However, it was not so awkward to suggest the clause was ambiguous or unclear. Further, clause 15.4(b) may read less

4781 See par 1030 above.
4782 See further details at par 5309 below.

naturally than a complete sentence would have in order to accommodate the structure of the clause, split into the chapeau and numerous subclauses.

5308 For the reasons set out below, the context and purpose do not weigh against the meaning clause 15.4(b) has on its face: that there is no liability for Claims within the ambit of the provision, regardless of whether they arose prior to the change of control or subsequently. Nor do the context or purpose suggest that the parties did not intend the words to have their ordinary meaning.

5309 The Cargill Parties relied on the context of clause 15.4(b), which fell within a set of provisions in clause 15 prescribing notification requirements and time limits for claims made by Cargill Australia. The Cargill Parties submitted that this context suggested an alternative construction of clause 15.4(b): that it "comfortably" applied only to claims which had not yet been notified under clause 15.1 when the change of control occurred and clause 15.4(b) became operative.[4783] The difficulty with this argument was that clause 15.13 stated that "[e]ach qualification and limitation in this clause 15 is to be construed independently of the others and is not limited by any other qualification or limitation". The Cargill Parties' submission effectively disregarded clause 15.13 as it relied on other qualifications and limitations within clause 15 to assist in the construction of clause 15.4(b).

5310 Read independently of the qualifications or limitations in other parts of clause 15, there was no indication at all that clause 15.4(b) only applied to claims not notified under clause 15.1. As a result, the submission was inconsistent with the requirement in clause 15.13 and could not be accepted for this reason. That said, even absent clause 15.13, it would have been a stretch to contend that the existence of clause 15.1 would have meant it was appropriate to read down the clear wording of clause 15.4(b).

5311 Notwithstanding, clause 15.13 did not go so far as to require a departure from the basic principles of interpretation. Clause 15.13 did not have the consequence that the provisions within clause 15, including clause 15.4(b), were to be interpreted without

4783 But also see par 5305 above.

regard to their context within the Acquisition Agreement as a whole, or the context, purpose or objects of the agreement more broadly.

5312 In relation to purpose, there could be good commercial reasons in the sale of a business to include a clause in the contract that extinguishes liability for both existing and future claims if the buyer ceases to control the acquired business. In the context of a complex commercial transaction of significant value, it is clearly commercially advantageous for a seller to have finality after a sale. Although a provision like clause 15.4(b) may be disadvantageous to the buyer, it is perfectly plausible that it could be agreed to by a buyer according to its ordinary meaning as part of negotiating a wider commercial deal.

5313 That said, contrary to the Viterra Parties' submission, it did not follow that the purpose of clause 15.4(b) was to disincentivise Cargill from having 2 attempts at getting its money by selling the shares in Joe White and the Joe White Business and then suing, or by suing and then selling. It was submitted by the Viterra Parties that the purpose of such a disincentive would have been to prevent Cargill being over compensated. This submission cannot be accepted for 2 reasons.

5314 *First*, the second scenario referred to in this submission did not reflect how clause 15.4(b) operated. On neither construction contended for did clause 15.4(b) prevent the Buyer suing and, after receiving judgment, selling. Such a conclusion would be nonsensical as it would have the effect of imposing a permanent injunction upon Cargill Australia from selling the Joe White Business if it were to sue. As a result, it was not effective to prevent Cargill Australia, as the Buyer, having "2 goes at getting [its] money" returned for what it had acquired.

5315 *Secondly*, the Viterra Parties' argument on this point was predicated on any damages awarded being inaccurate and likely to significantly undervalue the Joe White Business prior to any subsequent sale for a higher price. The Viterra Parties did not provide a basis for this proposition. Therefore, while there were plausible commercial objects for the construction supported by the Viterra Parties, such objects did not

include the disincentive purpose for which the Viterra Parties contended.

5316 The Cargill Parties submitted that the "evident purpose of the clause [was] to ensure finality for any liability that may arise after the Buyer and the Seller have ceased to have any involvement in the [Joe White Business]". However, the preferred construction of clause 15.4(b) (as contended for by the Viterra Parties) would also ensure finality for liability of this type. As ensuring finality for Viterra was a plausible purpose for both of the alternative constructions in consideration, the submission based on finality alone did not lend particular support to either of the competing constructions.

5317 The Cargill Parties submitted that it would be commercially irrational for clause 15.4(b) to apply to Claims that arose prior to Cargill, Inc ceasing to control Joe White because this construction would have the following effects:

(1) Incentivise Viterra to delay the resolution of Claims.

(2) Create a disincentive to Cargill, Inc realising commercial opportunities.

(3) Result in the timing of court processes determining contractual obligations.

For the reasons set out below, the Cargill Parties' submission failed to establish that these effects were commercially irrational.

5318 In relation to the submission that clause 15.4(b) would incentivise Viterra to delay the resolution of claims, it is possible such an incentive might be created. However, the timing of any proceeding being instituted was always a matter for Cargill Australia. Further, a court has control of its processes once a proceeding is commenced. These processes include giving a speedy hearing and determination if the circumstances warrant it.[4784] Furthermore, parties in commercial disputes are often subject to numerous factual and legal circumstances which may incentivise them to delay, or

[4784] No application for expedition was made by the Cargill Parties; quite the contrary, the trial was delayed at the request of the Cargill Parties twice and ultimately the court insisted that the case commence when it did.

vigorously pursue, the resolution of claims. As the Viterra Parties submitted, these "submissions can be multiplied on both sides interminably". In short, such a commonplace possible factor did not suggest or favour any particular construction. Finally, although a provision which may incentivise a seller to delay the resolution of claims may be disadvantageous to the buyer, such a provision could plausibly be agreed to by a commercially rational party as part of a wider commercial deal.

5319 As to the second submission, a disincentive to realise commercial opportunities may have been created. However, this was not a commercially irrational or, in some contexts, even unusual effect of the terms of a commercial contract. Parties often assume obligations which diminish their incentive to pursue, or preclude, other commercial opportunities. In short, Cargill, Inc was given a simple choice after it commenced this proceeding: sell the Joe White Business or maintain its control over the operation until all Claims were resolved.

5320 There are 3 reasons the Cargill Parties' third submission, that it would be irrational for the timing of court processes to determine the existence, or extinguishment, of contractual rights and liabilities, cannot be accepted.

5321 *First*, this submission mischaracterised the trigger for clause 15.4(b). The real operative event was Cargill, Inc ceasing to control Joe White or the Joe White Business, rather than the timing of the court process. *Secondly*, it is open to, and not uncommon for, contracting parties to create contractual rights and liabilities which may be contingent on processes or events over which the parties have no, or only limited, control. *Thirdly*, the thrust of this argument appeared to have been that it would be irrational for the Cargill Parties' case to be impacted by the timing of the delivery of a judgment. However, again this was no more than a consequence of having decided to sell the Joe White Business before this proceeding was resolved; a matter entirely within Cargill's control.

5322 Although the consequences that have unfolded in these circumstances may appear harsh because, contractually, Cargill Australia is unable recover for what may be

significant claims, it is not an absurd result which should justify departing from the plain words of clause 15.4(b).[4785]

5323 The fact that the correct construction of clause 15.4(b) has the potential to have severe consequences for Cargill might, in some contexts, suggest that this was not the intended construction. However, in the context of this transaction, it was perfectly plausible that such a provision could be agreed to by large commercially rational parties. Other provisions within clause 15, although not to be relied upon to construe clause 15.4(b),[4786] serve to illustrate the significant limitations of liability Cargill Australia was willing to agree to. For example, clause 15.7 prevented Cargill Australia making a Claim if any Claim was less than $500,000 *and* unless and until the aggregate amount of all Claims properly made under the Transaction Documents exceeded $3.5 million.

X.145.4 Operation of clause 15.4(b) as a matter of contract

5324 Cargill Australia's contractual claims against Viterra for breaches of the Warranties and of clauses 13.1 and 13.8 of the Acquisition Agreement fall within the scope of clause 15.4(b). The definition of Claim covered a range of matters including, most relevantly, a "cause of action", "Liability", "claim" and "proceeding" and therefore squarely captured Cargill Australia's claims in this proceeding. Claims for breach of the Acquisition Agreement were clearly "under or in relation to or arising out of the Transaction Documents", given the Acquisition Agreement was expressly included in the definition of Transaction Documents.[4787]

5325 As a result, clause 15.4(b) applied to extinguish any contractual liability Viterra may otherwise have had to Cargill Australia for breaches of the Warranties and clauses 13.1 and 13.8 of the Acquisition Agreement. Consequently, the Viterra Parties' new

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4785 There might have been circumstances in which cl 15.4(b) produced what might be considered an absurd result, such as a change of control as the result of insolvency of Joe White. However, such a circumstance is unlikely to have been in the contemplation of the parties when the Acquisition Agreement was entered into and was not raised by the parties in this proceeding as being something in contemplation on 4 August 2013.

4786 Clause 15.13.

4787 See par 1022 above.

defence has been made out in relation to those claims insofar as the claims are based on breach of contract against Viterra.

X.145.5 Effect of clause 15.4(b) on claims for misleading or deceptive conduct and deceit

5326 The Viterra Parties submitted that, in addition to operating as a defence for claims based on breach of the Acquisition Agreement, clause 15.4(b) operated as a defence to claims brought by Cargill Australia for breach of section 18 of the Australian Consumer Law, and to claims brought on the basis of deceit.

5327 The Cargill Parties submitted that clause 15.4(b) had no effect in respect of the claims for misleading or deceptive conduct or deceit on the basis that, had the conduct alleged in those claims not occurred, Cargill Australia would not have entered into the Acquisition Agreement.[4788]

5328 In making this submission, the Cargill Parties relied on a line of authority for the proposition that the terms of a contract cannot be relied upon if a person was induced to enter into the contract based on misleading or deceptive conduct in trade or commerce that was in contravention of section 18 of the Australian Consumer Law.[4789] They referred to a relatively recent case in this line of authority, *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd*,[4790] in which there was an attempt in a subcontract to reduce the time in which any claim could be made based on the Australian Consumer Law to a period of 7 days.

5329 In that case, the plaintiff's allegations based on misleading or deceptive conduct were rejected by a referee, and those findings were affirmed by the court.[4791] However, the defendant also sought to rely on the time limitation for the claim as agreed in the

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4788 The Cargill Parties also submitted that to allow clause 15.4(b) to act as a defence to claims for misleading and deceptive conduct would be contrary to public policy, as it would effectively allow the Viterra Parties to contract out of the operation of the Australian Consumer Law. Arguments of this nature were raised at various points throughout the proceeding, and are considered above, including in issue 144.

4789 See par 4326 above and the cases cited in fn 3616 above.

4790 (2018) 56 VR 557 (Riordan J). This decision was preceded by conflicting New South Wales authority on the issue of whether the statutorily prescribed time limit could be contractually reduced.

4791 Ibid, 561 [2]-[3], 577 [46]-[48], 590-591 [80]-[81], 593 [89]-[91].

subcontract in order to defeat the plaintiff's claim under section 18 of the Australian Consumer Law. Proceeding on the assumption (contrary to the findings made) that section 18 had been contravened and that absent misleading or deceptive conduct the plaintiff would not have entered into the contract, it was stated that the appropriate remedy would have been to put the plaintiff in the position it would have been in had any misleading conduct not occurred even though there had been no claim made within 7 days.[4792] Thus, in addition to public policy reasons, it was held that the terms of the subcontract could not be determinative of the ability to obtain relief for contravention of section 18 if a court were satisfied that the contract would not have been entered into had the misleading or deceptive conduct not occurred.[4793]

5330 Naturally, if the true counterfactual was that no transaction would ever have taken place, then, generally speaking, it would be inappropriate for the terms of a contract that would never have been entered into to determine the rights of the parties.

5331 Applying these principles, the Cargill Parties' submission must be accepted. It has been found that the Viterra Parties engaged in misleading or deceptive conduct and deceit in the events leading up to the Acquisition Agreement,[4794] and also at the moment the Acquisition Agreement was entered into.[4795] In the absence of this conduct Cargill Australia would not have entered into the Acquisition Agreement.[4796] Accordingly, with respect to their misleading or deceptive conduct and in relation to their deceit, the Viterra Parties are unable to rely on the terms of the Acquisition Agreement, including clause 15.4(b), as a defence to liability for such conduct.[4797]

4792 Ibid, 606 [139].

4793 Ibid, 606 [138].

4794 See issues 15-20, 22-23, 48-51 above.

4795 See issues 48-51 above.

4796 See issues 20, 33, 49 above.

4797 The Cargill Parties have also succeeded in claims for misleading or deceptive conduct and deceit in relation other conduct of Glencore and Viterra for which it was not claimed that, in the absence of the conduct, Cargill Australia would not have entered into the Acquisition Agreement: see issues 24-29 above (concerning the situation where the Acquisition Agreement had already been entered into), and 54-60 above (relating to the Other Bidders Representations which resulted in the purchase price being increased). Since the Cargill Parties have succeeded in claims where there was a direct causal link between misleading or deceptive or fraudulent conduct and entry into the Acquisition Agreement, it is not necessary to consider the application of cl 15.4(b) to these other claims.

Y. Conclusion

5332 Cargill Australia pressed its case on multiple fronts. It focused on representations made by the Viterra Parties at each stage of the sale process. In the conduct of this proceeding, the parties descended into the minutiae of the events connected with the transaction. No stone was left unturned.

5333 These reasons have set out how and where Cargill Australia has succeeded in making its case. To be clear, the success of any of the claims relating to the Warranty Representations, the Financial and Operational Performance Representations or the Pre-Completion Representations would have been sufficient to entitle Cargill Australia to damages on the basis that, had Viterra not engaged in the relevant conduct, Cargill Australia would not have acquired the shares in Joe White or the related assets.

5334 The most straightforward claim was the claim based on the Warranty Representations.[4798] The Warranty Representations were enshrined in the Acquisition Agreement; they were made in the same terms as expressed in the written contract[4799] and the contract contained an express acknowledgement of reliance. Further, the release given pursuant to clause 10.3 of the Confidentiality Deed (and if applicable to Cargill Australia's claims, contrary to what has been found, the operation of clause 10.2) did not apply to any representations made in the Acquisition Agreement.

5335 With the minor exception of a single Warranty,[4800] each of the Warranty Representations included in the claim was false or incorrect at the date of the Acquisition Agreement and also at Completion.[4801] Cargill Australia relied on the Warranty Representations and would not have entered into the Acquisition Agreement if the Warranty Representations were not agreed to be made in their terms as part of the Acquisition Agreement.[4802] Accordingly, Cargill Australia's claim for

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4798 See issues 48-51 above.

4799 The Warranty Representations comprised Warranties 4.2, 6.1(e), 7.3, 9.2, 12, 13.4 and 17(a).

4800 The allegation that Warranty 6.1(e) was breached was not pursued in closing submissions: see issue 46 above.

4801 See issues 41-45, 48-51 above.

4802 See issue 49 above.

misleading or deceptive conduct based on the Warranty Representations succeeded. These findings were made notwithstanding that Cargill Australia's claim for breach of contract in relation to the Warranties ultimately could not be successful, as clause 15.4(b) of the Acquisition Agreement operated to extinguish any contractual liability that Viterra may otherwise have had for those breaches.[4803]

5336 The Financial and Operational Performance Representations represented a separate success in Cargill Australia's case. These were implied representations conveyed by conduct of the Viterra Parties during the sale process,[4804] making this aspect of the claim necessarily more complex than the claim based on the Warranty Representations. Nonetheless, Cargill Australia was successful in proving that the Financial and Operational Performance Representations constituted misleading or deceptive conduct, and that these representations were relied upon by Cargill Australia in entering into the Acquisition Agreement. A key element of this part of the case was establishing that the Viterra Practices existed and were not disclosed. There was a large body of evidence to demonstrate that they did and that they were concealed. Further, by virtue of the knowledge possessed by Hughes, as a senior employee of Viterra Ltd and acting as agent for Viterra (in addition to Glencore), Cargill Australia also established its claim for deceit.[4805]

5337 Misleading or deceptive conduct was again established in respect of the Pre-Completion Representations, which comprised various representations made by Glencore and Viterra in responding to Cargill Australia's serious concerns about aspects of Joe White's operations, shortly before Completion in October 2013.[4806] While Cargill Australia did not establish that it relied on these representations in proceeding to Completion, it did establish that because of the Pre-Completion Representations, Cargill Australia was denied a valuable opportunity to receive meaningful legal advice on whether it was entitled to terminate the Acquisition Agreement. Further, it has been found that if Cargill Australia had not been deprived

4803 See issue 145 above.
4804 See issues 1-4, 6-7, 15 above.
4805 See issues 22, 23 above.
4806 See issues 24, 25 above.

of that opportunity, it would have terminated the Acquisition Agreement instead of proceeding to Completion. However, due to the manner in which the claims regarding the Pre-Completion Representations were pleaded, Cargill Australia did not establish that Viterra knew the Pre-Completion Representations were false, and as a result its related claim in deceit failed.[4807]

5338 As a result of its success in the claims for misleading or deceptive conduct and deceit listed above, Cargill Australia is entitled to damages equal to the difference between the purchase price paid under the Acquisition Agreement and the true value of the Joe White Business as at 31 October 2013.[4808] The key factual findings have been made on the issues that were in dispute concerning any loss claimed.[4809] Further, Cargill Australia did not suffer this loss as a result of any failure on its part to take reasonable care, and so its entitlement to compensation will not be reduced.[4810] As the Viterra Parties have been found to have fraudulently caused Cargill Australia's loss, they are excluded from the operation of the apportionment regime in Part VIA of the *Competition and Consumer Act*. As such, it was not necessary to identify concurrent wrongdoers or to consider what lesser portion of Cargill Australia's loss (if any) it would have been just for the Viterra Parties to bear.[4811]

5339 Finally, and submerged in the claim for loss in the primary claims above, Cargill Australia was successful in establishing that the Other Bidders Representations that were made by the Viterra Parties, at the 11th hour after the formal bidding process was complete, constituted engaging in misleading or deceptive conduct and deceit. By that conduct, Cargill was misled to believe in a state of affairs that simply did not exist. Unlike the other claims, the loss derived from this conduct was the specific amount that Cargill was induced to add to the purchase price by those representations, being $15 million.[4812] This amount formed part of the loss suffered arising out of the primary

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4807 See pars 3458-3459, 3482 above.
4808 See issue 73 above.
4809 See pars 4303, 4338 above.
4810 See issue 80 above.
4811 If the apportionment regime had applied, there would have been no reduction in any event: see issues 80, 82 above.
4812 See issues 54-60 above.

claims, but even if Cargill Australia had not been successful in making those claims, it would still have been entitled to compensation in the amount of $15 million.

5340 The Viterra Parties counterclaimed against Cargill Australia, and brought a third party claim against Cargill, Inc, seeking to set off any liability to Cargill Australia by demonstrating breach of, or misleading or deceptive conduct in relation to, the Confidentiality Deed entered into between Glencore and Cargill, Inc at the outset of the sale process. These claims were unsuccessful. Further, although the Viterra Parties were successful in establishing that Cargill Australia made the No Reliance Representations about their non-reliance on information provided by the Viterra Parties in the sale process, and that these representations were misleading or deceptive, they failed to establish any loss arising from this conduct.[4813]

5341 The Viterra Parties also brought third party claims against Joe White and the Third Party Individuals, being certain former employees of Joe White.[4814] The claims against Joe White, Youil, Wicks, Stewart and Argent have failed in their entirety and will be dismissed. Further, the Viterra Parties have failed in their claims against Hughes for misleading or deceptive conduct in trade or commerce, but have succeeded in proving that Hughes breached his employment contract by failing to act ethically, honestly and in the best interest of Viterra Ltd.[4815] However, despite proving Hughes breached the Hughes/Viterra Contract, Viterra Ltd has not established it suffered any loss by reason of those breaches. This was because the Viterra Parties have failed to prove that they would have taken certain identified steps which, if taken, would have given them the opportunity to ameliorate their liability to Cargill Australia.[4816]

5342 In so finding, particular regard has been paid to the fact that, when told of the existence of the Operational Practices and their significant level of implementation as part of Joe White's operations prior to Completion, Glencore and Viterra chose to proceed without properly investigating or disclosing the information available to

4813 See issues 95-99 above.
4814 See issues 124-143 above.
4815 See issues 137-138 above.
4816 See issue 139 above.

them. In doing so, they apparently believed that their actions would not give rise to any substantial claims against them.[4817] They were wrong.

5343 The parties will be given the opportunity to read these reasons before final orders are made. In addition to dealing with the question of costs, the orders of the court will include that there will be judgment for Cargill Australia against each of the Viterra Parties in a sum to be calculated in accordance with these reasons. The Viterra Parties' counterclaim against Cargill Australia will be dismissed.

5344 In relation to the Third Party Claim, there will judgment for the third parties to this proceeding, except Hughes. The parties will be directed to make further submissions on the orders to be made in relation to Hughes.[4818] The counterclaim of Cargill, Inc against the Viterra Parties will be dismissed.

Z. Further remarks

Z.1 Consideration of the evidence, pleadings and submissions

5345 In some authorities, concern has been expressed about the fact-finding role of a trial judge when there has been a substantial period of time between when witnesses have given evidence and the time at which judgment is delivered. There has been a considerable lapse of time from when the witnesses gave evidence in this case and the time of the publication of these reasons. Unfortunately, given the size of the case, this has been unavoidable. Further, during the trial the Cargill Parties challenged an interlocutory ruling on the basis that, because a matter had not been expressly referred to in the reasons for that ruling (or so they contended),[4819] an inference ought to have been drawn that something had been overlooked. Accordingly, although these reasons are already lengthy, to assist in understanding how the pleadings and submissions have been dealt with and how the evidence has been assessed, some further matters should be addressed.

4817 See issues 131, 139 above.
4818 See par 5268 above.
4819 But see *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 17)* [2018] VSC 750, [61], [72]-[76].

5346 During the course of the trial, I made contemporaneous notes while witnesses were giving evidence. Further, given the number of witnesses, I directed my associates to ask each witness to agree to a photo being taken of her or him in order to assist me.[4820] Furthermore, I maintained a separate document to record my views at the completion of the evidence of each witness, including where appropriate on issues of credit. Naturally, at the completion of the lay evidence in 2018, this document was reviewed so that any views I had formed could be considered in light of the evidence as a whole. The document was reviewed again after all the evidence in the trial had been given.

5347 As to the documents referred to at trial, a running list of tendered documents was kept, which list was provided to the parties to confirm its accuracy on a frequent basis. The court book was compiled and maintained electronically,[4821] and its index was updated each hearing day to indicate which documents had been tendered. Further, the court maintained its own electronic court book. Whenever a witness referred to a document in the court book (either in a witness statement or during oral evidence), the document was marked in the court's own court book to record the relevant witness, together with either the paragraph number in the witness statement of the relevant witness or the date and time the witness was taken to the document in court.[4822]

5348 There were a large number of documents tendered in this case. In order to reconcile the documents referred to in the pleadings with those tendered at trial, with the assistance of my associates a table was compiled of each document referred to in the pleadings, together with a cross-reference to these reasons. If a document was referred to in the pleadings but not in these reasons, it was noted in the table that the document was not included. Upon substantially completing these reasons, I reviewed every document in the table that was not expressly referred to in these reasons to determine whether any further documents needed to be included. Thus, regardless of whether

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4820 The parties were informed that it was my intention to obtain a photo of each witness.

4821 With some very minor exceptions, largely for reasons concerned with confidentiality.

4822 There were exceptions to this with some of the excel spreadsheets. For practical reasons, in relation to oral evidence for these documents I generally recorded the name of the witness without referring to the date and time.

a document is expressly referred to in these reasons, each of the documents referred to in the pleadings that was also tendered at trial has been considered.

5349 Also in relation to the pleadings, the parties were required to identify which allegations were relied upon with respect to each of the issues for determination. Another table was prepared listing every paragraph of the pleadings that had been so identified (together with the further paragraph numbers of pleadings referred to by the paragraphs referred to in the list of issues). That table was reviewed to ensure every allegation identified had been addressed in these reasons to the extent the allegations were maintained in closing submissions.[4823]

5350 In these reasons, a large number of footnotes consist of cross-references to other parts of the judgment. This has been done to assist the reader. However, given the length of these reasons the cross-referencing should not be taken as exhaustive. In other words, because reference is made to a particular paragraph or paragraphs, it should not be taken as excluding a reference to other paragraphs in these reasons or to the evidence more generally. Given the sheer volume of materials that needed to be addressed, it would not have been efficient to purport to exhaustively refer to every piece of evidence that was considered to support any observations or findings made in these reasons.

5351 Further, for anyone saddled with the task of reading these reasons in their entirety, undoubtedly some parts of them are repetitious. This has been sought to be avoided to the extent possible by cross-referencing, but for some issues it was decided it would assist the reader to summarise what was stated previously. Furthermore, there must be an inherent risk that the reader may perceive an inconsistency between a summary and the more detailed account of what preceded it. Naturally, if any such perception arises, then reliance should be placed upon the more detailed account of the matter being addressed.

4823 With respect to some of the pleadings, a practice was adopted of referring to and repeating earlier allegations of the party or parties on a repeated basis. Naturally, it was not practical or appropriate to refer to the same allegations repeatedly in these reasons, however each of them was addressed and checked off in the spreadsheet.

5352 Finally, with respect to the closing submissions, most of the written closing submissions were provided to the court before oral closing submissions. Those submissions were read by me in their entirety before oral closing submissions commenced. Further, after reserving judgment, I have read all those written submissions again carefully, together with the transcript of the oral closing submissions. Given the number of points raised, and the considerable length of these reasons in light of that, it was simply not practical or efficient to refer expressly to every single point raised in closing submissions. However, the fact that a point has not been expressly referred to does not mean it has been overlooked. Naturally, in a case of this size, some discretion must be exercised in identifying the real issues for determination in dealing with the substantive submissions. Absent such an approach, these already lengthy reasons would have been even longer and the time at which they could be delivered would have been commensurately delayed.

Z.2 Some parting words

5353 In *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*,[4824] Owen J concluded his judgment by observing that from time to time in the 5 years in which he had worked on that case he had felt like he was confined to an oubliette. Apart from saying that I am in a much better position to empathise than I was 3 or 4 years ago, I shall not be so pretentious as to compare this proceeding with what his Honour dealt with in that case. However, it must be observed that the 2 multinationals involved in this litigation have utilised an enormous amount of the court's resources since this proceeding was commenced in October 2014, and in particular since mid-2017 when repeated interlocutory disputes arose leading up to the trial finally commencing on 18 June 2018.[4825]

5354 In such circumstances, it is incumbent on all parties to this proceeding to ensure that the remaining matters that need to be attended to before final orders may be made in

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4824 (2008) 39 WAR 1, 908-909 [9761].

4825 For the first 3 years this proceeding was on foot, the parties spent the time producing a large amount of documents by way of discovery, and also had a number of interlocutory disputes. For further details see *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 25)* [2020] VSC 172, [14]-[22].

respect of liability, quantum and costs are dealt with as efficiently as reasonably possible.[4826]

CERTIFICATE

I certify that this and the 1809 preceding pages, together with annexures A to D, are a true copy of the reasons for judgment of Elliott J of the Supreme Court of Victoria delivered on 28 January 2022.

DATED this 28th day of January 2022.

.....
Associate

[4826] During closing submissions, I stated that I felt duty bound to say something about the manner in which the case had been conducted. This arose in circumstances where the Cargill Parties produced very detailed documents to be relied upon in closing submissions of which they had chosen to give the other parties no notice. This resulted in me expressing my dissatisfaction yet again about how the case was being conducted: see also, for example, par 1930 above. (To be clear, the criticism had been directed to the Cargill Parties and the Viterra Parties, but not the Third Party Individuals.) The parties addressed the court in due course on the pressures and difficulties in running a case of this size, particularly with overseas clients operating in different time zones. In light of the observations made subsequently in *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 25)* [2020] VSC 172, I have determined nothing more need be said on this topic as part of these reasons.

ANNEXURE A[4827]

LIST OF PARAMETERS TESTED BY THE MALT PROFICIENCY SCHEME WHERE THE VALUE OF THE "STANDARD DEVIATION" CHANGED AFTER 18 FEBRUARY 2011

Parameter/analyte	**Value at 3 Feb 2011 (Round 169(1))**[4828]	**Date when value of "standard deviation" first changed after 3 Feb 2011**	**Value at 13 July 2012 (Round 186(1))**[4829]	**Number of changes between 3 Feb 2011 and 15 Oct 2013**
Moisture	0.2	10 Nov 2011	0.15	1
Diastatic Power	8	10 Nov 2011	10.4	18
Alpha Amylase	6	10 Nov 2011	5.5	12
Total Nitrogen (Dumas)	0.03	1 June 2012	0.028	1
Total Nitrogen (Kjedahl)	0.03	1 June 2012	0.028	1
Homogeneity	0.5	3 Feb 2012	0.5	2
Partly Unmodified Grains	0.5	10 Nov 2011	0.52	1
DMSP[4830] (Malt)	0.6	12 Jan 2012	0.6	4
Total DMS[4831] (Malt)	1.2	12 Jan 2012	1.2	13
Residual Sulfur Dioxide	1	7 March 2011	1	2
Glycosidic Nitrile	0.1	10 Nov 2011	0.11	1
Total Phenols	No value for this analyte recorded in the relevant report	11 July 2011	No value for this analyte recorded in the relevant report	11
Colour (EBC[4832] Wort) (Visual)	0.3	5 May 2011	0.3	6
Colour (EBC Wort) (Spectrophotometric)	0.4	11 July 2011	0.4	6
Boiled Wort Colour (Visual)	0.8	11 July 2011	0.8	8

4827 See par 286 above.
4828 See par 208 above.
4829 See par 286 above.
4830 Dimethyl Sulfide Precursor.
4831 Dimethyl Sulfide.
4832 European Brewery Convention method of analysis.

Parameter/analyte	Value at 3 Feb 2011 (Round 169(1))	Date when value of "standard deviation" first changed after 3 Feb 2011	Value at 13 July 2012 (Round 186(1))	Number of changes between 3 Feb 2011 and 15 Oct 2013
Boiled Wort Colour (Spectrophotometric)	0.8	11 July 2011	0.8	8
TSN[4833] (EBC Wort) (Dumas)	0.03	6 Aug 2012	No value for this analyte recorded in the relevant report	1
TSN (EBC Wort) (Kjedahl)	0.03	6 Aug 2012	No value for this analyte recorded in the relevant report	1
TSN (EBC Wort) (Spectrophotometric)	0.03	6 Sept 2012	No value for this analyte recorded in the relevant report	1
MSP (EBC Wort)	No value for this analyte recorded in the relevant report	11 April 2011	0.5	4
IoB[4834] Sol Extract Difference (0.2- 1.0mm)	0.4	10 Nov 2011	0.35	1
Colour (IoB Wort) (Visual)	0.3	11 July 2011	0.3	2
Colour (IoB Wort) (Spectrophotometric)	0.4	1 June 2012	0.3	1
SN (IoB Wort) (Dumas)	0.03	10 Nov 2011	0.025	1
TSN (IoB Wort) (Kjedahl)	No value for this analyte recorded in the relevant report	7 March 2011	No value for this analyte recorded in the relevant report	2

4833 Total Soluble Nitrogen.

4834 Institute of Brewing method of analysis.

ANNEXURE B[4835]

A. Summary of historical financials

Pro forma normalised Profit & Loss	FY10A	FY11A	FY12A	YTD13A
Sales revenue ($ million)	306.2	253.9	268.2	65.7
Malt margin[4836]	105.0	101.7	107.6	26.0
$/tonne	220.5	231.4	234.2	230.6
Unadjusted Earnings (EBITDA) ($ million)	37.1	36.6	36.4	7.0
$/tonne	77.9	83.3	79.3	62.2
Unadjusted Earnings (EBIT) ($ million)	27.8	27.3	27.8	4.4
$/tonne	58.3	62.0	60.5	39.3
Production capacity (kilotonnes)[4837]	500.0	480.0	480.0	550.0
Production utilisation (%)[4838]	91.5%	93.5%	97.9%	95.2%
Production volumes (kilotonnes)	457.5	448.7	469.8	130.9
Sales rate (%)[4839]	104.1%	97.9%	97.8%	86.3%
Sales volumes (kilotonnes)	476.3	439.5	459.5	113.0

B. Summary of forecast financial information

Forecast Profit & Loss	FY12A	FY13F	FY14E	FY15E	FY16E
Sales revenue ($ million)	268.2	252.8	268.5	278.3	281.1
Malt margin[4840]	107.6	104.7	116.4	123.5	124.6
$/tonne	234.2	203.7	221.0	232.7	234.9
Unadjusted Earnings (EBITDA) ($ million)	36.4	25.1	34.3	43.3	43.7
$/tonne	79.3	48.9	65.2	81.7	82.3

4835 See pars 532, 534 above.
4836 Included Accumulation and Position Margin.
4837 Production capacity was said to have reflected closure of Brisbane (December 2012), and Minto start up (May 2012). Full production capacity post Minto start up at 550 kilotonnes.
4838 Production utilisation based on production volume/production capacity.
4839 Sales rate was based on sales volumes (including sale of inventories) production volumes.
4840 Included Accumulation and Position Margin.

Unadjusted Earnings (EBIT) ($ million)	27.8	14.9	23.9	32.8	33.5
$/tonne	60.5	29.0	45.4	61.8	63.2
Production capacity (kilotonnes)[4841]	480.0	550.0	550.0	550.0	550.0
Production utilisation (%)[4842]	97.9%	93.1%	96.3%	97.0%	97.0%
Production volumes (kilotonnes)	469.8	512.1	529.6	533.5	533.5
Sales rate (%)[4843]	97.8%	100.3%	99.5%	99.5%	99.5%
Sales volumes (kilotonnes)	459.5	513.8	526.7	530.6	530.6

4841 The 2013 to 2016 financial years excluded costs of shared services then currently provided to the business by Glencore, which management estimated would be approximately $2 million per annum if required to be performed on a standalone basis. However, it was stated management believed that this cost would reduce if undertaken as part of a larger shared services function.

4842 Production utilisation was based on production volume/production capacity.

4843 Sales rate was based on sales volumes (including sale of inventories)/production volumes.

ANNEXURE C[4844]

1 Summary of statements recorded in Lindner's notes on 23 October 2013 that were not accurately reflected in the talking points utilised by Mattiske or the Reply Letters.[4845] The statements are organised into the following:

A. Customer specifications.

B. Certificates of Analysis.

C. Risks.

D. Joe White's approach.

E. Barley varieties.

F. Gibberellic acid.

2 The following statements were recorded in Lindner's notes but not reflected in the Mattiske talking points:

A. Customer specifications

Youil

3 It was not a plant capability issue but a barley variety issue and that Joe White was *always struggling to meet specifications*.

4 Joe White *lost contact with the procurement team*.

5 The *requirements placed by brewers on malt companies were "almost impossible to achieve"*.

6 When asked *whether Cargill had purchased something (a business) that could not deliver, Youil stated that he could not answer that*, but stated that if Cargill's theoretical blend model was adopted, it was "probably ok".

7 The cost savings of using lesser grade barley was between $10 and $20 per tonne.

4844 See par 1373 above.

4845 See pars 1276-1311, 1355-1360, 1373 above. See also pars 1319-1322, 1368-1372, 1376-1378, 1380, 1442-1444, 1447-1450, 1503-1509, 1514-1522 in relation to the discussions between Purser and Mattiske from 23 to 30 October 2013.

Wicks

8 *Specifications were often outside of contract*.

Stewart

9 Customers have said that their specifications were a target.

B. Certificates of Analysis

Hughes

10 In response to the question *"Why issue wrong certificate?" Hughes stated that it was to tell the customers how they could expect the malt to behave*.

11 *There were some open communications with customers regarding the practices*.

12 Joe White issued Certificates of Analysis "all the time – every plant, for all customers".[4846]

Youil

13 *Joe White has sent out-of-specification malt to customers in the past*.[4847]

14 Joe White was told to reduce the quality of production.

Wicks

15 Wicks did not know whether Joe White communicated with customers about the Viterra Certificate of Analysis Procedure, but was recorded as stating "sometimes".

16 Cargill was the exception in the way that it operated and that the industry operated the way Joe White operated.

Stewart

17 Stewart was of the view Cargill ran its business very differently.

18 *Stewart had no idea of the legal implications of a Certificate of Analysis saying 12 when the*

4846 The significance of this being that inappropriate practices concerning Certificates of Analysis potentially affected all customers.

4847 To the limited extent the Reply Letters referred to instances where the incorrect barley variety was used and to non-compliance with prohibitions concerning gibberellic acid, this matter as articulated above was disclosed in those letters: see pars 1405, 1512, 1524 above.

result was a 10.

19 Joe White ensured the customer was always right by changing the result.

C. Risks

Hughes

20 When asked about what Joe White could do to comply, Hughes stated that there would be a financial impact on the Joe White Business and that Stewart was pulling the numbers together; and the issues raised *a reputational risk*.

Youil

21 The *breaches of contract were a reputational risk*.

Wicks

22 If from completion Joe White had to supply in accordance with the contract it would result in *"commercial suicide"* and that the *"brand will be decimated"*.

D. Joe White's approach

Hughes

23 *Mattiske was not aware* of the use of unauthorised barley varieties.[4848]

Youil

24 Youil had no idea why Mattiske was not aware of these issues. He stated that the practice had been acceptable for years and that it was "business as usual".

Wicks

25 The Cargill 22 October Letter was a fair statement of what was said.

26 Joe White had done this to make as much profit as possible whilst keeping customers

[4848] See par 1234 above for Mattiske's position when the matter was first raised by Purser.

happy.

Stewart

27 The Cargill 22 October Letter reflected what was discussed, but did not capture De Samblanx saying "completely what expected" and that Viers was "surprised but doesn't know industry".

28 The *exposure on legal day 1 was that the wrong varieties could not be used*.

29 Cargill had huge storage so it was able to achieve blends in specification. *Applying the Cargill model to Joe White would be difficult*. In Sydney, there was limited storage whereas everywhere else had better storage.

30 *Joe White was trying to make malt as cheap as possible*.

31 The practices were not raised with Mattiske because an expectation to make margins was still there.

E. Barley varieties

Hughes

32 *Cargill knew of the industry practice*, and that Cargill wanted to know how Joe White approached the issue.

33 If Joe White had been using the correct barley the cost base would be about $1.5 million higher per year.

34 Joe White was *required to source cheaper barley*, and from the present time until March 2014; Joe White *did not always have the barley available, which could be "big $"*.

Youil

35 Youil did not know if customers were aware of Joe White's laboratory testing and reporting.

36 "Heineken – very surprised doing it".[4849]

37 *If Joe White were required to source the correct barley varieties overnight, Joe White would possibly need to pay more or fail to satisfy obligations under the contracts*.

Wicks

38 *Joe White did not "communicate [the substitution of a] different variety [of barley] knowingly"*.

39 There was a balance between Joe White's obligation to communicate with its customers concerning the use of the different barley variety and Joe White guessing about meeting their wants.

40 *Joe White was trying to guess what the customer wanted and acted accordingly rather than just telling them*.

41 It was *difficult to get the barley required*. For example, the 2 varieties approved by Heineken (Gardiner and Stirling) were both hard to get.[4850]

42 If Joe White had to buy barley in April 2014 it would cost more and Joe White would need to evaluate the contractual arrangements in place with the farmers to mitigate the costs.

Stewart

43 *Glencore did not supply Joe White with the required varieties*, instead, Joe White had been *"getting bad barley from Glencore"*, which *eroded its ability to meet specifications*.

44 From October 2013 until April 2014, if Joe White was required to use varieties specified in the contracts, *Joe White may have to push back shipments*.

45 *Joe White did not communicate with customers around contracts*, but Gordon instructed

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4849 It was far from clear what this note was conveying. In the context where the evidence was that customers were not told of incorrect varieties being used, it would appear to record Youil expressing surprise.

4850 It is noted that in the 30 October Reply Letter it was stated that there was a short term shortage of certain barley varieties: see pars 1512, 1524 above.

them to do so in around October or November 2011.

46 Joe White had been breaching contracts, by using barley inconsistent with the contract, and not telling the customer.

47 When asked why customers were not informed when Joe White was going outside customer contracts, Stewart replied because it was industry standard and brewers knew about it; but he was not sure of the decision-making process.

F. Gibberellic acid

Hughes

48 Sometimes Joe White used gibberellic acid when it should not have and that there were probably customer contracts that said not to use it, but Joe White did – *Gibberellic acid was used routinely when it should not be at all plants*.[4851]

49 Gibberellic acid *was used to drive capacity* and not using it would reduce production capacity by 20 percent.

Hughes and Youil

50 Both stated that not using gibberellic acid would result in an extra day of production (from 4 days to 5 days of germination).[4852]

Wicks

51 *Gibberellic acid was used about 20 percent of the time when it should not be and that specifications were often outside of contractual specifications*.[4853]

4851 It is noted that the Reply Letters made reference to non-compliance with gibberellic acid prohibitions, but nothing was stated about the prevalence across Joe White's plants or the frequency: see pars 1405, 1512, 1524 above. Similarly, Mattiske referred to the use of gibberellic acid when prohibited in his discussions with Purser, but failed to communicate the extent of the issue: see pars 1368, 1376, 1378(6) above.

4852 Mattiske told Purser that ceasing to use gibberellic acid would have the effect of increasing the germination time from 4 days to 5 days, but incorrectly communicated that the issue was confined to 1 contract with Asia Pacific Breweries: see pars 1505, 1519 above. He further stated it was not a long-term issue: ibid.

4853 This is referred to at par 8 above of annexure C, but is included here as well as the statement was noted in the section of Lindner's notes dealing with gibberellic acid.

52 *Whilst Heineken and Sapporo conducted audits, they would not know about gibberellic acid.*

Stewart

53 *The use of gibberellic acid was a reputational risk which was twice as big of an issue when the customer required its malt to be additive free*.

54 Without gibberellic acid, it added another day to production, resulting in loss of production and electricity costs (Stewart gave brief calculations of those losses).

ANNEXURE D[4854]

DEFINED TERM[4855]	**MEANING**
Adjustment	A difference between the Recorded Analytical Test Result and the Reported Analytical Result.
Customer Required Barley Varieties	The barley varieties which Ryan was instructed were the customer's required barley varieties for each of the orders recorded in the Barley Data, being the spreadsheet prepared by Gilbert + Tobin titled "Schedule E data" (page 38346).
Malt Blend Components	The individual batches of malt used in a particular order, as recorded in the Barley Data.
Production Issue Quantity	The quantity in tonnes of the individual batches of malt used in a blend, as described in the third statement of Abbot at [26].
Recorded Analytical Test Result	The value that was recorded in the Parameters Data as being the test result recorded (ie achieved from testing) internally by Joe White for a particular parameter.
Relevant Period	The period commencing on 18 February 2011 and ending on 31 October 2013, being the period in respect of which Ryan was instructed to undertake his analysis in the Deviation Analysis.
Reported Analytical Result	The value that was recorded in the Parameters Data as being the analytical value reported by Joe White to the customer in the Certificate of Analysis for a particular parameter.
Reported Variety	A barley variety that was recorded in the Barley Data as being a variety that was reported by Joe White to the customer in the Certificate of Analysis for a particular order.
Specification	The value that was recorded in the Parameters Data as being the specification recorded by Joe White in the Laboratory Information System for a particular customer for a particular parameter.
Standard Deviation	In respect of each parameter, the value inputted by Ryan in his Deviation Analysis at column B of the tab entitled "Standard Deviation" on instructions from Gilbert + Tobin at page 60291.

4854 See par 2323 above.

4855 For the purposes of this annexure D.

Facts drawn from the Parameters Analysis page 38347_H

Item	Fact	Methodology/calculation	Transcript reference/Source
1.	Of the 4,359 Certificates of Analysis[4856] included in the Parameters Data, 98.88% of those Certificates of Analysis (or 4,310) had one or more parameters the subject of an Adjustment (ie the Recorded Analytical Test Result and Reported Analytical Result did not match).	This is set out in the summary page of the Parameters Analysis.	Page 38347_H, tab "Summary", cells B9 and C9
2.	The 98.88% (or 4,310) Certificates of Analysis which had one or more parameters the subject of an Adjustment equate to 1,347,372 tonnes or 99.16% of the total tonnage for the 4,359 orders.	This is set out in the summary page of the Parameters Analysis.	Page 38347_H, tab "Summary", cells D9 and E9
3.	Of the 4,359 Certificates of Analysis included in the Parameters Data, 88.05% of those Certificates of Analysis (or 3,838 orders) had one or more parameter results Reported that was the subject of an Adjustment that brought a Recorded Analytical Test Result that was outside Specification to a Reported Analytical Result that was within Specification.	This is set out in the summary page of the Parameters Analysis.	Page 38347_H, tab "Summary", cells B16 and C16

[4856] All references to "Certificates of Analysis" in Items 1–4 in this table are a reference to customer order data appearing in the "Reported" column (column J) of the "Data" sheet in page 38347_H, which Ryan was instructed, pursuant to item J of the table on page 2 of the letter of instruction dated 26 September 2018 (page 38303_0001), records the result for each parameter reported to the customer in the Certificate of Analysis.

Item	Fact	Methodology/calculation	Transcript reference/Source
4.	The 88.05% of those Certificates of Analysis (or 3,838 orders) which had one or more parameter result Reported that was the subject of an Adjustment to bring a Recorded Analytical Test Result that was outside Specification to a Reported Analytical Result that was within Specification equate to 1,210,608 tonnes or 89.10% of the total tonnes for the 4,359 orders.	This is set out in the summary page of the Parameters Analysis.	Page 38347_H, tab "Summary", cells D16 and E16
5.	87.2% of all individual Recorded Analytical Test Results contained in the Parameters Data are recorded as being within Specification or otherwise had a blank entry in the Recorded Analytical Test Result column (Column I).	Page 38347_H ("Data" Sheet) **A. Total Recorded Analytical Test Results**: Highlight all of the data in column U by clicking on the top of the column. The total number of Recorded Analytical Test Results is **87,351**, being the "Count" value less 1 to account for the heading. **B. Number of Recorded Analytical Test Results within Specification:** Apply the filter to column U to show only the rows which have a "0" in that column. Highlight all of the data in the column by clicking on the top of the column. The number of Recorded Analytical Test Results that are within Specification is **76,202**, being the "Count" value less 1 to account for the heading. **C. Number of Recorded Analytical Test Results with a blank result in the Parameters Data:** Highlight all of the data in column I and apply the filter to select only "blanks". This will show only those rows which are blank for Recorded data, that is for which no Recorded result was extracted. The number of Recorded Analytical Test Results that are blank are	T6626.6-29

Item	Fact	Methodology/calculation	Transcript reference/Source
		6,716. Ryan's analysis allocated those a "0" in column U.[4857] **Percentage of Recorded Analytical Test Results within Specification:** (B/A)*100 = **87.2%** **Percentage of Recorded Analytical Test Results within Specification (not counting blanks):** ((B – C)/A)*100 = **79.6%.**	
6.	12.6% of all individual Recorded Analytical Test Results contained in the Parameters Data are recorded as being outside Specification and being the subject of Adjustment such that the Reported Analytical Result is within Specification.	Page 38347_H ("Data" Sheet) **A. Total Recorded Analytical Test Results**: Highlight all of the data in column W by clicking on the top of the column. The total number of Recorded Analytical Test Results is **87,351**, being the "Count" value less 1 to account for the heading. **B. Number of rows where the Recorded Analytical Test Result is outside Specification but the Reported Analytical Result is within Specification:** Apply the filter to column W to show only the rows which have a "1" in that column. Highlight all of the data in the column by clicking on the top of the column. The number of rows where the Recorded Analytical Test Result is outside Specification but the Reported Analytical Specification is within Specification is **10,971**, being the "Count" value less 1 to account for the heading. **Percentage of rows with Recorded Analytical Test Result outside Specification and Reported Analytical Result within Specification**	T6627:1-18

[4857] By reason of assumption F in the letter of instruction to Ryan dated 26 September 2018 (page 38303_0001): see par 2322 above.

Item	Fact	Methodology/calculation	Transcript reference/Source
		(B/A)*100 = **12.6**% The 10,971 parameters with Recorded Analytical Test Results outside Specification and Reported Analytical Results within Specification: • are found in 3,838 separate orders (as referenced at 3 above); and • have estimated times for departure (column C) ranging from 3 January 2010 to 31 October 2013; and • cover 53 customers (being the list of individual customer names from the filtered results in column D). The 53 customers are identified in schedule A to this document.	
7.	87.4% of all individual Recorded Analytical Test Results contained in the Parameters Data are not recorded as being outside Specification and being the subject of Adjustment such that the Reported Analytical Result is within Specification or otherwise had a blank entry in the Recorded Analytical Test Result column (Column I).	Page 38347_H ("Data" sheet) **A. Total Recorded Analytical Test Results**: Highlight all of the data in column W by clicking on the top of the column. The total number of Recorded Analytical Test Results is **87,351**, being the "Count" value less 1 to account for the heading. **B. Number of rows other than where the Recorded Analytical Test Result is outside Specification and the Reported Analytical Result is within Specification**: Apply the filter to column W to show only the rows which have a "0" in that column. Highlight all of the data in the column by clicking on the top of the column. The number of rows other than where the Recorded Analytical Test Result is outside Specification and the Reported Analytical Specification is within Specification is **76,380**, being	T6627.26-6628.5

Item	Fact	Methodology/calculation	Transcript reference/Source
		the "Count" value less 1 to account for the heading. **C. Number of the 76,380 rows in Column W coded with a "0" but for which there is a blank in the Recorded Analytical Test Result column I**: Once you have applied the filter in Column W to click only those with a "0" (per step B above), without clearing that filter move to Column I and using the arrow, filter these by selecting only "blanks". The number of rows that have blank in Recorded and a "0" in Column W is 6,716. **Percentage of rows other than where the Recorded Analytical Test Result is outside Specification and the Reported Analytical Result is within Specification** (B/A)*100 = **87.4%** **Percentage excluding rows with a blank Recorded Analytical Test Result** ((B-C)/A)*100 = **79.8%.**	
8.	37.1% of all Adjustments recorded in the Parameters Data were such that the Recorded Analytical Test Result was outside Specification but the Reported Analytical Result was within Specification.	Page 38347_H ("Order Summary" sheet) **A. Total number of Adjustments**: The figure in cell E4364 (29,372). This total is drawn from "Column E" in the "OrderSummary" sheet, which is the total of all rows in column Q ("LR Recorded and Reported Rounded Excluding Duplicates") of the "Data" sheet which contain a "1", being the total number of parameter results in the Parameters Data where the Recorded Analytical Test Result and the Reported Analytical Result do not match (after Ryan has applied various instructions and assumptions).	T6628.6-6630.12

Item	Fact	Methodology/calculation	Transcript reference/Source
		This total includes 5,811 results that do not match because the Recorded Analytical Result is blank, but the Reported Analytical Result is not blank. This figure is calculated by filtering column Q to show only rows containing "1" and then filtering column I (or K) to show only "blanks"). **B** **Total number of Adjustments where the Recorded Analytical Test Result is outside Specification but the Reported Analytical Result is within Specification:** The figure in cell H4364 (10,900) This total is drawn from "Column H" in the "OrderSummary" sheet, which is the total of all rows in column X ("LR Recorded Out Reported In Excluding Duplicates") of the "Data" sheet which contain a "1". For the purpose of this figure, Ryan was instructed to exclude (and did exclude) the 5,811 rows that were treated as non-matching in column Q because the Recorded Analytical Test Result was blank. **Calculation:** (B/A)*100 = **37.1%.** **C. Total number of Adjustments (column E of the "OrderSummary" sheet) excluding blank Recorded Analytical Test Results** **Calculation:** A (29,372) – 5,811 = 23,561. **Percentage excluding rows with a blank Recorded Analytical Test Results:** (B/C)*100 = **46.26%**	

Item	Fact	Methodology/calculation	Transcript reference/Source
9.	There were 261 individual Recorded Analytical Test Results for the Beer Thai, Beer Thip Brewery 1991 Co Ltd and Cosmos Brewery Thailand Co Ltd customers in the Parameters Data that were recorded as being outside Specification.	Page 38347_H ("Data" sheet) Apply the filter to column D to select only the customers beginning with the names "Beer Thai", "Beer Thip" and "Cosmos Brewery". Apply the filter to column U to select only the rows that have a "1" in the column. Highlight all of the data in the column by clicking on the top of the column. The number of Recorded Analytical Test Results outside Specification is 261, being the "Count" value less 1 to account for the heading.	T6632.13-6633.29

Facts drawn from the Barley Analysis Page 38345

10.	Of the 2,753 unique orders with at least one Reported Variety in the Certificate of Analysis[4858] and at least one Customer Required Barley Variety, there were 2,695 (97.89%) orders where all Reported Varieties on a Certificate of Analysis were a Customer Required Barley Variety.	This is set out in the "Results" page of the Barley Analysis. The figure of 2,753 is obtained by adding the figures in cells B15 and B16 (2,695+58).	Page 38345, tab "Results", cells B15 and C15
11.	Of the 4,171 unique orders with at least one barley variety used in the blend and at least one Customer Required Barley Variety, 3,236 or 77.58% of those orders, were orders where not all the barley varieties used in the blend were Customer Required Barley Varieties.	This is set out in the "Results" page of the Barley Analysis. The figure of 4,171 is obtained by adding the figures in cells B21 and B22 (935+3,236).	Page 38345, tab "Results", cells B22 and C22

[4858] All references to "Certificates of Analysis" in items 10, 12 and 13 in this table are a reference to customer order data appearing in the "Reported Materials" column (column P) of the "Barley Data" sheet in page 38345, which Ryan was instructed, pursuant to item P of the table on page 3 of the letter of instruction dated 5 October 2018 (page 38303_0008), identifies the barley variety or varieties reported in the Certificate of Analysis for each order.

Item	Fact	Methodology/calculation	Transcript reference/Source
12.	Of the 2,788 unique orders with at least one barley variety used in the blend and at least one Reported Variety in the Certificate of Analysis, there were 2,457 (88.13%) orders where not all barley varieties used on the blend were Reported Varieties in the Certificate of Analysis.	This is set out in the "Results" page of the Barley Analysis. The figure of 2,788 is obtained by adding the figures in cells B27 and B28 (331+2,457).	Page 38345, tab "Results", cells B28 and C28
13.	Of the 2,753 unique orders with: • at least one barley variety used in the blend, • at least one Reported Variety in the Certificate of Analysis; and • at least one Customer Required Barley Variety, there were 2,429 (88.23%) unique orders which had: • at least one barley variety used in the blend that did not match any Reported Variety in the Certificate of Analysis; and/or • at least one barley variety used in the blend that did not match any of that Customer's Required Barley Varieties.	This is set out in the "Results" page of the Barley Analysis. The figure of 2,753 is obtained by adding the figures in cells B40 and B41 (2,429+324).	Page 38345, tab "Results", cells B40 and C40
14.	0.93% of the Malt Blend Components recorded in the Barley Data have a Production Issue Quantity of "0".	<u>Page 38345 ("Barley Data" sheet)</u> The total number of rows of data in the sheet is 52,970, being the "Count" value less 1 to account for the heading. Sort the data in column K by smallest to largest. All data in that column up to row 493 (row 492 excluding the heading) contains a "0". (492/52,970)*100 = **0.93%.**	T6647.5-15
15.	1.53% of the Malt Blend Components recorded in the Barley Data have a	<u>Page 38345 ("Barley Data" sheet)</u> As per the	T6647.16-23

Item	Fact	Methodology/calculation	Transcript reference/Source
	Production Issue Quantity of "0.0001" tonnes or less.	methodology in 14. All data in that column up to row 809 (row 808 excluding the heading) contains a value of "0.0001" or less (808/52,970)*100 = **1.53**%.	
16.	2.48% of the Malt Blend Components recorded in the Barley Data have a Production Issue Quantity of "0.0005" tonnes or less.	Page 38345 ("Barley Data" sheet) As per the methodology in 14. All data in that column up to row 1,315 (row 1,314 excluding the heading) contains a value of "0.0005" or less (1,314/52,970)*100 = **2.48**%.	T6647.24-29
17.	7.54% of the Malt Blend Components recorded in the Barley Data have a Production Issue Quantity of "0.01" tonnes or less.	Page 38345 ("Barley Data" sheet) As per the methodology in 14. All data in that column up to row 3,995 (row 3,994 excluding the heading) contains a value of "0.01" or less (3,994/52,970)*100 = **7.54**%.	T6647.30-6648.4
18.	16.1% of the Malt Blend Components recorded in the Barley Data have a Production Issue Quantity of "0.1" tonnes or less.	Page 38345 ("Barley Data" sheet) As per the methodology in 14. All data in that column up to row 8,531 (row 8,530 excluding the heading) contains a value of "0.1" or less (8,530/52,970)*100 = **16.1**%.	T6648.5-10
19.	28.4% of the Malt Blend Components recorded in the Barley Data have a Production Issue Quantity of "1" tonne or less.	Page 38345 ("Barley Data" sheet) As per the methodology in 14. All data in that column up to row 15,046 (row 15,045 excluding the heading) contains a value of "1" or less (15,045/52,970)*100 = **28.4**%.	T6648.11-15
20.	45.2% of the Malt Blend Components recorded in the Barley Data have a Production Issue Quantity of "5" tonnes or less.	Page 38345 ("Barley Data" sheet) As per the methodology in 14. All data in that column up to row 23,942 (row 23,941 excluding the heading) contains a value of "5" or less (23,941/52,970)*100 = **45.2**%.	T6648.16-20

Item	Fact	Methodology/calculation	Transcript reference/Source
21.	56.34% of the Malt Blend Components recorded in the Barley Data have a Production Issue Quantity of "10" tonnes or less.	Page 38345 ("Barley Data" sheet) As per the methodology in 14. All data in that column up to row 29,844 (row 29,843 excluding the heading) contains a value of "10" or less (29,843/52,970)*100 = **56.34**%.	T6648.21-25
22.	The majority of orders recorded in the Barley Data contain more than one Malt Blend Component (ie, more than one row in Production Issue Quantity).	Page 38345 ("Barley Data" sheet) Per column K For example, select the drop-down menu for "Order Number" in Column A and select only order number 10001846. With respect to order number 10001846, Column K (being "Production Issue Quantity") shows the seven Malt Blend Components comprising this order.	
23.	10.8% of the orders recorded in the Parameters Data are for malt supplies of less than 100 tonnes.	Page 38347_H ("Order summary" sheet) Sort column C by smallest to largest There are 4,362 rows of order details (4,359 excluding headings) All data in column C up to row 474 (471 excluding headings) contains a value less than 100 tonnes. 471/4,359 = 10.8%.	T6648.26-6649.25
24.	50% of the orders recorded in the Parameters Data are for malt supplies of less than 225 tonnes, and 50% are for malt supplies of more than 225 tonnes	As per the methodology in 23. All data in column C up to row 2,179 (2176 excluding headings) contains a value of 225 tonnes or less 2,176/4,359 = 49.99%.	
25.	1.04% of the total quantity of Malt Blend Components recorded in the Barley Data are recorded to have been produced from Hindmarsh barley.	Page 38345 ("Barley Data" sheet) Select all of the data in column K. The "Sum" figure is **1,356,674.71** Apply the filter to column M to select only the rows that have a "Hindmarsh" in the column (being Hindmarsh Pale Malt and Hindmarsh Trial Pale Malt). Select all of the data in column K. The "Sum" figure is **14,118**.	T6655.17-6657.2

Item	Fact	Methodology/calculation	Transcript reference/Source
		(14,118/1,356,674.71)*100 = **1.04**%.	
26.	The "Sum" figure for "Hindmarsh" referred to at 25 above (14,118 tonnes) contained Hindmarsh Malt Blend Components across 188 unique orders. These 188 unique orders have an estimated date of departure (ETD) range of 7 June 2010 to 31 October 2013.	Page 38345 ("Barley Data" sheet) Per 25 above, apply the filter to column M to select only the rows that have a "Hindmarsh" in the column (being Hindmarsh Pale Malt and Hindmarsh Trial Pale Malt). *Unique orders*: This figure is obtained by removing duplicate Order Numbers from Column A (ie applying the "Remove Duplicates" feature in Excel). *ETD*: Select Column D, "ETD" and filter by "Oldest to Newest."	
27.	Hindmarsh Pale Malt and Hindmarsh Trial Pale Malt were recorded as Malt Blend Components in the orders of 32 customers in this period.	Page 38345 ("Barley Data" sheet) Per 25 above, apply the filter to column M to select only the rows that have a "Hindmarsh" in the column (being Hindmarsh Pale Malt and Hindmarsh Trial Pale Malt). Select the drop down menu in Column B, "Customer Name". The number of individual customers recorded in the drop-down menu in Column C is 32. The 32 customers are identified in schedule B to this document.	

Item	Fact	Methodology/calculation	Transcript reference/Source
28.	384 issue batches of Hindmarsh containing at least 5 Tonnes of Hindmarsh were recorded as Malt Blend Components in the Barley Data. 593 issue batches of Hindmarsh containing less than 5 tonnes of Hindmarsh were recorded as Malt Blend Components in the Barley Data.	Page 38345 ("Barley Data" sheet) Per 25 above, apply the filter to column M to select only the rows that have a "Hindmarsh" in the column (being Hindmarsh Pale Malt and Hindmarsh Trial Pale Malt). Apply the filter to Column K to select values that are greater than or equal to 5 and the figure for those orders that use at least 5 tonnes is 384 issue batches. Apply the filter to Column K to select values that are less than 5 and the figure for those orders that use less than 5 tonnes is 593 issue batches.	

Facts drawn from the Deviation Analysis Page 60297

29.	Of the 3,070 Certificates of Analysis[4859] included in the Parameters Data during the Relevant Period, 42.90% of those Certificates of Analysis (or 1,317) had one or more Affected Results (ie the Recorded Analytical Test Result was outside Specification by more than two Standard Deviations and the Reported Analytical Result was within Specification)	This is set out in the summary page of the Deviation Analysis.	Page 60297, tab "Summary", cells B23, B25 and C23
30.	The 1,317 Certificates of Analysis included in the Parameters Data during the Relevant Period which had one or more Affected Results equate to 508,338 tonnes or 52.01% of the total tonnage for the 3,070 orders during the Relevant Period	This is set out in the summary page of the Deviation Analysis.	Page 60297, tab "Summary", cells D23 and E23

[4859] See fn 4856 above, for items 29-31 of this table of annexure D.

Item	Fact	Methodology/calculation	Transcript reference/Source
31.	The 3,070 Certificates of Analysis included in the Parameters Data during the Relevant Period comprise 70.43% of the 4,359 Certificates of Analysis included in the Parameters Data	This is set out in the summary page of the Deviation Analysis.	Page 60297, tab "Summary", cells B18, B25 and B26
32.	The 3,070 Certificates of Analysis included in the Parameters Data during the Relevant Period comprise 71.94% of the total tonnage included in the Parameters Data.	Page 60297 ("Summary Sheet") **A. Total tonnage in the Deviation Analysis**: This figure can be found at cell D11. The total tonnage of the 4,359 orders originally analysed is **1,358,770**. **B. Total tonnage in the Relevant Period:** This figure can be found at cell D25. The total tonnage of the 3,070 orders in the Relevant Period is **977,445**. **Percentage of total tonnage in the Deviation Analysis that is within the Relevant Period:** (B/A)*100 = **71.94**%.	Page 60297, tab "Summary", cells D11 and D25.

Item	Fact	Methodology/calculation	Transcript reference/Source
33.	The Deviation Analysis for the Relevant Period (18 February 2011 to 31 October 2013) contains orders for 46 individual customers and records that of those individual customers, 93.48% (43 out of 46) were shipped an order with a Certificate of Analysis that contained an Affected Result.	Page 60297 ("Data" Sheet) **A. Customers in the Relevant Period:** Filter column C to show only results after 17 February 2011. Copy the "Customer Name" column into a new sheet. Press "Remove Duplicates". There are 52 unique values. Then manually remove the following remaining duplicates from this list: • Beer Thip Brewery (1991) Co Ltd; • Beer Thai; • Marubeni Australia Ltd; • Kirin Brewery Co Ltd; • Beer Thai 1991 Public Co Ltd; • Beer Thip Brewery 1991 Co Ltd. Once these have been removed there are **46** individual customers. **B. Number of customers with Affected Results:** Go back to the "Data" Sheet. Filter Column AI for "1". This will show all parameters with an Affected Result in the Relevant Period. Copy the "Customer Name" column into a new sheet. Press "Remove Duplicates". There are 46 unique values. Then manually remove the following remaining duplicates from this list: • Beer Thip Brewery 1991 Co Ltd; • Marubeni Australia Ltd; • Kirin Brewery Co Ltd. Once these have been removed there are **43** individual customers. **Percentage of customers:** B/A*100 = 93.48%.	

Item	Fact	Methodology/calculation	Transcript reference/Source
34.	3.52% (or 2,132) of the 60,645 individual entries contained in the Parameters Data during the Relevant Period were Affected Results (including parameters that Ryan was instructed to exclude[4860])	Page 60297 ("Data" Sheet) **A. Relevant Period:** Filter column C to show only results after 17 February 2011. **B. Total entries during the Relevant Period without excluding excluded parameters:** At column AI, the number of entries during the Relevant Period is **60,645**, being the "Count" value less 1 to account for the heading. **C. Number of Affected Results during the Relevant Period:** At column AI, the number of Affected Results is **2,132**, being the "Sum" value. **Percentage of total entries during the Relevant Period (without excluding excluded parameters) which were Affected Results:** C/B*100 = 3.52%.	T8578.30-8582.11
35.	4.01% (or 2,132) of the 53,162 entries contained in the Parameters Data during the Relevant Period were Affected Results (excluding parameters that Ryan was instructed to exclude)	Page 60297 ("Data" Sheet) **A. Relevant Period:** Filter column C to show only results after 17 February 2011. **B. Total entries during the Relevant Period after excluding excluded parameters:** Filter column AH to show only the "1"s,[4861] then at column AI, the number of entries during the Relevant Period is **53,162**, being the "Count" value less 1 to account for the heading. **C. Number of Affected Results during the Relevant Period:** At column AI, the number of Affected Results is **2,132**, being the "Sum" value. **Percentage of entries during the Relevant Period (after excluding excluded parameters) which were Affected Results:**	T8582.12-8583.24

4860 See next item including fn 4861 below.

4861 This excludes parameters that Ryan was instructed to exclude by reason of the letters of instruction to Ryan dated 18 June 2019 and 21 June 2019.

Item	Fact	Methodology/calculation	Transcript reference/Source
		C/B*100 = **4.01**%.	
36.	197 of the 587 entries for the parameter "1,000 Corn Weight g, Dry Basis" during the Relevant Period were Affected Results	Page 60297 ("Data" Sheet) **A. Relevant Period:** Filter column C to show only results after 17 February 2011. **B. Total entries for this parameter during the Relevant Period:** Filter column G to show only results for "1,000 Corn Weight g, Dry Basis", then at column AI, the number of entries during the Relevant Period for this parameter is **587**, being the "Count" value less 1 to account for the heading. **C. Number of Affected Results for this parameter during the Relevant Period:** At column AI, the number of Affected Results is **197**, being the "Sum" value.	T8583.25-8584.15
37.	204 of the 1,851 entries for the parameter "Soluble Protein %, Dry Basis, Congress" during the Relevant Period were Affected Results	Page 60297 ("Data" Sheet) **A. Relevant Period:** Filter column C to show only results after 17 February 2011. **B. Total entries for this parameter during the Relevant Period:** Filter column G to show only results for "Soluble Protein %, Dry Basis, Congress", then at column AI, the number of entries during the Relevant Period for this parameter is **1,851**, being the "Count" value less 1 to account for the heading. **C. Number of Affected Results for this parameter during the Relevant Period:** At column AI, the number of Affected Results is **204**, being the "Sum" value.	T8584.16-25

Item	Fact	Methodology/calculation	Transcript reference/Source
38.	493 of the 2,980 entries for the parameter "Total Protein %, Dry Basis" during the Relevant Period were Affected Results	Page 60297 ("Data" Sheet) **A. Relevant Period:** Filter column C to show only results after 17 February 2011. **B. Total entries for this parameter during the Relevant Period:** Filter column G to show only results for "Total Protein %, Dry Basis", then at column AI, the number of entries during the Relevant Period for this parameter is **2,980**, being the "Count" value less 1 to account for the heading. **C. Number of Affected Results for this parameter during the Relevant Period:** At column AI, the number of Affected Results is **493**, being the "Sum" value.	T8584.26-8585.1
39.	The sum of the number of entries in Items 36-38 above, being the total number of Affected Results for those three parameters during the Relevant Period, is 894, comprising 41.93% of the total number of Affected Results during the Relevant Period at Items 34 and 35	**The sum of the number of Affected Results during the Relevant Period for the three parameters at Items 36-38:** 197+204+493 = 894 **Percentage of total number of Affected Results during the Relevant Period for those parameters:** 894/2,132*100 = 41.93%.	T8585.2-27

Item	Fact	Methodology/calculation	Transcript reference/Source
40.	34 of the 3,095 entries for the parameter "Moisture %" during the Relevant Period were Affected Results, being 1.10% of the total number of entries for that parameter during the Relevant Period	Page 60297 ("Data" Sheet) **A. Relevant Period:** Filter column C to show only results after 17 February 2011. **B. Total entries for this parameter during the Relevant Period:** Filter column G to show only results for "Moisture %", then at column AI, the number of entries during the Relevant Period for this parameter is **3,095**, being the "Count" value less 1 to account for the heading. **C. Number of Affected Results for this parameter during the Relevant Period:** At column AI, the number of Affected Results is **34**, being the "Sum" value. **Percentage of entries for this parameter during the Relevant Period which were Affected Results:** 34/3,095 = 1.10%.	T8586.19-8587.7
41.	For Certificates of Analysis that contained one or more Affected Results, there was an average of 1.62 Affected Results per Certificate of Analysis[4862] during the Relevant Period (ie excluding Certificates of Analysis which had no Affected Results)	This is calculated by taking the total number of Affected Results during the Relevant Period per Items 34 and 35 above, and dividing it by the total number of Certificates of Analysis during the Relevant Period which had one or more Affected Results per Item 29 above: 2,132/1,317 = 1.62.	T8589.11-8590.13
42.	There was an average of 0.69 Affected Results per Certificate of Analysis during the Relevant Period (ie including Certificates of Analysis which had no Affected Results)	This is calculated by taking the total number of Affected Results during the Relevant Period per Items 34 and 35 above, and dividing it by the total number of Certificates of Analysis during the Relevant Period per Item 29 above: 2,132/3,070 = 0.69.	T8590.14-8590.29

[4862] See fn 4856 above, for items 41-42 of this table.

Item	Fact	Methodology/calculation	Transcript reference/Source
43.	For each included parameter with a Standard Deviation of zero,[4863] the total number of Adjustments and the total number of Affected Results is the same	This was demonstrated by the example of the parameter "1,000 Corn Weight g, Dry Basis" as follows. Page 60297 ("Data" Sheet) **A. Relevant Period:** Filter column C to show only results after 17 February 2011. **B. Number of Affected Results for this parameter during the Relevant Period:** Filter column G to show only results for "1,000 Corn Weight g, Dry Basis", then at column AI, the number of Affected Results is **197**, being the "Sum" value. **C. Number of Adjustments for this parameter during the Relevant Period:** At column X, the number of Adjustments is **197**, being the "Sum" value.	T8594.6-8598.21

Facts drawn from the edited copy of the Deviation Analysis page 60297_0001

Note: Page 60297_0001 is a copy of page 60297 with figures changed by the court book operator, on the basis of instructions given by senior counsel for the Viterra Parties, Mr Parmenter QC. Entries in Column D of the "StandardDeviation" sheet were changed from 1s to 0s for the parameters at rows 51-88 (being the parameters at items 50-87 of page 60291 for which Ryan was instructed to assume a Standard Deviation of zero and include in his analysis). The calculations in the spreadsheet were then recalculated. As a result, page 60297_0001 shows the Deviation Analysis with those parameters excluded. Refer T8602.7-26.

[4863] Being the parameters at items 50-87 of the table at page 60291 which comprised Ryan's instructions as to Standard Deviation values. These are the parameters at numbers 50-87 of column C of the "Standard Deviation" Sheet of page 60297 (note that they appear in rows 51-88).

Item	Fact	Methodology/calculation	Transcript reference/Source
44.	With the parameters at items 50- 87 excluded, 25.31% of Certificates of Analysis[4864] included in the Parameters Data during the Relevant Period had one or more Affected Results (ie the Recorded Analytical Test Result was outside Specification by more than two Standard Deviations and the Reported Analytical Result was within Specification)	This is set out in the summary page of the edited copy of the Deviation Analysis.	Page 60297_0001, tab "Summary", cell C23 T8602.27-8603.4
45.	With the parameters at items 50- 87 excluded, 1.66% (or 1,007) of the 60,645 individual entries contained in the Parameters Data during the Relevant Period were Affected Results (including parameters that Ryan was instructed to exclude[4865] and the parameters at items 50-87 of page 60291 that the court book operator was instructed to exclude by senior counsel for the Viterra Parties)	Page 60297_0001 ("Data" sheet) **A. Relevant Period:** Filter column C to show only results after 17 February 2011. **B. Total entries during the Relevant Period without excluding excluded parameters:** At column AI, the number of entries during the Relevant Period is **60,645**, being the "Count" value less 1 to account for the heading. **C. Number of Affected Results during the Relevant Period:** At column AI, the number of Affected Results is **1,007**, being the "Sum" value. **Percentage of total entries during the Relevant Period (without excluding excluded parameters) which were Affected Results:** C/B*100 = **1.66**%.	T8603.19-8604.24

4864 See fn 4856 above for this item.

4865 See next item including fn 4866 below.

Item	Fact	Methodology/calculation	Transcript reference/Source
46.	With the parameters at items 50- 87 excluded, 2.57% (or 1,007) of the 39,148 individual entries contained in the Parameters Data during the Relevant Period were Affected Results (excluding individual parameters that Ryan was instructed to exclude and the parameters at items 50- 87 of page 60291 that the court book operator was instructed to exclude by senior counsel for the Viterra Parties)	Page 60297_0001 ("Data" Sheet) **A. Relevant Period:** Filter column C to show only results after 17 February 2011. **B. Total entries during the Relevant Period after excluding excluded parameters:** Filter column AH to show only the "1"s,[4866] then at column AI, the number of entries during the Relevant Period is **39,148**, being the "Count" value less 1 to account for the heading. **C. Number of Affected Results during the Relevant Period:** At column AI, the number of Affected Results is **1,007**, being the "Sum" value. **Percentage of total entries during the Relevant Period (after excluding excluded parameters) which were Affected Results:** C/B*100 = **2.57%**.	T8604.25-8605.15

[4866] This excluded parameters that Ryan was instructed to exclude by reason of the letters of instruction to Ryan dated 18 June 2019 and 21 June 2019 and parameters that were excluded by the court book operator at the instructions of senior counsel for the Viterra Parties.

Schedule A - Fact 6

List of individual customers

	Customer Name
1	An Loc Phuong Company Ltd
2	Asia Pacific Breweries Singapore PL
3	Asia Pacific Brewery Hanoi Ltd
4	Beer Thai 1991 Public Co Ltd
5	Beer Thip Brewery 1991 Co Ltd
6	Brasserie De Tahiti
7	Cambodia Brewery Limited
8	Cargill Japan Ltd
9	Chen Tai Foods Co Ltd
10	Cosmos Brewery Thailand Co Ltd
11	Dakao Trading and Service Co Ltd
12	DB Breweries Limited
13	EMM LLC
14	Guinness Anchor Berhad
15	Hanoi Beer
16	Hite Brewery Co Ltd
17	Hitejinro Co Ltd
18	Hue Brewery Limited
19	Khon Kaen Brewery Co Ltd
20	Kirin Brewery Company Limited
21	Lao Asia Pacific Breweries Limited
22	Lion Breweries South
23	Long Fong Import Export Co Ltd
24	Lotte Chilsung Beverage Co Ltd
25	Louisiane One Member Company Limite
26	Marubeni Australia Limited
27	Meidiya Company Ltd
28	Millac Foods PVT Ltd
29	Millers Brewery Limited
30	Myawaddy Trading Limited
31	Nestlé Singapore Pte Ltd
32	Nouvelle Brasserie de Madagascar
33	Oriental Brewery Co Ltd
34	Pathumthani Brewery Co Ltd
35	Phoenix Beverages Limited
36	Pt Multi Bintang Indonesia
37	Saigon Beer Alcohol and Beverages

38	San Miguel Beer Thailand Ltd
39	San Miguel Brewery Inc
40	San Miguel Brewery Vietnam Ltd
41	Singha Beverage Co Ltd
42	Solomon Breweries Ltd
43	South Pacific Brewery Limited
44	Sumitomo Corporation Asahi
45	Sumitomo Corporation Kirin
46	Tan Hiep Phat Co Ltd
47	Thai Asia Pacific Brewery Co Ltd
48	Thai Duyen Trading And Transpo
49	Thai Tan Trading and Transport
50	The South Africa Breweries Ltd
51	United Thai Distillers Co Ltd
52	Vanuatu Brewing Limited
53	Vietnam Brewery Limited

Schedule B - Fact 27

List of individual customers

	Customer
1	Asia Pacific Breweries Singapore PL
2	Asia Pacific Brewery Hanoi Ltd
3	Beer Thai (1991) Public Co Ltd
4	Beer Thip Brewery (1991) Co Ltd
5	Brasserie De Tahiti
6	Cambodia Brewery Limited
7	Cargill Japan Ltd
8	Cosmos Brewery (Thailand) Co Ltd
9	Guinness Anchor Berhad
10	Hanoi Beer
11	Hite Brewery Co Ltd
12	Hitejinro Co Ltd
13	Khon Kaen Brewery Co Ltd
14	Kirin Brewery Co Ltd
15	Lao Asia Pacific Breweries Limited
16	Lotte Chilsung Beverage Co Ltd
17	Louisiane One Member Company Limited
18	Millac Foods PVT Ltd
19	Nestlé Singapore Pte Ltd
20	Oriental Brewery Co Ltd
21	Pathumthani Brewery Co Ltd
22	Pt Multi Bintang Indonesia
23	Saigon Beer Alcohol and Beverages C
24	San Miguel Brewery Inc
25	Singha Beverage Co Ltd
26	Solomon Breweries Ltd
27	South Pacific Brewery Limited
28	Tan Hiep Phat Co Ltd
29	Thai Asia Pacific Brewery Co Ltd
30	Thai Duyen Trading And Transport
31	Thai Tan Trading and Transport
32	Vietnam Brewery Limited