QUEENSLAND HEALTH PAYROLL SYSTEM
COMMISSION OF INQUIRY

Statement of Witness

Name of Witness	John Swinson
Date of Birth	Known to the Commission
Address and contact details	Known to the Commission
Occupation	Partner, King & Wood Mallesons
Officer taking statement	N/A
Date taken	19 April 2013

This statement is provided with limited knowledge of the other evidence that is held by the Commission, or that will be adduced in its Hearings, or any knowledge of the submissions that have or will be made to it. I am prepared to supplement this statement with addendum statements if further matters are raised that are not already canvassed in this statement.

I, John Swinson state;

1. I make this statement in response to a request from Counsel Assisting the Queensland Health Payroll System Commission of Inquiry ("**the Inquiry**") ("**the Request**"). I have been provided with a CD containing 15 volumes of documents. I also received additional documents 252A, 174A, 218A and 221A via email. I have been advised to direct my attention to these documents in preparing this statement.
2. I have made a previous statement ("**the First Statement**") to the Inquiry on 13 March 2013 (following an interview with Mr Horton on 25 February 2013) and I appeared before the Inquiry on 22 March 2013. Emma Kenny (Senior Legal Officer for the Inquiry) has confirmed that this statement does not need to address matters which were dealt with in the First Statement.
3. Following a review of the First Statement, I would like to correct two dates. At paragraph 84 "23 December 2009" should read "23 December 2008" and at paragraph 85 "15 January 2010" should read "15 January 2009".

Signature: _____ Witness signature: _____

4. I was further interviewed by Mr Horton on 18 April 2013 ("**the Second Interview**"). During this interview, Mr Horton was particularly interested in certain matters and directed me to focus on those matters in this statement. As such, this statement focuses on the matters listed in the Request which were of interest to Mr Horton during the Second Interview, or which, in my view, were of importance.
5. I have not been asked to undertake a comprehensive review of my files and I have not done so. This statement is based on my recollection, although I have been assisted by documents. I refer to paragraph 2 of the First Statement in relation to the State's waiver of legal professional privilege.
6. On 5 December 2007, prior to the IBM contract being signed by the State, I provided the State with a letter. That letter is referred to in paragraph 30 of my first statement, and attached as **JVS3** to that statement, and is located in Volume 3 at page 169. In that letter, I stated: "Accordingly, it is extremely important to the success of this project that the Agreement and relationship with IBM is properly managed."
7. I said this in this letter because, no matter how well the contract is prepared, if the contract is not properly managed by the customer, then there is more likely to be an unsatisfactory result for the customer. Appointing a party as a prime contractor can reduce project risk, but it does not mean that the prime contractor should not be managed.
8. In this situation, it was extremely important to properly manage the contract, particularly where the scopes of the various pieces of work were to be defined and agreed during the project.
9. I was not asked to advise on any issues regarding the contract after it was executed until 23 July 2008. I set out the advice that I gave at that time in paragraph 72 of my first statement.
10. On 19 August 2008, IBM issued a delay notification to the State pursuant to Schedule 24 of the contract. My memory is that this delay notification related to work that IBM was doing in relation to the Department of Education, Training and the Arts (DETA), and that IBM was seeking an extension of time in relation to this work.
11. I meet with Stan Sielaff from DETA (and possibly other people from DETA such as Scott Smith as well as people from CorpTech) in relation to this delay notice. The view was reached by everyone who considered this issue at CorpTech and DETA that the reasons given by IBM did not justify IBM's request for an extension of time. I agreed.
12. John Beeston from CorpTech provided me with a proposed response to IBM. I made suggested edits to that proposed response and sent them to John Beeston on 22 August 2008. This response went through a number of internal drafts, with various people providing comments and suggested edits.

13. On 2 September 2008, John Beeston forwarded to me (as well as a number of other people) a copy of the final letter that was sent by Barbara Perrott of Corp Tech to Bill Doak of IBM on 2 September 2008. In that letter, the State refuted IBM's assertion that IBM was entitled to delay or to increase charges to the State.

14. At this time, I was aware that there were discussions taking place within Corp Tech and DETA regarding IBM's performance under the contract. I remember that one issue that was discussed at this time was that Paul Supranant from IBM was no longer working on the project. Paul Supranant was listed as a key person in Schedule 29 of the contract that identified "Specified Personnel". My memory was that Paul Supranant was key in relation to the WorkBrain integration and architecture, and it was of concern to the State at this time that it appeared that Paul Supranant was no longer involved in the project, and that this appeared at the time to be a breach of the contract by IBM that resulted in an increase in the risk to the State. There was debate at the time whether or not to include this issue in the letter to IBM referred to in the paragraph above. It was decided not to include reference to Paul Supranant no longer being involved. I was not sure of the reason for this or who made this decision.

15. At about this same time, about 21 August 2008, IBM made a request to Corp Tech to have John Beeston removed from the project. This is referred to in paragraph 83 of my first statement. I remember meeting with Barbara Perrott in relation to this, and said words to the effect that if IBM wanted Mr Beeston removed, then that is a good reason not to remove him because he must be doing a good job.

16. On 19 September 2008, I emailed Barbara Perrott and asked if there was anything that I could do to assist CorpTech. I received a response via email from John Beeston on 17 September 2008 that stated that after discussions between CorpTech's stakeholders and IBM, it was agreed to reserve the State's options on the pursuit of legal remedies pending the outcome of discussions with IBM aimed at determining how the parties can most effectively proceed. I was informed it was Corp Tech's preference for such discussions to occur in good faith and without the real or apprehended threat of legal remedies.

17. In March 2009, I was asked to prepare a formal notice of breach to IBM along with an internal briefing note. I referred to this in paragraphs 79 and 80 of my first statement. I never finalised the briefing note, for the reasons set out in paragraph 80 of my first statement. A copy of the draft briefing note is included in volume 8 at page 311. I sent this almost complete draft to Chris Bird at Corp Tech. I do not know if anyone else at Corp Tech saw this draft briefing note.

18. I was never instructed by the State to undertake a considered review of whether IBM was actually in breach of contract or had made any misrepresentations to the State.

19. I was never instructed by the State to review whether changes requested by IBM where matters which were within the scope of the existing contract. I was not aware of any other person conducting such a review.

20. I was not generally involved in the negotiation, drafting or review of change requests to the contract.

21. I have been asked by Mr Horton to deal with an additional point in this statement, namely: Ms Perrott and Mr Bradley have both been asked in their oral evidence they would have done if certain information had come to their attention in 2007 (Perrott - T day 16 p 104; Bradley - T day 17 p 86-87). Both said, in effect, they would have sought legal advice. The question I was asked was if I been consulted about that information at that time, what would my advice to be to Ms Perrott and Mr Bradley at that time? It is difficult to provide an answer to that question, without relying on hindsight and the how matters actually transgressed, and without having access to all the facts now or the ability to contemporaneously interview those involved. Clearly, if what was suggested was in fact true, it is a serious issue that may have jeopardised the whole tender process. My advice would have been to conduct further investigations, to ask IBM to provide a response to Corp Tech, and possibly, ask IBM to provide reasons why it should not be excluded from the tender process. At the time, if the tender was to go ahead, it was important to ensure that the tender process was competitive. It would be a serious matter for all concerned if IBM (or Accenture for that matter) was to be excluded from the tender process. If that was the outcome of the investigations, then the whole tender process (i.e., a closed tender with selected tenderers) would have to have been rethought.

Mr Gray's Report

22. I have been provided with and asked to comment briefly on a report prepared by Mr John Gray. I will not repeat or summarise those parts of Mr Gray's report that I discuss below, but will refer to the parts that I comment on by paragraph number. I am only making brief comments, and the fact that I do not comment on a part of the report does not necessarily mean that I agree with that part.

Reference 10.29

23. The very nature of the structure of the contract was required because there was insufficient detail of the State's requirements at the time of contracting, and ascertaining and detailing those requirements was an initial task to be undertaken by the Contractor.

In an ideal world, the project would be fully scoped prior to contract, but the reality is that this often is not commercially possible.

24. In terms of the requirements being agreed by consensus, ultimately the Customer had the right to approve the requirements and the design. The process of identifying and describing requirements necessarily involved IBM as they were undertaking the requirements gathering exercise. In my view, this did not undermine the contractual structure and still enabled the Customer to achieve its contractual objectives.

25. The outcome of SoW 7 was subject to acceptance by the State pursuant to the acceptance testing provisions in the contract (GITC Part 2, clause 12.4). If the output of SoW 7 was not acceptable to the State, then the State had the right to reject that work and require IBM to redo the work for acceptance.

26. Moreover, Schedule 17 made is clear that it was for the State to accept or reject the Relevant Statement of Work. As stated on page 2 of Schedule 2, if the Relevant Statement of Work was rejected by the State, then IBM would not perform the work.

27. It would be ideal if the State could have the casting vote or dictate to IBM what the State required in a Statement of Work (or an amendment), as suggested by Mr Gray. However, IBM would not accept this, particularly where there is a fixed price regime. Because that was not acceptable, the next best alternative (having the State accept or reject what IBM proposed, with the ability not to proceed) in my view gave the State the necessary leverage.

Reference 10.37

28. Mr Gray acknowledged that it is not uncommon for contracts to be entered into for projects where the scope of services are to be described in more detail as the first phase of the project. In these circumstances, it is not uncommon for timetables to be described as "indicative" and no detailed project implementation and payment plans to be provided until that detailed planning has been done. On this basis, it was entirely appropriate for the contract not to include detailed fixed timetables on the date of signing, notwithstanding the importance of timing under the project.

29. Further, while it would have been appropriate to include this further detail in SOW 8, it is apparent from SOW 8 that detailed planning had still not been undertaken at that time. From a contract management perspective it would have been appropriate for the State to require these deliverables prior to accepting SOW 8. However, absence of these requirements does not point to a failing of the contract itself.

30. The Customer Contract did deal with timely performance including through:

- time being of the essence (Schedule 1 clause 1.3);

- including a timetable and a clear process for dealing with delays against that timetable (Schedule 23 and Schedule 24);
- requiring a project management plan as a deliverable of SOW 7 (clause 2.1.2 of SOW 7);
- specifying that a Project Implementation and Payment Plan should be included in the SOW, if required (M8.6 in MO8); and
- measuring performance against timetable as a KPI which was to contribute to an at risk amount of 15% (Schedule 19).

31. In my view, all of the necessary contractual mechanisms were in place and available to the State in the management of deliverables and scopes of work under the contract.

32. In terms of liquidated damages, notwithstanding the importance of the timeframes, it is highly unusual for a supplier such as IBM to agree to liquidated damages. (And if they do, the price will often increase to cover that risk.) Given that this was a negotiated contract with a large IT supplier, it is not at all surprising that there are no liquidated damages, notwithstanding the importance of timely delivery. Further, I note that liquidated damages would have capped the State's right to recover damages for delay if IBM had negotiated on those amounts (which they would have inevitably done). See clause 11.6.5 in GITC part 2.

Reference 11.9

33. Some aspects of the project could have been executed under Module 11 (Integration), but there were also a range of contracting services to be provided under other Statements of Work (eg SOW 7 requirements gathering). Module 8 could be used for all services, with the applicable Statement of Work setting out the requirements for that particular Statement of Work. Given the short timeframe in which it was required to agree this contract, and the broad range of services to be performed, in my view this approach was an equally valid and simpler approach in the circumstances.

34. The intent of the contract was that a Statement of Work, if needed, could be drafted as a systems integration statement of work, with relevant provisions dealing with outcome rather than inputs.

Reference 11.18

35. This was a contract negotiated with a major supplier of IT services where the scope was still to be detailed. In negotiations, I attempted to have these provisions as binding, operative clauses. IBM did not agree. The State considered it was best to include the principles as non-binding statements, rather than not have them at all.

36. I have addressed the issue regarding a delivery time above.

37. Moreover, in my view, it is not correct to say that the high level objectives (clause 1.3) and the guiding behaviours (clause 2) have no legal effect. As set out in the contract, these agreed clauses can be used to assist in the interpretation of the other clauses of the contract and can be used as a point of reference if there the contract is silent on an issue. In my view, these clauses impact the legal obligations of IBM in a way that is favourable to the State.

Reference 15.27

38. I disagree with this assessment.

39. The principles in clause 2 establish a process whereby issues are to be dealt with quickly and productively, but not to condone or allow contractual breaches.

Reference 15.11

40. As a matter of practice, the private sector IT contracts that I prepare do not include a show cause process. However, the right to terminate for material breach usually only arises after the contractor has failed to rectify the material breach within the required period. In my experience, this period is usually between 14 and 60 days.

41. The process in the contract is the standard process included in GITC which has been used extensively by the State for many years. It is not my preferred approach but I saw no reason to vary from the State's adopted position on this issue.

42. I note that under clause 16 of GITC Part 2, if the Contractor commits a material breach the Customer may issue a Notice to Show Cause requiring the Contractor to show cause (within the period specified in the notice, such period being at least 7 days) as to why the Customer should not terminate the Contract. While this requires a consideration of the Contractor's response, it should not unduly limit the Customers ability to terminate in the event of a material breach.

43. I also note that this contract was a "separate stage" contract. See C1.44 in the General Order (Schedule 1) and clause 11.5 in GITC Part 2. This gave the State additional opportunity to end the relationship with IBM if needed.

Question

44. Mr Horton asked me the following question: Consider whether, in order to hold IBM to its representations or promises in its response to the ITO, that response ought to have been incorporated into the 5 December 2007.

45. My practice is not to do so. To the extent that the ITO response had material statements in it, those statements should be included explicitly in the contract. That was the process that took place here. I remember that significant work was conducted by CorpTech to

review the IBM ITO response, and to make sure that anything of importance was included in the contract (primarily in the SOW and SOS parts of the contract).

46. To the extent that IBM made any misleading representations in their ITO response, the State would have had a cause of action for misleading and deceptive conduct under the Trade Practices Act, regardless of whether or not the ITO response was included in the contract.

47. As a general matter, in my view, including the ITO response in the contract creates risks, because some parts of it may not be accepted by the customer, some parts are often stated to be options, and some parts are general information about the bidder that have no contractual relevance. Moreover, during the tender and contract negotiation process, the offer of the bidder may be refined, and so the ITO response may not represent the bidder's final offer. In my view, it is better practice and leads to a clearer result to extract the relevant parts of the ITO response into the appropriate parts of the contract . That was what occurred here.

Declaration

This written statement by me dated 19 April 2013 and contained in the pages numbered 1 to 8 is true and correct to the best of my knowledge and belief subject to the matters identified in the preamble and second paragraph of this statement.

Signature

Signed at BRISBANE this 19 day of April 2013

Witnessed:

Signature

Name ERIN MAYNE HANSON Rank SOLICITOR ~~Reg. No.~~ KING & WOOD MALLESONS

Signature: _____ Witness signature: _____