



**TRANSCRIPT
OF PROCEEDINGS**

SPARK AND CANNON

Telephone:

Adelaide	(08) 8110 8999
Brisbane	(07) 3211 5599
Canberra	(02) 6230 0888
Darwin	(08) 8911 0498
Hobart	(03) 6220 3000
Melbourne	(03) 9248 5678
Perth	(08) 6210 9999
Sydney	(02) 9217 0999

THE HONOURABLE RICHARD CHESTERMAN AO RFD QC, Commissioner

MR P. FLANAGAN SC, Counsel Assisting
MR J. HORTON, Counsel Assisting
MS A. NICHOLAS, Counsel Assisting

IN THE MATTER OF THE COMMISSIONS INQUIRY ACT 1950

COMMISSIONS OF INQUIRY ORDER (No. 1) 2012

QUEENSLAND HEALTH PAYROLL SYSTEM COMMISSION OF INQUIRY

BRISBANE

..DATE 27/05/2013

Continued from 16/05/13

DAY 32

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complaints in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings

COMMISSIONER: Good morning.

MR FLANAGAN: Mr Kent has a matter to raise first.

COMMISSIONER: Mr Kent?

10

MR KENT: Can I raise a couple of housekeeping matters,
commissioner?

COMMISSIONER: Yes.

MR KENT: One is the issue of without prejudice privilege
in relation to some correspondence, particularly in the
tender bundle for this. I can just inform you,
commissioner, the parties - that is the state and IBM -
have come to arrangements about maintaining that privilege
inter partes, which means that there is no restriction on
whatever use the commission wishes to put those documents
to.

20

COMMISSIONER: All right, thank you very much for that.

MR KENT: I'm - - -

COMMISSIONER: Yes, sorry.

30

MR KENT: Sorry. Did you wish to confirm that with
Mr Doyle?

COMMISSIONER: If Mr Doyle can just confirm it.

MR DOYLE: That's confirmed.

COMMISSIONER: Thank you.

MR KENT: The second one is this: as you may realise,
commissioner, there is some evidence in this tranche that
bears particularly on the conversation that Mr James Brown
had with the solicitor Mr Charlston which resulted in a
file note made from the conversation on the afternoon of
19 August.

40

COMMISSIONER: Yes.

MR KENT: That has led to a position where I, on behalf
of the state, appear for Mr Brown and for Mr Grierson, the
director-general. That circumstance has led to a situation
where I'm not able to do that so separate representation
has been organised for both of those witnesses, that is
Brown and Grierson, on that discrete issue and I think
Mr Haddrick is here this morning for Mr Brown.

50

COMMISSIONER: Mr Haddrick, good morning.

1

MR HADDRICK: As I say, Mr Commissioner, Haddrick, H-a-d-d-r-i-c-k, of counsel. I appear for Mr James Donaldson Brown, subject to you granting authority to appear in respect of the file note dated 19 August 2010 and matters incidental to it.

COMMISSIONER: What's proposed, that Mr Haddrick examine Mr Brown in relation to it and other witnesses to the extent that it's relevant in relation to the content of the conversation that is recorded and you examine him in respect of anything else that you think is relevant?

10

MR DOYLE: Yes. It's really Mr Brown and Mr Grierson, it's that confined, but they are confined - it gives rise to such a sharp point of distinction that it's really necessary, commissioner.

COMMISSIONER: I understand that. I just wonder why Mr Haddrick, for example, couldn't represent Mr Brown for all aspects of this party's - - -

20

MR DOYLE: In effect, he could. The problem becomes more so of Mr Grierson because in order to properly represent Mr Grierson, his representative, who'll be Mr Munford - I don't think he's here at the moment - one really needs to have a broad grasp of all of the evidence in this commission.

30

COMMISSIONER: I see.

MR DOYLE: That's the difficulty.

COMMISSIONER: I see.

MR DOYLE: And getting up to speed in that period of time wouldn't really have been possible, therefore, the distinction.

40

COMMISSIONER: All right. Mr Flanagan, do you a problem with what's proposed?

MR FLANAGAN: No. Indeed, the crown would have a right to examine any witness at the end, in any event.

COMMISSIONER: Yes, all right. Yes, thank you. I'll give Mr Haddrick leave to appear for Mr Brown on that basis.

MR HADDRICK: Thank you, Mr Commissioner.

50

MR KENT: One final housekeeping matter is this: I have arranged with the parties and, hopefully, you don't have any problem with it, commissioner, on behalf of the state for the ministers that we change the batting order and I go second-last prior to their representative in each case.

27/5/13

COMMISSIONER: Yes. That sounds reasonable.

1

MR KENT: Thank you, commissioner.

COMMISSIONER: Yes.

MR FLANAGAN: I understand my learned friend Mr Plunkett also wishes to seek leave to appear for the Honourable Ms Bligh.

10

MR PLUNKETT : Good morning, Mr Commissioner. I seek leave to appear in these proceedings for the next witness, Ms Bligh.

COMMISSIONER: Ms Bligh? Yes. I give you leave, of course.

MR PLUNKETT : Thank you, commissioner.

MR FLANAGAN: May I commence then, Mr Commissioner, by tendering the four-volume settlement bundle, a copy of which has been provided to your associate and to you, Mr Commissioner.

20

COMMISSIONER: I'm sorry, I didn't hear the last of what you said.

MR FLANAGAN: I think a copy has been already provided to your associate and to you, Mr Commissioner.

30

COMMISSIONER: Yes. I see. Exhibit 136 is the tender bundle for settlement.

ADMITTED AND MARKED: "EXHIBIT 136"

MR FLANAGAN: Thank you. My learned friend Mr Foley will also seek leave to appear, Mr Commissioner.

COMMISSIONER: Mr Foley, good morning.

40

MR FOLEY: Yes, good morning. May it please the commission. I seek leave to appear for the hearings this week on the settlement phase on behalf of the Honourable Robert Evan Schwarten, former minister for public works and minister for information and communication technology. My name is Foley, initial M. I'm instructed by Cranston McEachern Lawyers.

COMMISSIONER: Thank you. I give you list to appear for Mr Schwarten.

50

MR FOLEY: Thank you.

MR FLANAGAN: Mr Commissioner, I call the Honourable Anna Bligh.

27/5/13

BLIGH, ANNA MARIA affirmed:

1

THE WITNESS: Good morning.

COMMISSIONER: Good morning. Mr Flanagan?

MR FLANAGAN: Thank you, Mr Commissioner.

Your full name is Anna Maria Bligh?---That's right.

10

And, Ms Bligh, you've supplied a signed statement to the commission dated 15 May 2013 of 15 pages in length?
---That's correct.

Would you look at this document, please. Thank you. Is that the statement that you've executed together with annexures?---Yes, it is.

Are the contents of that statement true and correct to the best of your knowledge and belief?---Yes, they are.

20

I tender that statement.

COMMISSIONER: Ms Bligh's statement is exhibit 137.

ADMITTED AND MARKED: "EXHIBIT 137"

30

40

50

MR FLANAGAN: Ms Bligh, from September 2007 to March 2012, 1
you were the premier of Queensland?---That's correct.

Prior to September 2007, among other roles, you were the
deputy premier of Queensland from July 2005 and the
treasurer from February 2006 until September 2007?---That's
correct.

In your role as treasurer, you became familiar with the
Shared Services Initiative?---Correct.

10

All right. One government organisation involved in
initiative was CorpTech, which originally fell within
Queensland Treasury, is that correct?---Yes.

In July 2008, we know from other evidence in this
commission that the Department of Public Works, of which
Mr Schwarten was the relevant minister and Mr Grierson was
the relevant director-general, became responsible for the
Shared Services Initiative and for CorpTech, is that
correct?---That's correct.

20

The Department of Public Works therefore became the
responsible department for managing the contract, dated
5 December 2007, between the state of Queensland and IBM in
relation to the whole of government roll-out of the Shared
Services Initiative?---Yes.

Whose decision was it to transfer responsibility for
CorpTech and this contract from Treasury to Public Works?
---That was largely my decision.

30

Just very briefly, would you explain to the commission
the reasoning behind this decision?---Certainly. The
government had made a decision, as I recall in 2002, 2003,
to effectively centralise a lot of the administrative, if
you like, back of house functions of government, IT,
payroll, financial services, in order gain some
efficiencies and to get more consistency across a broad
number of departments. That was a very big change and it
required, I think in its implementation, to be driven by a
central agency, and that was why the government at the
time gave Treasury the responsibility for it. Treasury
certainly drove - you needed someone with authority to
direct other departments as to what to do in that regard,
and Treasury played that role in establishing the Shared
Services Initiative. During the time that I was treasurer,
it was my observation that while I think Treasury employed
best endeavours that sort of work was really not their core
business, and it had reached a level of maturity in its
initial implementation where it was time to move
responsibility to an agency that had more experience and
was more of a line agency than a central government
function.

40

50

So why in particular the Department of Public Works? 1
 ---There wasn't really any clear and obvious home for it, if you like, but Public Works already had the function of the contracting to other government agencies for services, such as the fleet, the car fleet, services such as capital works, project management. So there was already a relationship that the Department of Public Works had for things that were in the same kind of family, if you like, of almost back of house in a not - it wasn't the education department's central role to manage a car fleet, Department 10 of Public Works did that on their behalf.

Was part of the reasoning that the Department of Public Works was viewed as the department that had experience in the management of large contracts?---Yes.

Did you speak to the honourable Mr Schwarten, the then minister, in relation to this transfer of responsibility from Treasury to Public Works?---Yes, I did. As I said earlier, it was largely my decision, it was my decision but I made that decision in consultation with the then treasurer and with the minister responsible for Public 20 Works.

Did Mr Schwarten express any reluctance on the part of his department to accept what has been described in evidence already as a "hospital pass"?---Look, I do think it would be fair to say that minister Schwarten indicated that, you know, he wasn't thrilled, but he accepted that it was a responsibility that government needed to exercise and that if I was asking him to take it on that he would certainly do so. 30

At the time of this transfer in July 2008, were you already aware that one of your former portfolios, namely, the Department of Education Training and the Arts, was experiencing difficulties in the implementation with IBM of the Shared Services Initiative?---I was certainly aware at around this time that the Department of Education held the view that the nature of their requirements were such that it would not be in the best interest to go for a one size fits all solution, if you like, that was being offered by IBM at the time. 40

Did you appreciate that at the time of the transfer to the Department of Public Works that certain agencies within the government, or certain departments, were resisting a one-shoe-fits-all solution for their HR and payroll requirements?---There were certainly discussions around that time about those sorts of concerns and resistance, but that was not unusual. Agencies generally resist doing things which, you know, are centralised rather than within their own control. It wasn't a level of resistance above and beyond what I would normally expect to see. 50

Can I take you then to your next point of involvement, or direct involvement, which seems to be at a meeting with Mr Schwarten and Mr Grierson on or about 27 January 2009, and you've supplied a diary entry in relation to that meeting. You accept that you had a meeting with Mr Schwarten and Mr Grierson on that date. Correct?---I certainly recall meeting with both of them during that January.

Thank you. Can I just test your knowledge of what you knew before that meeting, and I know that they informed you of certain things at that meeting, but prior to the meeting did you have any knowledge that the LATTICE payroll replacement project for Queensland Health had been delayed?---I'm sorry, I can't recall whether I knew before the meeting. It's something I know, whether I knew it before that meeting I can't say.

All right. Did you have any knowledge of when the proposed go live date was under the contract, the 5 December contract, originally July 2008, and subsequently there's an indicative date of September 2008. Do you recall that there were go live dates proposed that had passed?---Certainly, I was advised of go live dates in previous cabinet budget review decisions at the time when the contract was first made, for example. I believe I was aware that at least one of the deadlines had been passed, but I couldn't say for sure whether I knew it before that meeting.

Can I test your further then. Did you know that the cost of the project, that is, the Queensland Health LATTICE replacement project, had increased by 27 January 2009? ---Again, I don't know what I knew before the meeting. I certainly remember that the meeting discussed this issue, whether or not I had very much information before that discussion is beyond my memory.

Can I ask you this general question then: prior to the meeting with Mr Schwarten and Mr Grierson on 27 January 2009, did you have any knowledge of problems that were being experienced in terms of the whole of government roll-out for the Shared Services Initiative by IBM pursuant to the contract of 5 December 2007?---Not that I recall, but it's possible.

All right. Thank you. I take it from paragraph 11 of your statement - you can look at paragraph 11 if you choose - that at this meeting on 27 January 2009 you have no specific recollection of what was discussed, is that correct?---I remember the meeting, I remember some discussions about broader information technology issues across government and some of the more, if you like, strategic issues. I think I've talked about that in my statement in relation to example: whether or not

government should have a chief information officer. I
don't have any specific recollection of a discussion about
IBM, but I accept that a discussion did happen because
subsequent events confirm that.

1

Whilst you act clear in paragraph 16 of your statement,
that no final decision could be made by yourself, Mr
Schwartan and Mr Grierson on 27 January about the whole
government arrangements with IBM because that would require
a cabinet budget review committee decision, would it not? 10
---Yes.

You make that point, but the preliminary decision that was
made on 27 January 2009 still had an important practical
consequence, do you agree?---Yes.

It meant that no further statements of work would be
entered into with IBM pursuant to the 5 December 2007
contract until IBM had completed, and I assume
successfully, the Queensland Health LATTICE replacement
project, is that correct?---Yes.

20

30

40

50

That is there was a practical decision, albeit something that had to be later confirmed by the committee that IBM was only to proceed with Queensland Health LATTICE replacement. Yes?---Yes. I think that's a fair statement. As you will be aware from my other comments in my statement, there was a discussion paper across government to identify whether the practical effect of that would have any unforeseen consequences, but, yes, you're right, the practical effect began at that point.

1

All right. May I take you to the contract bundle, volume 8, page 63, which is a document that's been brought to your attention and you've been able to consider in making your statement. Correct? I'll show you the document so you don't have to recall that?---Yes. Sorry. Can you - - -

10

That's at page 63 of volume 8 of the contract bundle?---So this is the ministerial briefing note?

20

Yes. So it's the - - -?---Yes.

- - - ministerial briefing note to Mr Schwarten not to yourself - - -?---Yes.

- - - so I appreciate it's not a document that was brought specifically to your attention, but you accept that if Minister Schwarten was briefed by Mr Grierson or others in relation to the meeting with you that you expected a director-general, given time assured, to attend the meeting with you with an option and a proposal for a way forward. Yes?---Yes.

30

In terms of this document, it contains a number of information about the implementation, at least, of phase one under the 5 December 2007 contract and the difficulties that were being encountered. Having read the document in terms of preparing to give evidence today, does it assist you in recalling what was discussed at the meeting on 27 January 2009?---Certainly, my recollection is that government pursued the course of action that would limit IBM's involvement to the Queensland Health LATTICE replacement for some of the reasons that are outlined in this document.

40

All right. Do you recall at this meeting being told that there were delays in the implementation of the Shared Services initiative under the contract?---As I said, it's hard to recall when I knew exactly which parts of this - - -

50

Right?---- - - but there's no doubt that my decision to move to a new course of action was based on concerns about both timing of delivery and cost of delivery.

In terms of the cost of delivery, we appreciate that as at September 2008, the US government had permitted Lehman Brothers to be bankrupted; the global financial crisis was upon us and according to your statement you had an election coming up very shortly in this time frame. Yes?---Yes.

But if someone came to you seeking further moneys to carry out the Shared Services initiative across the whole of government pursuant to a contract, your immediate reaction would have been "no more money". Yes?---That's correct.

All right. I'm more interested though in whether or not at this meeting you have any recollection of Mr Schwarten or Mr Grierson expressing to you that there had been a loss of confidence by other government agencies in relation to IBM's role as primary contractor under the 5 December 2007 contract?---I don't recall anything along those lines and there's nothing in the subsequent documents that went to the Cabinet Budget Review Committee along those lines, but I can't rule out that someone might have said that, but that's not uppermost in my memory.

All right. It's just if you look at the three dot points in relation to page 2 of the briefing note to Mr Schwarten there is a reference there to delays in the implementation of phase one of the program and some blame, if you like - and I'm not interested whether that blame is correct or incorrect, but some blame in relation to IBM in failing to bring its global expertise practices and program methodologies to the program. Did you recall that there were explicit or implicit criticisms by Minister Schwarten and Mr Grierson of IBM's performance under the contract at this meeting of 27 January 2009?---As I've said, I don't have a specific memory of that discussion at that meeting, but I'm very familiar with a course of decision-making in which concerns and criticisms of IBM about the timing, the delays in the timing and the costs of the project were expressed by both Minister Schwarten and the director-general and those were expressed formally in Cabinet Budget Review documents and confirmed informally in the discussions.

You see, the difference for this commission is that this is a decision that's been made for all practical purposes as of 27 January 2009 when one might argue there was time to deal with IBM and to deal with a different solution for the Queensland Health payroll project, whereas the decision made by the committee on 21 September 2009 there had been a set go live date and there were steps towards implementing the go live date by the end of that year or early in 2010 and one might see that as being too late to change horses, in effect. So I'm asking you as at 27 January 2009, it would seem that you were presented only with one option by Minister Schwarten and by Mr Grierson and that one option was that the horse in terms of the vendor, IBM, could not

be changed at that time, that is as at 27 January 2009. Do you recall that you were only presented with that one option?---I don't recall any other options being put forward, but there were specific imperatives around the Queensland Health payroll, particularly in relation to LATTICE and the lack of support for LATTICE that required a sense of urgency that was perhaps not as evident in some of the other projects in other agencies.

You knew at this time, having been treasurer and having served in other portfolios, apart from Health, but you still knew that Queensland Health's payroll with the number of employees and the number of awards was one, if not, the most complex department in the Queensland state government?---Yes.

Was it expressed to you by either Mr Schwarten or Mr Grierson that there had been some consideration given to terminating IBM at that time, that is, terminating IBM's involvement not just in relation to further or future statements of work, but terminating their involvement in the Queensland Health payroll project?---Not to the best of my recollection.

Do you recall any discussion - and I appreciate it seems from the papers that you were only presented with one option, but do you recall any discussion that the time was ripe or the time was appropriate to look for a different vendor to roll out this complex agency requirement?---No.

We know from the documents that the proposal by IBM under the 5 December 2007 contract was for an interim solution for Queensland Health rather than a more permanent solution and the more permanent solution would come once the whole of government - it's been called the bells and whistles - were rolled across each department. Do you recall any discussion at the 27 January meeting that consideration would be given to seeking a more permanent solution for Queensland Health rather than an interim solution?---I don't recall that level of detail.

The sense of it, of course, would be that if IBM are not going to be given any future statements of work under the contract until this is done that a more permanent solution could have been considered. Do you appreciate that?

COMMISSIONER: And was needed.

MR FLANAGAN: Pardon?

COMMISSIONER: And was needed.

MR FLANAGAN: Yes; and needed?---Yes. Yes, I appreciate that. In seeking to recall these, I just go back to the matter that you've drawn to the attention of the commission and that is this was a time when the global financial

crisis was really spiralling in a very dangerous way across the world. The matters that were concerning me as premier was establishing, I think, during that week an employment taskforce to deal with rapidly escalating unemployment. Recalling this level of detail in that broader context is difficult.

1

Can I say we don't wish to be at all critical of you for failing to recall - - -?---Yes. No, no, I understand.

10

- - - what happens at this meeting, but can I summarise it this way and if you don't think this is a fair proposition, correct me, that when you were called upon on 27 January 2009 by Minister Schwarten and by Mr Grierson to make a preliminary but very long-reaching decision to only have IBM concentrate on the Queensland Health payroll replacement that you as premier in terms of what they said to you and presented to you were only presented with one option, that is, have IBM complete the interim Queensland Health payroll solution?---Yes.

20

30

40

50

Thank you. May I then take you very quickly to your next point of involvement which is the meetings or planned meetings with IBM representatives on 7 July 2009. We have read your statement and you deal with that fully in your statement but it would seem that Mr Ken Smith, your director-general took that meeting on your behalf. Is that correct?---Yes.

And your diary entry and his entry would seem to confirm that he actually took that meeting?---Yes.

Having said that, I have to ask you this question: do you have any recollection of Mr Smith reporting back to you what was the content of that meeting with IBM representatives. Do you have any recollection of that?---No.

And indeed, just to be clear about this, there was nothing said in those meetings with IBM representatives on or about 7 July 2009 which to your knowledge would be relevant to our inquiries?---That's correct.

Thank you. Can I then take you to the go live of the system for Queensland Health payroll in March 2010. Now, how soon after the system went live in March 2010 was it brought to your attention that there were problems with Health employees being correctly paid?---To the best of my recollection, there were problems that emerged around - sort of the afternoon of the first pay day, so there's a lapse of time between the system going live and people's pay being scheduled and on the day that they would have normally expected to be paid, really by late afternoon, there were at least some concerns starting to, you know, filter up and onto the air waves and into the public arena and that escalated to the following day.

Do you recall who brought it to your attention?---No.

Now, you identified that there was growing public concern about the Health payroll system. Is that correct?---Yes.

The issue was also being raised in parliament. Yes?---Yes.

And you were aware that Mr Schwarten was suggesting that it was not an IBM systems problem but rather a problem with Queensland Health in terms of data input?---Yes.

And you're also aware that Mr Lucas as deputy premier and minister for Health had a different view; namely that whilst data input may have been one of the problems, another problem was with the system itself. Yes?---Yes. In the early days, there was - everybody was rushing to find what might be the answer to this problem.

Yes?---I should say that my recollection is that on the first pay day of the first of the new system, it was clear

that there were problems but it wasn't really until the second pay day when - and I think there was a level of acceptance that there might be some teething problems with a big new payroll system and that - you know, even those people affected by it in the Health system, everybody has heard of this happening in other places, but it was really when the second one had the same and even worse problems.

Yes?---And then of course the third one, that it became clear that this was not a teething problem, that this was something much, much more serious and much more entrenched and people started to really search for answers.

All right. In any event, you became aware that the auditor-general had prepared a report, or at least a draft report, that he was intending to table in parliament on or about 29 June 2010?---Yes. He had made public that he was conducting that review.

You received a briefing note in relation to the auditor-general's report on or about 25 June 2010. Is that correct?---That's correct.

May I take you to that briefing note rather than test your memory in relation to it?---Yes.

It is found in volume 2 of the settlement bundle, page 364?---I'm sorry, that's page 364?

364, Ms Bligh?---Yes.

Now, I think we all agree and it's clear from your statement and it has to be fact that even though this briefing note to you as premier is dated 25 July 2010, it should be dated 25 June 2010?---That's correct.

And in the body of the document when it refers to the auditor-general's report being tabled on 29 July 2010, that should also be read as 29 June 2010?---That's correct. I can only assume this was a typo.

All right, thank you. Then what has been considered in terms of this briefing note to you at a fairly early stage, that is July 2010, is in the fourth paragraph, the first dot point, negotiating a finalization of contractual arrangements with IBM in relation to the Queensland Health payroll contract?---I'm sorry, can you just bring me to the - - -

Yes. Can I take you - if you look under Recommendations, the fourth dot point and then the first dot point at that paragraph - - -?---Yes.

- - - negotiating finalization of contractual arrangements with IBM in relation to Queensland Health payroll system

contract following a notice to show cause. So even at this stage, contemplation was given to negotiating with IBM rather than taking a more formal or legalistic approach to the problem. Yes?---This - as I recall - well, this briefing note, put it in context, is to brief me about the auditor-general's report and to propose a government response. My recollection is that the auditor-general's report recommended that we issue a notice to show cause as to the question of termination and that dot point, I think, needs to be read in that context.

1

10

Yes?---So yes, it uses the word "negotiating", but it also uses - contemplates issuing a notice to show cause as to why they shouldn't be terminated.

Quite?---So yes, there is use of that word but if you - in the context of the recommendation of the auditor-general to report and my public statement as a result - at this government response, the termination of the contract was certainly a live option as well.

20

Quite, and I'm about to take you to your response after we have dealt with this document, if I may?---Okay.

Can I take you then to page 365. We touch upon the topic, or one of the topics, that is dealt with in detail in your statement and that is the reasoning behind why the state of Queensland negotiated a settlement with IBM and it would seem that if you look at four paragraphs from the bottom of page 365:

30

The Department of Public Works recommended that the government attempt to reach a negotiated settlement in response to issuing a notice to show cause to IBM for the reasons outlined below. Further advice from DPW is at attachment 4A.

Can I just stop there and take you to attachment 4A which you will find at page 389 of this volume. What is being identified there are the risk of moving to terminate IBM immediately?---Yes.

40

We know that that subsequently became part of a report by KPMG, dated 21 July 2010 but in terms of this document here, do you recall that one of your concerns at the time was ensuring that Health employees continued to get paid and the system actually worked. Yes?---Yes. That was my primary concern.

All right. Now, in relation to this document, do you recall how this information was provided in attachment 4A? I'll ask you a specific question; do you recall that you requested Mr Ken Smith to obtain this information from Mr Mal Grierson?---I don't recall that.

50

Did you take steps yourself to inform you as premier as to what the true risk was if IBM were terminated, pursuant to the notice to show cause of process?---Over and above the legal advice that was provided and the KPMG advice? 1

Yes?---Look, KPMG was invited by the Department of Premier and Cabinet to do the risk assessment that formed part of the cabinet documents or the cabinet budget review committee documents. I don't have a recollection of a discussion around the decision to get that extra advice but it's not unusual for - well, in fact it's the role of a central agency and a premier's department to not only rely on the recommendations or advice coming from a line agency but if you like, to add value by making an assessment beyond the interests of one agency but the interest of the whole of government and the public interest. 10

20

30

40

50

And then at page 371, the note is made under item 2, second paragraph, that the state will issue a notice to show cause to IBM seeking a response as to why their contract should not be terminated. Thereafter, you made a joint press statement with the then deputy premier, the honourable Mr Lucas. Can I take you to that document, you'll find it in the same volume, volume 2, at page 1-1.

Whilst that document is not dated, if one was to go to the relevant web site, we find that it's a media release for 29 June 2010?---Correct.

That accords with your recollection? If you look at the first three dot points on that page, "Ms Bligh said the government will take decisive action, including," and the second dot point, "Issue a show cause notice to IBM and reserve its rights to withhold final payment and seek damages"?---Yes.

At that time, that is, at 29 June 2010, the government, through its public announcements, was contemplating pursuing its contractual rights and also reserving its rights in relation to suing at a future date IBM for damages that may have arisen. Yes?---That's correct.

That is made clear, is it not, by the identification at page 1-2, the second last paragraph, that the note in this press release - and, again, I'm not concerned whether it's right or wrong - but the auditor general's report clearly identifies failings on the part of the contracted provider, IBM. Then at page 1-3, you make a public statement with Mr Lucas that you would hold IBM accountable in the terms that is suggested there. Yes?---That's correct.

As at 29 June 2010, the state was intent on reserving its rights and keeping open the possibility of suing IBM down the track for damages arising from that. From an early stage, is it the case that you appreciated that because of the level of public interest and that any negotiated outcome with IBM would be the subject of public scrutiny and perhaps further scrutiny by the auditor-general?

---Absolutely. This was a very high profile issue for the government, extensive media interest, extensive public interest and one couldn't be under any illusion that this was going to be a high profile decision. I should say in relation to your previous point, that of course the government was making these statements in the context of issuing a show cause to the company as to why they should not be terminated. It would have made a nonsense, I think, of issuing that show cause if we hadn't at the same time said, "We would be reserving our rights." We wanted them to understand that we were serious and that this was - we wanted them to take the show cause seriously.

Thank you. You knew at this stage that on the most fundamental level the allegation against IBM was that it

had failed to deliver a suitable payroll product. Yes?
---Yes.

1

And that the state had a contractual right to terminate the contract and sue for damages?---Yes.

You had already, however, had indications from the Department of Public Works through minister Schwarten and Mr Grierson, or some indication at least, that a negotiated outcome with IBM may be preferable so as to transition in an orderly manner through to CorpTech. Yes?---Yes. In these sorts of events there's always more than one possible course of action, and this one was a choice between pursuing legal course of action or finding a settlement.

10

Did you, at any stage, after 29 June 2010, have any idea as to what the state's possible quantum of damages may be if the state was to sue IBM?---The documents, the legal advice provided by Crown Law and Mallesons both go to that issue. That material was provided to me and I certainly read it in the context of making the decision in July. I don't recall exactly when I became aware of it but the documentation is there, the Crown Law advice was received along with the Mallesons advice. If I recall rightly, some time between the June press release and July there was a series of advice being got along the way.

20

We'll come to the advice, but I think my question's more specific. Did you, at any time after 29 June 2010, have any idea as to what the state's possible quantum of damages may be against IBM?---Not a specific number, no, until I read those legal opinions.

30

All right. Did you, at any stage after 29 June 2010, appreciate what the state's prospects of success were if it were to pursue IBM for damages?---Well, the appreciation I gained of that is from the legal advice that was provided through Crown Law and Mallesons.

40

One thing that's missing, as we've asked you before, in this process, there does not seem to be at any stage an advice from the solicitor-general as to the quantum of damages or possible quantum of damages, nor as to the state's prospects of success in suing IBM. Putting aside the solicitor-general, there is neither any opinion from senior counsel at the bar Australia wide or state wide in relation to those two issues also. Can you tell us why that wasn't sought?---Well, there's a number of reasons. As outlined in both the advices from the assistant Crown solicitor from Crown Law and from Mallesons, the advice was that determining a quantum of damages in the context of such a complex project and complex contract would take a matter of months, in their view. That it would require a scope of work that, you know, as I said, on their advice to me, would take some months. More broadly than that, the decision that I faced as premier and as the government

50

faced was really a decision between exercising our legal advice, and we had mixed advice about the success or otherwise of that, and considering the practical consequences for the payroll system if we were to exercise those legal rights. So I was very conscious at all points of the decision making that this was not only a legal decision, that I had an obligation to consider what the practical consequences of that might be particularly, in my view, for the people who were affected and were suffering as a result of the payroll system defects.

1
10

Can I take you to page 226 then of volume 2?

COMMISSIONER: 22 - - -

MR FLANAGAN: 226.

COMMISSIONER: Thank you.

MR FLANAGAN: I'll need to deal with the cabinet submission of 22 July 2010 in some detail with you, Ms Bligh, but you'll be pleased to know I won't have to be as detailed with 26 August 2010. You appreciate these questions are simply to identify the considerations taken into account by the government in ultimately settling with IBM. If you look at page 226, this is in fact the cabinet budget review committee decision of 22 July 2010, which is to approve the preferred option, negotiate a settlement with IBM and negotiations not to exceed a period of six weeks. It's within the parameters of table 1, yes, which I'll bring you to, and you authorised the director-general of Public Works to conduct the negotiations. First of all, there's nothing surprising in the committee identifying the director-general of Public Works as the appropriate officer to carry out these negotiations, is it?---No.

20
30

One would expect that's the sort of person a cabinet budgetary review committee would pick to carry out these negotiations?---Precisely.

40

All right. Thank you. It notes that an update to the committee would happen within six weeks. Can I take you to the parameters in table 1, and you'll find table 1 at page 239?---Yes.

Within those parameters, first of all, dealing with item 1, "Payment of remaining milestones." The state had a preferred position and an acceptable position. The preferred position was that no further payments were to be made to IBM. Correct?---Correct.

50

And the acceptable position was pay the 1.85 million and
retain a retention payment of 1.49 million. Yes?---Yes.

1

But in relation to item 6, legal release of obligations,
the preferred state's position in terms of negotiations was
that no release was to be given to IBM. Correct?---Yes.

That made sense in these terms that if no release is given
as the preferred position, the state could have reserved
its rights in relation to suing IBM down the track. Those
damages may well have been the additional resources of the
state thrown at solving the problem, that is CorpTech
resources. We know - and I'm not suggesting for a minute
that the increase in payroll staff for Queensland Health
from 550 people to 1100 people was caused by IBM's
identified defects, but that would have been considered in
terms of down the track investigating these matters for the
purposes of determining what was the nature of the damages
incurred. Yes?---Potentially that's my understanding.

10

20

If one doesn't give a release when we come to the
supplemental agreement, one does not read more perfectly
drafted full releases of both parties, but if you have a
release of IBM as part of the negotiation process, it means
that even if the system failed completely, the government
would not have had any recourse to IBM. Correct?---That's
my understanding.

So it's not a surprising parameter to have of the preferred
option of the state of Queensland in terms of protecting
its position - was to have no released. Yes?---That's
correct.

30

But the acceptable position in terms of the parameters -
and why I need to draw this to your attention is that it
seems that we do go outside these parameters when we come
to the final settlement - was a qualified release, for
example, "Retaining rights in case must be abandoned due
to inability to overcome defects," which is the proposition
I'm putting to you that this limited release would have
protected the state of Queensland had it ultimately been
determined that the solution built and implemented by IBM
simply didn't work. Yes?---Correct.

40

Thank you. Can I take you then to page 227. I appreciate
this is just simply a submission that's given to you as one
person who sits on the review committee. In terms of this
review committee, it consisted of yourself, Mr Lucas,
Mr Schwarten and the then treasurer. Is that correct?
---That's correct.

50

This is actually a submission that would have come - - -?
---Sorry. Can I just clarify that.

Yes?---This is in 2010. I'm sorry, I'd actually have to
double-check whether Minister Schwarten was formally a

member of the Cabinet Budget Review Committee at that stage. There is the three most senior ministers, the premier, the deputy and the treasurer and then there is a fourth minister that rotates and, I'm sorry, I just - - -

All right. That's fine?---But Minister Schwarten would have certainly been there to present the case.

Yes, yes. What you're being presented with is something from the Department of Public Works, aren't you?---Yes.

Yes. So, ultimately, in one sense what you're being presented with is something from or something that would come through Mr Grierson as director-general of public works?---That's correct.

All right, thank you?---But it's formally presented by the minister.

By the minister. Yes. If I can take you to the summary in the second paragraph there, it's a paragraph that's intrinsically critical of the state of Queensland. It says:

The high-level nature of the state's original system requirements, the uncertainty of its original tender requirements and the fact that IBM's response was not appended to the contract Q11 has meant that the state has not been able to successfully refute IBM's assertions on scope. Scope remains a significant area of ongoing contractual debate between IBM and the state.

Just in terms of your knowledge, was it ever explained to you that the contractual arrangements between IBM and the state of Queensland permitted change requests to be made by IBM, to be considered by the state of Queensland, to be signed off and accepted by the state of Queensland and those change requests would then become part of the contract as between IBM and the state of Queensland?---I don't recall that level of specific detail, but I would see that as a reasonably standard part of a major project contract.

Did anyone ever explain to you, say Mr Schwarten or Mr Grierson, at any stage of this process that there had been three, at least, significant change requests which had led to a lot of the scope requests being resolved - not all, but most, change request 60, 61 and 184? Was that ever discussed with you?---I don't recall any such discussion, but I'm familiar with those issues as a result of reading the material that was - reading at the time the material that CBRC based its decision on.

Yes?---So I was certainly familiar with that by the time we were contemplating this decision. It's referred to extensively by IBM in their response to the show cause.

Yes. Ultimately though, through different change requests, by 30 April 2010, IBM had to deliver what was called deliverable 47, which is a working payroll system, and they had under this two days to fix what was called severity 2 defects. Did you appreciate that on a fundamental level that there had been a failure by IBM to deliver that by 30 April 2010?---I don't have a recollection of that level of specificity.

10

All right, thank you. Can I take you to page 228 then. Again, there's a process here where I'm taking you to a document that you would have, no doubt, read as many documents that you would have read as premier - - -?---Yes.

- - - but inquiries have a tendency to put the microscope on certain decisions and this is one of the decisions we have to do it, but if you look at page 228 of the second paragraph in the second sentence, it's talking about an orderly transition, but it says:

20

The consequence of taking this course of action -

that is settling with IBM?---Yes -

means the state giving up an unidentified set of potential legal - - -

30

MR KENT: Undefined.

MR FLANAGAN: Sorry, undefined. Thank you -

undefined set of potential legal claims against IBM which in the case of a damages claim cannot be fully quantified at this time. This needs to be balanced against the option of litigation where IBM has access to all project documentation and the auditor-general's report which will be used vigorously to mount a legal defence.

40

We don't find anywhere where there's a legal opinion that would have told you that the auditor-general's report would not be admissible in litigation. It might have given IBM a course of investigation, but were you ever told as a matter of law that the auditor-general's report would not be admissible in a trial as between the state of Queensland and IBM in that it simply constitutes the opinion of one person, the auditor-general?---I don't recall ever being given that advice and it's certainly not contained in the documents.

50

You see, it's suggesting that the auditor-general's report, which really deals with scoping and governance, is going to

27/5/13

BLIGH, A.M. XN

be used by IBM to, in effect, defeat a claim that it's failed to deliver a working payroll system. Do you see? Did anyone explain to you that you were actually on good contractual terms or good contractual ground in terms of IBM failing to deliver by 30 April 2010?---I think both the Mallesons' opinion and the Crown Law opinion certainly puts the view that the government was on strong contractual grounds and that was then something that had to be balanced against what the practical consequence of exercising those contractual rights might be.

1
10

Can I take you to page 320. This submission had numerous annexures - - -?---Yes.

- - - and some of those annexures was in fact the Mallesons' advice. At 320 you'll see it's called The Damages Option Paper IBM Payroll System Contract. It's a document dated 19 July 2010 - - -?---Yes.

- - - constituting damages advice from Mallesons and may I ask you with this document to turn to page 321 and it's item 1.4, recommendation for next steps. What Mallesons are actually suggesting here is that more work needs to be done to determine the likely value of any claim against IBM and the prospects of success of each claim, that is, their advice as at 19 July 2010 to the Department of Public Works, at least, was that further work needed to be done to assess both prospects of success and quantum?---Yes.

The second paragraph says:

20
30

To prepare an advice as to prospects all relevant documents, emails, reports and contractual amendments need to be reviewed. In addition, relevant witnesses should be interviewed and statements taken.

That's what I understand you're saying that this would take some time to quantify the state's claim. Yes?---Yes, and I believe - I'm sorry, I can't draw it to your attention, but I believe there's statements to the effect in the Crown Law advice that says it could take some months.

40

50

Quite. And it says:

Once details of the claims against IBM have been determined, the value of loss suffered as a result should be calculated and the state should take care when negotiating any settlement with IBM that it fully understands the actual existing and potential future claims against IBM and the likely quantum of such claims.

10

That's not a startling proposition for a lawyer to make, that is, in negotiating with a party with whom you're in contractual dispute that part of that negotiation was for you to know what is the likely claim for quantum in terms of your dispute. Yes?---Yes. I should also - and I'm sure you're familiar with this - the substance of this advice in relation to damages outlines a number of possible areas and that the most likely was in relation to damages for breach coming from material breaches, that there was a cap on that and that cap would be offset by any - well, be offset by any evidence that the state had in any way contributed to any of those, and that while there was potential, significant potential, for damages much greater than that cap in relation to negligence or misleading conduct, that the prospects of that were significantly slimmer than establishing material breaches.

20

Quite. I think in the documents that are in the settlement bundle there is a suggestion by Clayton Utz at the beginning that the claim could be hundreds of millions. Mr Swinson, from Mallesons in his advice makes it clear that the contract itself of 5 December capped - - -? ---That's right.

30

- - - the damages at the value of the contract, which was \$88 million, according to his advice. If one was to be able to sue outside the contract one could go further, but one didn't have the clear contractual material breach that had been identified by Mallesons, being the failure to deliver deliverable 47 by 30 April. Does that accord with your recollection?---Yes.

40

You probably would never have seen the first draft settlement sheet compiled by Clayton Utz in relation to seeking damages, or having damages on the board - or on the table, I should say - as part of the negotiation with Clayton Utz, would you?---That's correct.

It would never have been brought to your attention that some initial work in terms of possible damages were being contemplated at the area of around \$12 million?---No.

50

In any event, no matter how one looks at it, the potential for damages in terms of how they were quantified for this claim was substantial. Yes?---Potentially, yes.

May I then take you to page 233 of the same volume please, Ms Bligh? This is a different topic, it's actually the risk that had been identified in this particular submission by the Department of Public Works in relation to terminating IBM rather than transitioning and settling with IBM. You'd be familiar with what's stated in paragraphs 22 to 25.

1

COMMISSIONER: Sorry, what page are we on?

10

MR FLANAGAN: On page 233, Mr Commissioner. Again, in terms of your own knowledge, can I test it this way, and there will be other people who are far more hands on in terms of the detail, but can I ask you this: did you know that after 30 April 2010, when the deliverable 47 was to be given, that is, IBM hands over the Health payroll system to CorpTech, that CorpTech would then be responsible for the running of the payroll system?---That stands to reason, yes.

20

Did you also know that there had been, initially, once the payroll was viewed as being in difficulties, that Queensland Health engaged a Mr Walsh and others to have what was called a "payroll stabilisation project"?---Yes.

Are you aware of that?---Yes.

And that was chaired by Mr Reid, the director-general of Health. Yes?---I'm not sure who chaired it, but I certainly was very aware of the project.

30

In July 2010, that project actually transitioned from the payroll stabilisation project into the payroll improvement project. I'm just wondering what was your knowledge of how the situation had improved in terms of pay run for the employees as at July 2010. There may be some significance in the fact whether you knew that there had been a transition from stabilisation to improvement?---I'm not sure whether the change in language was something I was aware of at the time, but certainly throughout that year my recollection is it's fair to say that the payroll system went from something that, in my view, was boarding on catastrophic to one that had started to stabilise in that you could at least know what was likely to happen at the next payroll and what the mistakes were likely to be, and therefore you could have manual systems to overcome. So there was a level of predictability about the flaws in it which help to stabilise it, but obviously the long term objective was to remove those flaws so that we didn't have to have manual re-works and manual solutions. So, yes, it did gradually start to improve, but even in July and then later on into the end of that year there was still many people whose pay was still not correct, it was still not reliable and there were categories of employees, I'm sure you've heard, concurrent employees, for example, which continued long beyond that time to have very, very serious

40

50

difficulties. I think it would be wrong to think that moving from stabilisation to improvement meant that everything was working as it should because I think that would be a stretch.

1

In terms of the KPMG report which is dated 21 July 2010, and if you look over to page 234 you'll see a summary of its finding at paragraph 28?---Yes.

There's nothing in the KPMG report that suggests the state of Queensland shouldn't do everything in its power to reserve its rights. Yes? Simply saying that caution or prudence should prevail in terms of transitioning from IBM to CorpTech. Yes?---That's correct.

10

And that issue ultimately became this, Ms Bligh, didn't it: the issue became whether or not the state of Queensland through CorpTech could develop relationships and contract with IBM subcontractors, particular subcontractors. Yes? ---That was certainly one of the issues.

20

And Infour, who were the Canadian company who had the expertise in relation to Workbrain. Yes?---Correct.

We've heard evidence from Ms Stewart, and the KPMG report lists everyone they speak to, and they speak to Mr Schwarten, Mr Grierson, Ms MacDonald, Ms Berenyi, all those people. They also speak to Ms Stewart. In the course of her evidence - and the transcript reference for those who want it is day 29, around page 104 onwards - her preference would have been soon after go live to have got rid of IBM completely. Can I ask you whether you had any knowledge of this: did you have knowledge that people from CorpTech would have been keen to get rid of IBM because of warranty problems under the contract?---No, I'm not aware of that.

30

Did you have any knowledge or are you aware of the evidence given to this commission that a person that KPMG actually spoke to was of the view that she would have liked, subject to dealing with the subcontractors and getting Infour on side, she would have liked to have got rid of IBM from the project?---I'm not aware of that, but there is quite a lot of material that I took into consideration about the ability to take those subcontractors into CorpTech's employ, and there's mixed views about that.

40

All right. If I can take you to page 329, which again this is another Mallesons advice that was annexed to the cabinet's submission. At page 239, you'll see there another item, 1.4. This is an advice which was dated 17 June 2010 and updated as at 19 July 2010, so can I be clear that in asking you questions about this, this is a legal advice prior to KPMG supplying it report - - -?---Yes.

50

- - - of 21 July 2010. In item 1.4, at page 329, there's three dot points. He says:

Irrespective of which option the state chooses, we recommend the state consider taking the following steps as a matter of priority: Determine whether the work currently being done by IBM in relation to the payroll system could be done by others; discuss internally the degree to which IBM's existing obligations are being undertaken or supplement by the work of CorpTech.

1

10

And then the third dot point:

Approach Infour to determine the likelihood that it would be able to take over the Workbrain aspects of the payroll operations from IBM in the event that the payroll contract is terminated.

And two other dot points over the page of what steps should be taken. Do you have any knowledge whether those steps as suggested by Malleons in their advice of 17 June 2010 and updated as at 19 July 2010 we retaken by the state of Queensland?---No, I have no knowledge of that.

20

30

40

50

From what you had read though in the cabinet's submission, you appreciate that there were some concerns that with Infor, IBM had a pre-existing relationship and it was thought that a risk might be that IBM brings to bear some commercial pressure for Infor - - -?---Sorry, I should correct my answer.

1

Yes?---There is some material in the IBM documents as I recall or it might be in the cabinet's submission that says that IBM had actually said - taken the state to task or taken the negotiators to task for directly contacting their subcontractors so I assume from that that there had at least been some contact with the subcontractors. It would be wrong to say that I had no knowledge of that but other than that, I'm not aware of any - I'm just looking - in the cabinet's submission itself, it does refer - it does advise the review committee that in the estimation of the Department of Public Works and I'm sorry I can't find it for you but in the estimation of Public Works, it would take somewhere between one and three months for hem to ensure that they had either internal capacity and or relationships with appropriate alternative providers and subcontractors. My view was that three months was too long and I - to be frank - didn't have confidence in those predictions given all of the other predictions that have failed to materialize.

10

20

30

Thank you. Just to complete the picture with this issue then and to take you to some paragraphs that you have already referred to in your evidence just then, can I take you to page 236, paragraph 39. This is just confirming that everyone knew, as part of the committee, that any negotiated process with IBM would be the subject of public scrutiny and probably scrutiny by the auditor-general? ---Yes, and I think it's fair to say that every member of the committee would have known that regardless of that paragraph being there or otherwise.

Quite, yes. Then page 237 paragraph 47?---Yes.

40

Can you explain why in negotiating a settlement with IBM that the state had to give up or release IBM from all liability?---I suspect that's really a question better directed to the negotiators but I assume that as is always the case in a settlement, people generally have to give up some things they don't want to give up and that the only way to reach a settlement with the other party was to reach a compromise that was necessarily - wasn't necessarily one that we liked the most but the one that would secure a smooth transition and ensure the continued support for the system as it was currently stabilizing.

50

Right. Finally, can I take you - when I say "finally", just on this topic; can I take you to page 335, just the last paragraph, it's a common warning in that negotiating particularly with a savvy commercial entity that the sate

of Queensland should always have a view to what it is seeking to achieve. Did you know that Clayton Utz were engaged by the Department of Public Works and indeed a specific partner there, Mr Jeremy Charleston, was engaged for the purposes of structuring the negotiations between the state of Queensland and IBM?---I don't recall knowing that at the time but it's quite possible that I did and it wouldn't be unusual in something of this magnitude that an agency would bring in one of those big consultancy firms to assist them in their negotiating position.

1

10

Through your director-general, Mr Ken Smith, were you ever informed that Mr Grierson in effect departed from the structured negotiation that had been established by Clayton Utz and had a face-to-face meeting with his associate deputy-director, Ms McDonald, with two other representatives from IBM where certain contractual principles or settlement principles were nutted out in the course of two-and-a-half hours. Did you become aware of that?---I don't have any memory of that level of detail but again, it would not surprise me to know that the person that the CBRC had authorised to conduct the negotiations had sat down face-to-face with the other party. It's hard to know how these things get settled without something like that happening eventually.

20

All right, thank you. Now, outside the cabinet submission, can I ask you these questions: were you ever presented with any evidence that if terminated, IBM would walk off the job?---I relied on the advice that was provided to me by Malleasons, by Crown Law and by KPMG. That there was a risk of that and I had to make a calculation about whether that was a risk that the state could afford to take. I took the view that anything that would further jeopardise the stabilization of the payroll system was a risk that was not in the public interest and would have been unconscionable for me to have knowingly entered in that risk.

30

Did you know of any historical evidence that would support a fear that IBM would walk off the job if terminated; that is, leave the state completely in the lurch, irrespective of its termination, responsibilities and disengagement responsibilities under the contract?---As I recall, there is some suggestion that that had occurred in the - other matters involving IBM in the past in the cabinet's submission but I think it's important for me to make it clear here that the prospect of IBM so-called walking out was not the only risk and IBM at that time was involved directly with staff every pay round with assisting to ensure that the pays got out, that they were also involved in fixing defects and they were also working on improvements and changes to the system that would stop the problems in the future. I don't claim to be an IT expert but as I have said in my statement, I have spent quite a lot of time in payroll hubs talking to people at hospital,

40

50

nurse unit managers and others who did the rosters et cetera. What that certainly gave me was a very in-depth understanding of how complex these system failures were and it certainly seemed to me to the extent that we were making any progress, to the extent that anything was getting better. It was because of a great deal of goodwill by all those people on the front line of the technical issues, if you like. My experience generally is that once people start to take legal action against each other, goodwill is one of the things that evaporates pretty quickly, so I had a concern that even if they didn't walk off, that the level of goodwill, openness and frankness that was necessary between operational technicians to explicitly look at what was causing a particular defect in order to then be able to fix it would be something very difficult to manage. In making that assessment, I not only relied on the legal advice but of course we had the response by IBM to the show cause notice and the subsequent decision by IBM to issue a notice of dispute. The tone of that response and the decision to issue a notice of dispute I think leads reasonably to the conclusion that IBM, with all of the resources that it can muster globally, would mount a very significant legal defence and possibly even a counterclaim.

IBM was a large client of the state of Queensland, or a large contractor with the state of Queensland, well beyond Queensland Health. Yes?---Yes. I think from recollection it has about 25 to 30 per cent of Queensland's information technology contracts.

Quite. So given the existence of those other contracts, they had a reputation to maintain with the state of Queensland. Yes?---Yes.

And given that there had been clear failure to deliver deliverable 47 by 30 April 2010 three of severity 2 defects and certainly without severity 2 defects being corrected within two days of such delivery, it was clear that there had been a failure on their part in that regard. Yes? At least in your mind?---Well, I had legal advice to that effect from one source but I also had IBM's refuting that assertion. They - my recollection of their response to the show cause notice was that they did not accept the 30 April requirement, that they believed that they had submitted a properly constituted change or variation to that. Whether or not that is valid, I'm not in a position to judge but I was certainly aware that they disputed that that was the case and that that would be something they would be very likely to pursue. You're right; they had a reputation of maintaining government but they equally had a reputation to maintain with clients across the world.

You see, I'm trying to assess the risk because ultimately when you say, "IBM need to stay on the job," Ms Stewart has identified for us, and the KPMG report identifies for us, there were specific subcontractors with IBM doing the work. There had been advice given by Mallesons suggesting that there is no impediment on the state of Queensland dealing directly with those subcontractors. It would seem in the submission of 26 August 2010 that there was a note that IBM says, "We don't like you dealing with our subcontractors while our contract is on foot," because of warranty provisions?---Yes.

1

10

But I'm trying to assess the risk, if one had reserved the state's rights to say, "We will ultimately terminate you and we will ultimately sue you for damages, but right now we want you to fix as many defects as you can," what was the risk of IBM hindering the state of Queensland, given its existing relationship with the state of Queensland to having access to Infor and certain subcontractors to get these people paid? What was the real risk?---There is Crown Law advice that, on the one hand, accepts part of Mallesons' advice in relation to the subcontractors, but it goes further and indicates that dealing with individual employees of those subcontractors may in fact expose the state to counterclaims from IBM in relation to breaches of contract themselves. So certainly that wasn't in my mind on the basis of the advice I had - it wasn't an absolutely clear-cut certainty that subcontractors could be retained. The risk as I was advised in advice from a very well-respected law firm, from Crown Law and from KPMG was that there was a risk and many decisions that come before CBRC are judgments about whether a risk is a sustainable risk; whether it's a risk that we can afford to take on a number of projects or other decisions. In fact, you know, often that's what CBRC is doing, is managing decisions around risks. As I said earlier, I took the view that any risk, no matter how small, to the payroll system and its stabilisation was a risk that I simply could not knowingly take in relation to the difficulties that so many people were experiencing.

20

30

40

But a risk, if ever so small, has to be weighed, does it not, against the release of IBM from a potential damages claim of many tens of millions of dollars by the state of Queensland. Yes?---Yes, it does. In doing so, I took into account further advice from both the legal opinion and the Cabinet submission and I guess my own general knowledge, that these sorts of disputes often take years and years to settle in the courts - sorry, take years and years to even get to court and more often than not after a great deal of expenditure on legal fees by all of the parties are ultimately settled because the cost of trying to actually pursue the legal case becomes untenable. I was faced with advice that said, "Even if you go down this legal path, you

50

may or may not be successful on the basis of the legal advice." The legal advice is not clear-cut. It doesn't say, "You've got a 100 per cent chance of success." It's probably somewhere around fifty-fifty at best and then further advice that says, "And even if you pursued that, it is unlikely that you will get satisfaction for a number of years. You will spend a lot of money getting to that point and the most likely outcome is that you will settle it." If that was a prospect, as I think, the advice to me said it was, then the orderly transition out of the contract in the way that best protected the employees of Queensland Health, I believed was the most responsible course of action.

1

10

But what you have here is by, in effect, 23 August 2010, you have in principle agreement whereby IBM are completely released from all their obligations, subject to fixing 35 defects, in effect, by 31 October?---Yes.

Were you aware that as early as 13 August 2010, IBM, through their lawyers, wrote to the state's lawyers to say, "We'd like our contract terminated by 31 August 2010," that is IBM itself as part of the negotiation process wanted to be out of the contract? That would hardly suggest that IBM were imperative to stay there and the final settlement of them only fixing 35 defects and being out by 31 October would hardly suggest that it was imperative in terms of a full release to have them there?---And that may be the case, but I'm not aware of that correspondence. On what I understand you've just told me, that correspondence didn't occur until 13 August, so I didn't have the benefit of knowing that when this decision was made and I could only make it on the basis of the advice that I had and the facts before me and I think the documents record that.

20

30

All right, thank you. Can I just take you to the document where it seems, at least from our point of view, the high point of these fears is identified and that's in the submission of 26 August 2010? May I ask you to change volumes to volume 3? The submission starts, Ms Bligh, at page 178, which is the Cabinet Budget Review Committee decision of 26 August 2010 and it was, in effect, at paragraph 6:

40

To authorise the director-general to act as the state's delegate in progressing the preferred option and to authorise the deputy premier and minister for health and the minister for public works and information and communication technology to agree on the final terms of the supplemental deed.

50

The passage I want to take you to though is found at page 184. This is before the supplemental deed is signed and it says in paragraph 10:

From a business continuity perspective, the state is still reliant on two key IBM subcontractor organisations, the presence of IT and Infor, and a number of individual contractors who have detailed technical knowledge of the system design and interfaces. It is understood that IBM's agreement with its subcontractors will commence to expire from the end of August 2010. Negotiations with IBM's key subcontractor organisations indicate that they would be prepared to provide support directly to CorpTech should the state elect to action a termination notice. However, during the negotiations with IBM -

1

10

and these were negotiations that had preceded 26 August -

it had indicated that it wished the state to cease all negotiations with its subcontractors as this is seen by them to be undermining the current contract.

20

The point being, however, that if the contract with IBM was terminated, there would not have been on its face to be any impediment with the state of Queensland dealing directly with the subcontractors that had been working on the project and, indeed, with Infor. That seems to be the highest the risk is expressed, at least as at 26 August 2010, prior to the execution of the supplemental deed. What I'm suggesting, if that is the risk and it's a risk that simply leads to a supplemental deed whereby IBM are completely released, where the state of Queensland has no right to damages in the future against IBM and where IBM merely have to fix 35 defects prior to leaving on 31 October 2010, it's not a great deal for the state of Queensland. Are you surprised by that proposition being put to you?---I think it needs to be seen in the context of these defects. If you go back to look at IBM's response to the notice to remedy and some of their earlier responses to the notice to show cause, there was an argument from IBM about whether they had any responsibility in relation to some of these and whether they had any intention or capability of continuing to work on them. 35 may not sound like a lot, but if you're someone who's not being paid properly, that's one of the reasons, then it means everything to you and having those 35 defects remedied appropriately, even though IBM were saying that they weren't going to do it, was actually of value to the state and was in the public interest. Whether or not the value equals what we gave up to get that, that's a legal judgment in an environment where the advice I had was it would take some months to even determine the sort of damages. As I said, that document, of course, and that relationship with the subcontractors is brought to CBRC's attention some five weeks after they've already made the threshold decision and that is in the best interests of those people

30

40

50

who are the victims, if you like, of the payroll problems, that we needed to prioritise the practical consequences over some of the legal considerations.

1

Finally, if I could take you to paragraph 68(1) on this topic, at least, and there's one further document I need to ask you about?---Sorry, was that eight?

Paragraph 68(1) of your statement?---Of my statement?
Sorry.

10

Yes?---Yes.

20

30

40

50

You say there:

1

I felt it was unthinkable to knowingly take an action that would put rectification at risk or, at least, cause further delay and further pain for Queensland Health employees.

By the date that this deed is signed, which is 22 September 2010, some water had passed under the bridge since the KPMG report of 21 July 2010. Progress had been made in fixing defects. In fact, I think you'll find the first term sheet had approximately 67 defects for IBM to fix. That's ultimately reduced in the supplemental deed to 35 defects, but people were ultimately getting paid. The Health stabilisation project had transitioned to the Health improvement project. There was still the issue of concurrent employees. But in all those circumstances, why did there have to be a full release of all damages claims against IBM to achieve that transition? That's the point we need some explanation of?---And my understanding of that is that that was the threshold issue for IBM to reach a settlement and you can see it from their point of view. Ultimately, both parties have to find middle ground whenever there is a settlement and, from my experience, those parties generally go away a bit unhappy because they've given something that they would rather not have given up. Ultimately, as I said, this for me was always primarily a people problem and it was about securing the payroll system to the best of our ability after it became obvious very soon after go live that this was a system that was failing people and that's what drove the threshold decision about settling. Once you take that decision then, you know, the parties get around the table and work out what it is that both of them are prepared to accept and I can only assume that that was one of the threshold issues for IBM.

10

20

30

40

50

In the documents in relation to settlement we do not find any evidence that IBM were ever asked directly, "If your contract is terminated, say by 31 August or 23 August 2010, will you hinder the state of Queensland in contracting directly with existing subcontractors of Infor?" It would seem that question was never put to IBM and we don't have any evidence that IBM, given its reputation, would have hindered the state of Queensland in having that access. Do you appreciate that?---Yes. You'll appreciate I wasn't party to the negotiations. I wasn't in the room as the negotiations were underway. I can only rely, as I did, on the advice that was provided to me and what's provided to me is that substantial legal opinions and other strategic advice from very reputable organisations, both inside and outside of government, that advised me in very clear terms that there was a risk and that that risk was one I had to consider. I put - and I think where maybe you're taking me to is and you're - the practical considerations above the

legal considerations when I made this decision. I believed sincerely that that was the right thing to do. I appreciate that there might be other legal finer points that were sacrificed in that process, but there was also a great sense of urgency. It might look on the documents as we look at them in hindsight that there were five weeks or seven weeks between these sorts of events, but when that's three or four pay packets that have, you know, failed you yet again, that's a very long time for people who every pay day have to go and make other arrangements and when you say it was stabilising, you're right, but it was stabilising with considerable manual intervention that was unsustainable in the long term and we needed all of our partners with a lot of goodwill to be sitting hand in glove with us and fixing it.

1

10

What I'm suggesting is that in terms of the settlement with IBM and the state of Queensland, the risk of not being able to contract directly with the subcontractors who were doing the work and directly with Infor and other such organisations loomed far too large in releasing IBM from any potential future damages claim. Do you agree with that or disagree with that in retrospect?---It's a judgment call and, as I said, not being party to the negotiations, I really don't feel in a position to judge. I only had the material in front of me at the time. I made my judgment based on that and I think it was a sound judgment in relation to the advice and material that I had in front of me at the time.

20

30

Would you have been assisted with an advice on quantum and prospects of success, albeit on a preliminary advice, from the solicitor-general or a senior barrister?---If it had been accompanied by the same advice that regardless of - you know, if there was a higher prospect of success, but nevertheless the same risk to the system was being presented to me, I believe I would have made the same decision. I was primarily constantly motivated by trying to fix this system.

40

Did you at the time - - -

COMMISSIONER: Is what you're saying, Ms Bligh, that regardless of the value of the state's rights, no matter how large they were or how valuable they were, you would have taken the same course?---If I had the same advice about the risk that this could significantly delay or perhaps see a serious breakdown between the technical support, IBM, and related subcontractors that would have put the system at further risk, yes, I believe I would have made the same decision.

50

MR FLANAGAN: Did you at any time in your discussions with your DG, Mr Ken Smith, or indeed with Mr Lucas or Mr Schwarten, identify any political imperatives which made

settling with IBM with full releases the more acceptable solution?---No, I don't recall this. What I do recall is discussions at the CBRC meeting that my political interests and the government's political interests would have been better served by pursuing legal action against IBM.

1

Would you explain why?---Well, certainly as I said in my statement, I felt that there was a lot of distress around this system. When people are not being paid, their lives are considerably damaged and so there was a lot of distress and from the employees themselves, but also from their families. I mean, this wasn't just the employees that were impacted. The operation of our hospitals was impacted every pay day because we actually had to have capability at the hospital level to supplement people's wages if they hadn't been paid correctly, so there was a lot of distress across the system. Beyond those who were impacted in some way, the general public I think were genuinely concerned that they want to see our nurses and our hospital staff paid properly. My sense was that the public and those affected would have felt some level of satisfaction if there had been - I suppose if we'd been able to say there's one scapegoat here and we're going to pursue them in the courts and there's sort of legal satisfaction, if you like. It doesn't fix the payroll system, but there is a sense of vindication, if you like. I believe that that would have served the government's political interests better because we would have been seen to be pursuing this big global company and giving them a bit of stick, if you like, but as I said - so ultimately I feel that I took a decision that was not necessarily in my own or the government's political interest, but was in the interests of the system of improving it and getting it fixed as quickly as possible.

10

20

30

40

50

If Mr Schwarten as the responsible minister has said that Mr Grierson, being the delegated director-general to carry out these negotiations, required further time, would that have been considered by the Budgetary Review Committee in its ordinary course of determining whether further time for negotiation would be given?---Well, it's a hypothetical. Given that the original decision required a report back within six weeks and that was included in the decision because, as you know from the legal advice, there was a sense of urgency. There was also advice that we should take an option as quickly as we could and implement it and there was also a deadline for when we could act on the original show cause notice. So that's why the six weeks was put as a deadline. So if they had wanted to pursue beyond that, they would have been required to come back to CBRC or, at least, have come to myself and said, "We've got this problem." Would it have been granted? I can't possibly speculate on that without knowing what the circumstances were and why they were seeking the extension, but in the event that wasn't necessary.

But if Mr Grierson felt he needed an extension, the appropriate thing to do would be to ask the budgetary review committee for such an extension?---Yes, although if there were some real urgency around it like, "We're very close to an agreement but it's going to take another four days," you know, I, as premier, could authorise that.

All right?---But if it was, "We need another six months," you'd have to come back because that's a very big departure from the decision of the cabinet budget review committee.

Finally, and I do mean finally, I've asked you to look at a document which was in volume 3, page 150, which was a file note of conversation between Mr Charleston from Clayton Utz and Mr James Brown from CorpTech?---Yes.

If you turn to page 151, item 6, "James said confidentially that this is a political decision. The politicians," and I'm not saying that necessarily includes you, but it just seems to be a general reference to the politicians - - -? ---I answer to the general description.

- - - "are extremely nervous and driven by the fact that if IBM is removed then there would be nobody to blame for the payroll problems outside government." I've asked you to look at that and consider it. Was that at all a consideration which you discussed with Mr Schwarten and Mr Lucas and the then treasurer in relation to negotiating settlement with IBM?---No, as I think I outlined a little earlier in fact to the contrary. I have looked at this document and I can only say that it doesn't make a lot of sense to me in the context. If I can ask you to cast your mind back to - this was one of the biggest political issues the government was grappling with, the person here goes on to write that, "We were concerned about anything being made public." This was a daily front page story, there was no prospect that this was going to be kept quite in any way. Equally, there was, in my view, no prospect that anyone in government could honestly believe that the electorate and the people who were paid by the payroll system, or not paid as the case may be, would be holding anyone other than government accountable for that. As I outlined, if we had been seeking somebody to blame the most explicit demonstration of that would have been to take legal action against IBM, far from removing them from the - I presume when he talks about removing them is, you know, whether or not to terminate the contract - far from exonerating them. If we had terminated the contract and pursued legal action, you know, vigorously and publicly, that would have if you like been a very explicit demonstration that we were blaming IBM. This doesn't quite make sense to me.

And consistent with your initial public statement of 29 June 2010?---That's right, yes.

That's the evidence-in-chief of Ms Bligh.

COMMISSIONER: Mr Traves?

MR TRAVES: No questions, thank you.

COMMISSIONER: Mr Ambrose?

MR AMBROSE: No questions.

MR FOLEY: No questions, thank you.

COMMISSIONER: Mr Doyle.

MR DOYLE: Yes, thank you. Just a few things, Ms Bligh. At the time of your January 2009 meeting with Mr Schwarten and Mr Grierson, can you recall please if one of the things that was discussed with you was that there had been a lot of changes of scope in the task to be undertaken under the QHIC project?---As I said in relation to my answers to Mr Flanagan, I really don't have a specific memory of the details of what was discussed at that meeting. I accept that the issue of this contract was discussed, and I can only take from the subsequent documents in relation to it what may or may not have been part of the substance. But in all of those subsequent documentation, the issue of scope and changes to scope are certainly included. I accept that there was a possibility or probability that was one of the issues discussed at the meeting.

All right. Well, I'm just asking what you can recall. As well, do you recall that topic, at least, was also attributed to some of increase in the cost of the performance of the QHIC project, changes of the scope of what's to be performed?---As I say, my recollection of this is really based on the documents and I think those issues are canvassed in the documents.

I'll try one more topic. Do you recall if an expression such as, "It's time to lock down the scope," or perhaps the expression, "Freeze the scope," was something that you can recall being raised with you in early 2009?---I don't have any memory of that kind of language.

Thank you. Help me please with your understanding by early 2009 of the QHIC project. Did you understand it to be an interim project?---As I said, I'm relying on the documents, certainly the documents demonstrate that there was a proposal.

The trouble with such an answer is it will encompass a great many things, great many documents. Just doing the best you can, at the end of 2008 did you have any understanding of the QHIC project being an interim one? ---No, I don't believe I did but it's possible.

Possible? At the end of June 2009, did you have an understanding of it being an interim project?---I'd have to refer back to the documents.

Our learned friend put it to you that it was to be an interim and minimum and that sort of concept. I just want to understand if you can now recall that first becoming something that was told to you?---Well, my understanding is that it's outlined in the cabinet budget review committee documents that were considered in 2009. I'd have to go back and see is that July 2009 or September. 10

It was July 2002, actually, but July 2009 makes the first of them. Okay, so would it be right to say, doing the best you can now, the first time you can reconstruct if not recall it being told to you that it was an interim project was in the middle of 2009?---It's likely in order to get to the cabinet submission point that it was raised with me at some point, but that's my first recollection it being formally advised. 20

Moving to a different topic, although perhaps they're all related, you've been shown some advices that you've received to assess the risks involved in making some arrangement with IBM or not making some arrangement with IBM, and that in part included an assessment of your rights, that is, the state's rights against IBM. In response to some questions, you've referred to IBM's responses itself to the notice to show cause and a notice of dispute, which I'll show you if you need to but I don't think you'll need to for these purposes. You understand, don't you, or you understood at the time that IBM challenged that it was in breach of the contract?---Yes. 30

And it did so on the basis that a lot of the delay and a lot of the cost - I'm going to give you a series of propositions - were attributable to the failure by the state organisations to cooperate in identifying what their requirements were, or failure by the state organisations to adhere to the scope and by keep changing scope enlarged the project?---Yes. 40

Do you recall those propositions?---Yes.

In respect of the deliverable 47, it's described as, I take it you've had occasion to look what that means?---Yes.

You know, don't you, that IBM at least had contended that the state's ability to rely upon what it said to be a failure to deliver deliverable 47 was disputed?---Yes. 50

In part because there had been an agreement to deal with some defects on the basis of a defects management plan - - -?---Yes.

- - - which displaced the operation of deliverable 47. You understood that to be the contention anyway?---Yes. 1

You also understood that IBM contended that it had complied with deliverable 47?---Yes.

And that the state had been calling things a severity 1 or 2 defects which were not?---Yes.

And had gone so far - that is IBM had gone so far - as to raise that in correspondence and you knew that that whole topic was dispute for various reasons?---Yes. 10

Thank you. You also knew, didn't you, that there was considerable scope for debate as to whether things quite a part from the system, the computer system, had led to the failure to give people their right pay?---Yes.

There had been concern about the implementation of a new business process by which people would only be paid if their rosters had been received and entered into the system by a certain time?---Yes. 20

Or changes to their rosters made in a certain time?
---Correct.

You knew that there were complaints that forms had been sent which were incomplete in various respects?---Correct.

Hadn't been sent at all?---Yes. 30

Had been sent but hadn't been acted upon - and so on, a whole series of those kinds of things?---Yes.

And that what was being presented publicly is the cause of the non-payment or the wrong payment of people could be said to have been attributable to those kinds of things?
---Well, I think there was quite a lot of debate at the time with various parties attributing cause and blame and it was - some of that I think was assisted by the review of the auditor-general and subsequent reports by Ernst and Young and others looking at the office software and the systems surrounding the implementation of the software. 40

50

Certainly in the period with which we're concerned up to 1
when the cabinet decides to progress negotiations with IBM,
you were aware that there were said to be causes - not
necessarily exhaustibly, but said to be causes which were
government-related causes rather than system-related
causes?---Yes. Yes.

And you knew, didn't you, as well that people had been
complaining of incorrect pay in respect of periods that
preceded the go live period - - -?---Yes. 10

- - - that is, complaints were made for things which had
nothing to do with the IBM system but which were being
publicized in the press as being due to it?---Yes.

Okay. Now, any assessment of what you would do - that is
you, the government, would do, would involve the
identification first of what your contractual rights were.
Yes?---Yes.

I take it that you would not have read the contract
yourself?---No. 20

Would involve understanding whether there had been a breach
and if so, whether it was by IBM or CorpTech or
Queensland Health?---Correct.

Whether if there had been some breach by IBM it had been
brought about by some conduct of Queensland Health or
CorpTech?---Correct. 30

Whether the result of that was the state has rights at all
against IBM?---Yes.

And you knew at least as far as IBM was concerned, it was
urging that there were no such rights?---Exactly.

And you understood that to be a reasonably arguable
position?---I don't feel that I was in a position to make
that judgment but yes, I was very aware that that was IBM's
position and as I said earlier in testimony, that informed
some of my thinking. 40

I think you said earlier in your testimony that the
gravamen of the advice that you received was that the
rights were at best fifty fifty. That was the language
that you used?---As a lay person, yes.

That will do. That sounds reasonably arguable?---Yes.

Is that how we should understand it?---That was my
understanding. 50

Thank you.

THE COMMISSIONER: Can I ask you where you got that from? I don't think I have seen documents, legal documents - - -? ---No, and I don't claim that it does. I was making, I suppose, a lay judgment about on the one hand we have Mallesons saying and Crown Law saying that we are on strong contractual grounds. I also had material from IBM which in response to the notice to show cause and then the decision by IBM to issue notice of a dispute that they refuted those claims by Department of Public Works on the strongest possible grounds so maybe making a judgment that it was a fifty fifty change is not quite the right way to express it, I felt there would be probably a hundred per cent chance that it would be actively contested and that there was at least some prospect given what I knew from the auditor-general's report that the blame from all of this was unlikely to be all on one party.

1

10

Accepting all of that, what was the real reason that the state never sought giving rise to the solicitor-general or senior counsel or even Mallesons on the question of prospects as it said so you had some idea, some idea, of the value of the rights that in the end gave way?---I can only answer that by saying we had the documents in front of us at a time when we had a sense of urgency about needing to make a decision, that I had no cause to have any - nor is there any suggestion in any of those documents that I had any cause to be other than confident about the advice that was being provided to me. It's not unusual for government to take the advice of Crown Law without necessarily seeking further from the solicitor-general. If the government had pursued - had decided to pursue or even further explore the legal option, I haven o doubt that we would have then sought much further and extensive legal advice and gone down the path as proposed by one of the advisors - or one of the advices to start to quantify the nature and potentially quantum of the damages but as I outlined earlier, there was, you know, advice that that would take months and it my view, it was months that we didn't have.

20

30

40

Is it the case that the sense of urgency to fix the payroll overrides every other consideration?---Not blindly. You know, the legal rights of the state were not something that were waived lightly or without - you know, a deal of regret as I have indicated but I felt we had really two very difficult options and we had to weigh up which one of those options was in the public interest and which was in the best interests of those people who were suffering as a result of the payroll, and it's fair to say that we had a sense of urgency about this. The first payroll had started to malfunction, if you like, in March. We're now, you know, some three or four months down the track. It's a very long time for people to have problems with their bank because their mortgage payments aren't being taken out - they're not able to pay for groceries - you know, these

50

were very traumatic events, these were not new inconveniences to people.

1

MR DOYLE: Thank you. Each of the legal advices to which you have been referred is expressly based upon a statement of facts which you knew were controverted by IBM. Is that so?---Yes.

Okay, thank you. Now, in terms of the timing of the settlement, that was - initially it was a six-week period that you were expecting a report back after your cabinet budget review committee meeting in July?---Yes, correct.

10

And you know that was extended for some time. It's right to say, isn't it, that your recollection is the timing of that was driven by the state rather than by IBM?---Yes.

Indeed, there came a time when it was reported to you that IBM was being slow in responding to proposals which were being put by the state?---Yes.

20

So it is right to say that the timing was a government-driven thing rather than an IBM-driven thing? ---I think that's fair enough.

Thank you. Do you have your statement with you?---Yes, I do.

Would you turn to - and it's on the annexures on it you're to go to. Page 24?---Page 22?

30

24?---All right. Yes.

This is - you will see a part of a note to you which we know now to be late June 2010?---Yes.

Prepared by Mr Smith?---Yes.

At the bottom of the page, second-last paragraph of 24, it refers to one of the possibilities that IBM could take lengthy and detailed legal action against the state would might involve counterclaims in relation to the government's role in the Queensland Health payroll implementation. Now, do you recall any discussion about that particular topic, either in the July cabinet budget review committee meeting or later on in August or September?---I certainly recall that being part of the discussions surrounding the decision at the CBRC meeting of July.

40

Right. Is it in this context that it was known that IBM disputed the facts upon which the state's position was based?---Yes.

50

And that it contended it had in fact rights under the contract against the state?---Yes, and those matters were made clear by IBM in their response to the notice to show

27/5/13

BLIGH, A.M. XN

cause and that was attached to the cabinet submission and it was discussed as part of the decision-making process.

1

Thank you. One more topic, I think. Page 48 now, please. This is on a document headed Risks of Moving to Terminate Immediately. Do you see that?---Yes.

And this was a document that was considered by you in the July cabinet budget review committee?---Well, my recollection was attached to a briefing note in relation to the government's response to the auditor-general's report. I don't believe it was attached to the CBRC submission but the contents of it are repeated in different formats in different documents.

10

Nonetheless it's something that you would have known of at the time of that meeting and, therefore, subsequently? ---Yes.

Just read to yourself please paragraph numbered 6?---Yes.

20

Again, what's identified here is a risk of not negotiating with - I'm sorry, of moving to terminate IBM - is in part that it would leave IBM free to comment on project implementation as it saw fit. Do you recall a discussion about that point at all at the July meeting or the August meeting?---No, not particularly.

COMMISSIONER: What does it mean?

30

MR DOYLE: That's what - - -?---I'm not entirely sure. I think it may be someone trying to protect the government from further embarrassment, which I think was very heroic at that point.

Okay. Whether it was capable of protecting the government or not, it was identifying an acknowledge that IBM took the view there had been failures within the state's administration of the project - - -?---Yes.

40

- - - which it would, no doubt, wish to make - the concern expressed here is that would become more publicly known than it was at the time?---Potentially, yes.

Thank you. Thank you. I have nothing further.

50

COMMISSIONER: Mr Kent?

1

MR HADDRICK: Mr Commissioner, I probably should record that I have no questions in respect of Mr Brown who had - - -

COMMISSIONER: I didn't because I thought that the leave you asked for - and I gather it wouldn't have extended to asking Ms Bligh any questions.

10

MR HADDRICK: Ms Bligh was asked questions about the memo of 19 August.

COMMISSIONER: I see. All right.

MR HADDRICK: So I should just record that for transcript purposes.

COMMISSIONER: All right, thank you. Yes, Mr Kent?

20

MR KENT: Ms Bligh, if I could take you please to volume 2 of the tender bundle, page 3.

COMMISSIONER: Sorry, which volume?

MR KENT: Volume 2?---I'm not sure if I have tender bundles. I think these are all settlement bundles, am I right, in that letter?

Thanks.

30

COMMISSIONER: It's the tender bundle for settlement. There are two tender bundles?---Okay.

MR KENT: It's just a term of art, Ms Bligh?---So it is this volume?

I'm pretty sure you've got it there?---And which - - -

Page 3?---This is a document from Blake Dawson to Mr Grierson. Yes.

40

Blake Dawson?---Yes.

I think you may have mentioned this document or its existence in other evidence that you've given today about something that you might have been generally aware, but I'll take you to some details of that in a moment.

Firstly, do you accept it seems to be a response given by Blake Dawson on behalf of IBM to previous concerns raised and, indeed, the notice to show cause?---Yes. This is the show cause; not the issue to remedy.

50

No, no?---I'm looking for a date on it, but subject to that date, confirming that, yes, 6 July.

27/5/13

BLIGH, A.M. XN

32-47

60

6 July on the first page and we see after the first big paragraph the subheading Notice to Show Cause. Do you see that?---Yes, yes.

1

I just want to take you please - firstly, did you see at the time this actual document or any reports of it or its contents filter up to you and the other members of the Cabinet Budget Review Committee?---This document was attached to the Cabinet Budget Review Committee's submission. It was provided to all members of the committee and it was the subject of discussion.

10

So if I take you then to the next page, page 4, which is the second page of the letter - can I take you please to the bottom third of the page, there's a paragraph starting with the words "in addition". Do you see that?---Correct.

And IBM is there asserting that it sets out what it requires the state to consider and referring to the report of the auditor-general. Correct?---Correct.

20

A little bit further it goes on to develop what's said to be demonstrated, that is the difficulties, including the four set out there; inability of the state to articulate business requirements, the processes for user acceptance testing, the training state staff and the effectiveness of the state's project governance. Are these the kind of things that were being expressed at that stage of the possible opposing case that was coming back from IBM in response to the notice to show cause?---Yes, yes. From my recollection, these are largely the failings that were identified by the auditor-general. Those were in the public realm. They were the subject of discussion and had been tabled in the parliament so I had no reason to doubt them. The auditor-general is pretty vigorous in their review, so that - whether or not there was a legal basis on which IBM could rely on was not something I'm qualified to judge, but, yes, IBM would have been aware of them because they were in the public arena.

30

That correspondence seemed to be nailing their colours to that mast. They were flagging their intention to rely on it?---That, amongst other things. The rest of the document goes through other documents, but, yes, that was certainly one of the things that they were raising.

40

Quite so. Can I take you please - and you've already discussed a couple of occasions the Cabinet Budget Review Committee decisions of 22 July, I think. Correct?---I think so. Yes.

50

Do you have your statement there?---Yes.

If you look at page 11 of your statement please?---Yes.

From paragraph 65 onwards you discuss really the Cabinet Budget Review Committee decision of 22 July and in paragraph 68 you set out in a number of subparagraphs the things that informed your approach to the decision. Correct?---Correct.

1

Those include, as you've already explained, matters that were included in the IBM response of 6 July?---Yes.

As I think you've agreed with Mr Doyle already, the advices that you were getting about this were based on assertions of fact that you were well aware at all times were in issue between the parties. IBM had a different view of them? ---That's exactly right.

10

I think you said a moment ago in an answer to a question from Mr Commissioner that at the time when any possibility of getting a precise advice about both liability and court - your earlier was that from Crown Law that might take months and in answer to Mr Commissioner's question, you explained that you didn't really have months at your disposal. At that stage you thought - - -?---Yes.

20

- - - you'd get more precise advice. Correct?---Yes.

Just tell me if you can why you didn't (indistinct) for months. I know that you say that there were pressures on you. Can you just explain that for me please?---What was at stake at that point was the rectification of a number of significant defects in the system. IBM had responsibility in my understanding for the rectification of those under the contract, but there was some dispute from IBM about whether all of those fell within their responsibility.

30

Those defects were, as you would expect, is my understanding, is they ranged from the sort of less serious right through to, you know, the very serious and we needed those fixed as quickly as possible. The parties were moving towards a more legalistic way of dealing with this. The parties had - the IBM party had moved to issue a notice of dispute. There was a show cause. There was a response.

40

Things were going down a legalistic track and we had to make a decision if we were going to pursue that, what are the risks and if we're not, we need to have an orderly as possible transition out of this contract to protect the people who are affected by its deficiencies.

You were driven, in short, by a solution to the payroll problem?---Yes.

50

Can I take you back then to your annexures and Mr Doyle took you to page 24. You may be relieved I'm going to take you to the same page and, indeed, the previous paragraph to the one that he took you to. So from the bottom of the page it's the third dash up from the bottom, "It should also be noted"?---Yes.

Do you see that there?---Yes.

1

What that says in the briefing note is that:

Up to 60 IBM staff were involved in what was said to be critical IT support to government, not only of Queensland Health program but also elsewhere in government.

Correct?---Yes.

10

As it's expressed there, that was a concern for the rapid termination of the contract?---Yes.

Was that a significant risk that was also being considered? ---In relation to contracts in other agencies?

Outside Queensland Health?---I would say that was a much lower order consideration, none of those to the best of my knowledge at the time were unstable or volatile or required any particular attention and I was not aware of any dispute in relation to contracts with IBM in relation to any of them, so I think it's been included in a briefing note for completeness, but it was never something that - it was a very lower order issue.

20

Conceded it was critical, really, at this time?---From my perspective at the time, yes.

Thank you, Commissioner.

30

COMMISSIONER: Mr Plunkett?

MR PLUNKETT: Yes, sir, I have no questions of Ms Bligh.

COMMISSIONER: Mr Flanagan?

MR FLANAGAN: May Ms Bligh be excused?

COMMISSIONER: Ms Bligh, thank you for your assistance, you're free to go?---Thank you, Mr Commissioner.

40

WITNESS WITHDREW

50

MR FLANAGAN: I call the honourable Robert Schwarten.

1

SCHWARTEN, ROBERT EVAN affirmed:

COMMISSIONER: Sit down, please, Mr Schwarten.

MR FLANAGAN: Mr Schwarten, would you give your full name to the commission?---My name is Robert Evan Schwarten.

Mr Schwarten, had you executed two statements for the commission, the first dated 20 May 2013 of nine pages? ---That's correct.

10

And the second undated of four pages?---That's correct.

Would you look at these documents, please. Are they the documents you've executed for this commission?---They are, Mr Flanagan.

And are the contents of those documents true and correct to the best of your knowledge and belief?---They are.

20

Mr Commissioner, I tender the two statements of Mr Schwarten.

COMMISSIONER: Yes. Mr Schwarten's two statements are respectively exhibit 138A and B.

ADMITTED AND MARKED: "EXHIBIT 13A AND B"

30

MR FLANAGAN: Mr Schwarten, you were the minister for Public Works between 29 August 1998 and 21 February 2011? ---That's correct.

And information and communication technology between 12 October 2006 and 21 February 2011?---That's correct.

In July 2008, a decision was made by the then premier to effect a transfer of CorpTech and indeed its responsibility for the contract of 5 December 2007 between IBM and the state of Queensland from Queensland Treasury to the Department of Public Works. Do you recall that decision? ---Yes, I do, not with fondness.

40

All right. And the premier and you met prior to the transfer occurred and you had a discussion in relation to it. Yes?---That's correct.

Do you recall that discussion?---Part of it. I remember the premier telling me at the time that there were some issues in this world that you just don't get, and she said that it was time to move this, she had grave concerns about it and she believed that it needed to go away from Treasury and come over to Public Works.

50

Do you recall what those grave concerns were about the Shared Services Initiative?---Basically, the premier had indicated to me a lot of money had been allocated to it, she wasn't happy with the way that it was progressing, she believed that it needed a new set of eyes on it, she believed that we had experience in contract and we had the other part of ICT and it was a fit - a perfect fit to that.

All right. Did you express any reluctance in relation to - - -?---Yes.

- - - first of all receiving CorpTech under your portfolio, and, secondly, being responsible for the ICT contract as between the state of Queensland - - -?---I think it would have been a general sort of statement of displeasure, but the premier makes these decisions, the premier has got the right to do that so there's not much point of protesting about it but I welcomed it probably to the extent that I guess a foal would welcome a carpet snake into their coop.

COMMISSIONER: What was your reluctance to take it on? ---We had enough on our plate at the time, we had a huge capital works program, we had quite a few balls in the air in the ITC platform anyway. But I also knew that I was getting a mother-in-law kiss, if you like, with all due respect to my dead mother-in-law. I knew of the difficulties in it because we had it in housing that it wasn't all going tickety-boo, and from what the premier had said, that there had been constant issues. I was aware that they had 10 implementations but everybody wasn't a happy camper. I recall at the time my father was dying, we were out at a pub at Kelvin Grove and some bloke come up and abused the hell out of me about shared services. I don't know what he had to do with it, I ended up getting him chucked out of the pub, so he obviously wasn't a happy camper. Just a general scutterbuttry in government that it wasn't going to be a maiden's prayer that was being handed over, and that sort of drove me to immediately get Mal Grierson to have due diligence on it. I think I said at the time, "It's like getting an unroadworthy motor given to you, the first thing you do is you get it checked out." If you've got an unregistered car given to you by a mate, the first thing you do is check to see how many damage it's going to cost you in the pocket. I was under no illusions that there were problems with it, yes.

MR FLANAGAN: After Mr Grierson did his due diligence as requested by you as the relevant responsible minister, did he report back to you?---Yes, he did.

Mr Schwarten, what was the results of Mr Grierson's due diligence?---Well, he confirmed our worst fears that it was not going to - we were not getting something that was without its challenges, I think would be the mild way of putting it.

COMMISSIONER: Can you remember, if you can, what the challenges were that Mr Grierson identified for you?---From memory, IBM was responsible for having the implementation of platforms right across government and there wasn't enough money to do it, in the budget there was simply not enough money to do it, that there were many outstanding programs, that there had been innumerable numbers of contractors brought in to work on it and that the level of progress commensurate with the number of people being employed simply wasn't there. They're a few that come to mind, but obviously part and parcel of the other discussions at the time were about the Health payroll, they were coming separately from Natalie MacDonald at the time who obliged me on a couple of occasions, I think probably early in July or something like that, that it wasn't going live because of problems. And then later in November or December, the same thing, that they were having problems with it, but that was separate to the due diligence. I can't recall Mal raising as part of the due diligence the problems with Health, but what his solution to it was that we needed to confine IBM to a couple of programs because of the wider agenda that it had was simply not going to be able to be fulfilled. That was the main message that I got out of it, was that we would simply not - that IBM would not be in a position to fulfill this contractual role right across all the platforms, and it was on that basis I think that Education was going to go back to TSS, I think, rather than go onto the SAP platform.

MR FLANAGAN: Before we come to the re-scoping that occurred on or about 27 January 2009, you and Mr Grierson went to the United States to identify and look at certain IBM facilities. Is that correct?---That's correct. Austin, Texas, we had a look at their green data centre. At that stage, we were building the data centre out at Springfield - I just can't think of the name of it at the moment.

First of all, that was in conjunction with IBM?---Yeah, that was in conjunction with IBM. We had a look at their data centre there, we also - - -

just to confirm, that is a project quite separate and distinct from any works being - - -?---Absolutely.

- - - conducted by IBM under the 5 December contract? ---Absolutely nothing whatsoever to do with it, and the same in Washington.

Now, when you attended in September 2008 with IBM representatives at Washington, do you recall Mr Grierson raising with IBM representatives any concerns that you and he had in relation to 5 December 2007 contract and its performance?---Yes, I have recollection. I can't remember exact words that he used at the time but I think his sentiments were basically that you haven't put your best foot forward, you haven't given us the time and we're not very happy about it. Primarily what we looked at there was their interactive technology, eGovernment, was part and parcel of what we were looking at there. It was - from memory, it was called IBM Jam. IBM Jam was the major topic of discussion but Mal certainly used that opportunity to - well, I wouldn't say read the riot act but certainly to make his displeasure known at what the concerns were - the limited progress that he saw.

Did that have any practical consequences in relation to the implementation of the contract when you arrived back in Australia?---Well, as I understand it, there were then further discussion - whether it had the desired effect of sharpening their minds on the issue, I really can't comment but I do recall that there was far more seriousness taken, I think, by IBM at that stage. Whether it was as a result of that or further meetings that Mal had with them when he had come back, I couldn't say.

All right. Can I move then to the rescoping of the works to be conducted by IBM under the 5 December contract. You recall that you met with the premier and Mr Grierson and the premier's office on or about 27 January 2009?---Well, I can't remember the date but yes, I can recall a meeting with the premier.

Mr Schwarten, doing as best as you can sitting there, can you tell us the effect of what was said and discussed at that meeting?---Well, basically, it was as I started to branch into when we were talking about the due diligence, it all came out of that as to what we could expect for the money that we had, what it would produce and to do that it was designed to rescope the whole of what we were doing and concentrate on getting Health, that was the number one issue, it was seen by Mal at that stage, it was important to me that we needed to confine ourselves to a much narrower scope than was previously the case in order to get that through and that concentration should have been down that path of Health and other departments were to go into either a different priority or a different order, hold the same platform that they had.

Now, prior to attending this meeting with the premier, you received a briefing note, did you not?---Yes, I would have done.

Can I show you the briefing note?---Yes.

It's volume 8 of the contract bundle, page 84. Sorry, I said page 84, I should say page 64?---Didn't we put any electronic facilities in this when we built it? What is it? Page - - -

1

Page 64 but it begins at page 63. This is the ministerial briefing note that you received for your meeting with the premier?---(indistinct).

Now, were you aware at that stage or at least informed - whether it was true or not we're not concerned with it - but were you informed IBM had under-estimated the cost and scope of the works to be conducted under the contract of 5 December 2007?---Yes, I believe that is the case.

10

Did you appreciate at the time that for the roll-out of the Shared Services Initiative for the whole of government under this particular contract that the money simply wasn't there to increase the amount?---That's correct.

20

All right?---That's correct, and I thank you for jogging my memory on that because that's precisely what the due diligence show.

Right. Now, Mr Schwarten, do you recall that prior to this meeting with the premier, you had a meeting in Rockhampton or a dinner meeting in Rockhampton with Mr Marcus Salouk from Accenture?---No, I don't recall it. I've got a pretty good memory but I actually don't recall it but I don't dispute that it occurred.

30

Do you recall him saying words to the effect to you of IBM having won the tender over Accenture that you should keep IBM's feet to the fire?---No, I don't recall him saying that at all. As I say, I don't recall that function at all but I have no doubt that it occurred because a restaurant that I (indistinct) and the statement that I read that Mr Salouk made was I then referred him to the director-general and the director-general - that would have been the normal consequence of somebody raising that with me. I would have said to him that, "I'll make sure that Mal Grierson knows about that and then you can get in to see him and make your position known on that." I'm afraid I just don't recall anything and my wife doesn't recall it either. I've got no doubt that we were there but all I can say is that it couldn't have been too spell-binding because I would have recalled if someone had said to me something dramatic was going to happen.

40

In terms of the contents of this file note, do you recall what matters from it you brought to the attention of the premier so as to receive at least from her a preliminary decision that IBM were to proceed only with the interim solution for Queensland Health?---Not really. I can't - I probably would have brought it all to her attention because I would have memorized it before I went in there.

50

All right. Before this meeting, Mr Schwarten, you no doubt discussed this in detail with Mr Grierson. Yes?---Yes, I would have, yes.

1

Because ultimately the premier has presented with one option only and the one option is no further statements of work to be entered into with IBM under the contract and IBM to complete only the interim solution for Queensland Health. Yes? ---That's right.

10

Now, in your discussions with Mr Grierson, you too prior to going to the premier must have decided why this was the one option to be presented?---Yes.

Now, why was that?---Well, Mr Grierson was of the view that this was the safest track to go down, that this simply - by scattering the services as it were or scattering the effort, there was less likelihood to pick a winner. We obviously - he was obviously of the view having done the research that he had into it that we had to weigh up the priorities and weigh up the risks and the greatest risk at that stage was the most complex IT program and that was with Health and he had his usual confident manner, would have weighed that up and came to the conclusion that we are far better off concentrating our efforts on the greatest need given that we didn't have an inexhaustible supply of funds.

20

As at January 2009, had you lost faith in IBM in relation to the implementation of the 5 December contract?---I wouldn't say lost faith in them because had we of lost faith, it would have probably been a different story but we're certainly frustrated, certainly angry I think might be another word, disappointment is a bit light on, quite frankly, in the feeling but anxious about their capacity to respond to what we were asking them to do and given that they are a huge name around the world, it didn't match with what their efforts were in reality to what we were seeing but I think loss of confidence is a bit stronger - - -

30

How would you describe it?---Sorry?

40

How would you describe it?---Concerned that they were not meeting the reputation that they had and not fulfilling the deadline. Worried that they weren't taking us seriously so that's the anger bit of it, I suppose, that they weren't taking it seriously and that they needed to be given a hurry-up of organization, they had come to the table with its reputation, it shouldn't have been flogged into action the way it was.

50

Given that they were given your concerns at the time, you appreciated that Queensland Health had 78,000 employees. Yes?---Absolutely. My primary concern as a Labor minister was to ensure that people got paid.

You also appreciated that the awards system for Queensland Health was the most complex award system for any department, perhaps apart from Department of Education, but it was certainly one of the most complex agencies in terms of payroll and - - -?---Well, I believe it was more complex than Education because of the number of people who were on rostered shifts and I think there was something like - I don't know, is it 18 different awards and 15 different industrial agreements, yes.

1

Given the complexity of the agency and given what your views of IBM were at the time in relation to the whole of the contract, why was it that you decided with Mr Grierson to present an option to the premier of Queensland that IBM should proceed only with the most complicated agency for an interim payroll solution?---Well, we had faith in - as I say, we hadn't lost faith otherwise we wouldn't have done that. Mal was obviously of the opinion and advised me accordingly that they had the capacity to do the job. He had never at any stage said to me, "I don't think IBM have got the capacity to do the job," but the fact was they were there, they had their employees into the program, we weren't left with a lot of options I would have thought at that stage to go and get somebody else to carry out this job.

10

20

30

40

50

Could you explain to us why you didn't have an option of finding another member or, indeed, terminating IBM and looking to the market for a different vendor to carry - - -?---Well, if I - - -

1

- - - out what was a distinct piece of work?---Yes. Well, the advice that I had received at all points was that they had more skin in the game than anybody else. They had their employees in the program and, quite frankly, nobody ever came to me and said, "It's safe to take IBM out. Nothing will happen if you break a contract with IBM." Every bit of information and advice that I ever received was, "If you stand IBM up, they may well down tools and you'll end up with a fate worse than death in it," and by that I mean you'll end up with a system where you'll end up having to draw a couple of hundred million dollars out of banks all over Queensland and send a pay card around the state to pay people. That was always firm in my mind that they had people in the job who were delivering it and if you took them out of the equation then that would have happened and so that was always my concern.

10

20

Did you discuss with Mr Grierson any other option than the one proposed to the premier in this document?---I don't believe so.

All right, thank you. Did you ever give consideration with Mr Grierson to instead of having an interim solution for the Queensland Health payroll system that, given it was to be the one project for IBM at that stage to have a more permanent solution - - -?---I'm sorry, I'm not sure - - -

30

Instead of having an interim solution, did you turn your mind with Mr Grierson to having a permanent solution for Queensland Health?---No, I don't believe we did. I think that we were tasked with the reality of a program that was halfway through, or better than that, and as such we had to soldier on and, as I say, this whole thing started well before we got hold of it and we could only ever try and find an interim solution to it because the contract had already been led.

40

In paragraph 24 of your statement, if you turn to that, that's the first statement that you provided to the commission, you say, "Mr Grierson's view was that we had to get IBM in, read them the riot act and get them to re-engage and refocus. I accepted that advice." Did you leave it to Mr Grierson to carry that out or did you carry that out personally?---No. Mal Grierson would have carried that out.

50

Do you recall what the response was from IBM?---Well, no, I don't as a matter of fact.

You met with Mr Grierson on a weekly or daily basis? ---Well, whatever the need took us, but on average it would

be weekly, but probably during some of this, it would be on a daily basis. You've got to remember that there was - it was the number 1 red hot issue in the department at the time and Mal was trying to juggle with it, so either him or Natalie MacDonald I would have been speaking to at least on the phone or meeting with them regularly about it.

All right, thank you. Can I take you then to the Cabinet Budget Review Committee decision of 21 September 2009 and for that if you turn to volume - - -?---Did you say 10
21 December?

21 September 2009?---September? Okay. Sorry.

If you go to volume 1, page 67?---Sorry. What was the page, 67, you said?

Page 67?---Mine is signed by Bronwyn Griffiths.

If you turn to page 70, you'll see there that you've signed a submission which suggests that IBM would only complete the implementation of the Queensland Health payroll system? ---Yes.

Even though that's the decision made as at that date by the Cabinet Budget Review Committee, you accept that for all practical purposes, Mr Schwarten, once the premier decided on 27 January 2009 that IBM would simply concentrate on the interim payroll solution that actually occurred?---Mm.

This is formalising that decision made, albeit on a preliminary basis, by you, Mr Grierson, and the premier on 27 January 2009?---Sorry. What's your point there, Mr Flanagan? I'm sorry.

Sorry. This simply finalised a decision that had been made previously by you, the premier and Mr Grierson on 27 January 2009?---I guess so. I'm just trying to familiarise myself with what other realms might have occurred on 27 January. My (indistinct) consolidating existing agency there was a smaller number of supported - no, I think that's right. Yes.

Thank you. Can I take you then to the go live decision in March 2010?---Yes.

When was it first brought to your attention and by whom that the Queensland Health payroll solution after go live was encountering problems?---That I can't actually recall. I presume it was Natalie MacDonald, but I couldn't be absolutely certain as to the point in time and the person who said, "Hey, there's problems with the payroll." I think it was probably a culmination of a lot of things, newspaper reports or whatever at the time, but I can't remember exactly the person because I actually made a

statement to the parliament about the successful implementation of it based on the advice from the department.

1

Yes?---And I had checked that with the minister's office, the Health minister's office, to make sure that that was okay and their advice was it was.

Could you look at this document please?---Is that the statement is it?

10

Yes?---I pretty well remember it.

Good. Thank you?---I think it is gratuitous towards IBM, if I recall correctly, saying that they had said that it was the hardest - if I can find it, "I'm extremely proud of this outcome of the combined Queensland Health, IBM and PPW project team for delivering such a good outcome," if you could only retract those words.

20

I tender that document, Mr Commissioner.

COMMISSIONER: Yes?---I recall making it and I had gone to the extent of checking with the minister's office - the Health minister's office and I think it was that and as a result of that I think it was down the order of batting that day of checking it for that reason.

The extract from Hansard of 25 March 2010 will be exhibit 139.

30

ADMITTED AND MARKED: "EXHIBIT 139"

MR FLANAGAN: Mr Schwarten, do you recall in or about April 2010 that you also conducted a press conference where you suggested that it was not a systems failure on the part of IBM, but rather it was a data entry failure on the part of the Department of Health. Yes?---Yes, I recall many conversations I had along that line of suggesting that there was nothing wrong with the system, per se, that the system delivered. I was assured by IBM, the system - and by SAP - did what it was supposed to do; that I made that claim on a number of forums, much to the mirth of people and the opposition and so on and I stand by it and still believe that the system paid people. If it wasn't, nobody would have got paid. I tried to make that point on a number of occasions that had the system failed then nobody would have got paid. We would have been back to the scenario that I talked about, pay cards and a fist full of \$50 notes, so I still maintain that that is the case.

40

50

Can I take you to volume 2, page 223 then. If you start at page 222 of volume 2?---222?

222?---Right.

These are notes that were given to you for the purposes of making the presentation at the Cabinet Budget Review Committee decision of 22 July 2010?---Yes.

1

Do you see that?---Yes.

It gives you the background on page 222 and then at page 223 it identifies anticipated criticisms for other members of the committee, such as the premier, the treasurer and Mr Lucas not agreeing with your view as to negotiating a settlement with IBM. Do you see that? ---That's correct. It's not unusual to have a briefing note.

10

20

30

40

50

Quite. And it gives you preferred responses that you would make in relation to why a settlement with IBM was preferable to actual litigation. Yes?---Yep.

As you sit there now, do you recall at the meeting of 22 July 2010 that you attended any minister resisting your suggestion that a negotiated outcome was to be investigated?---Well, I'm certain that Paul Lucas, being a lawyer, and no disrespect to the room full of lawyers that we have, was he had previously been very adamant about suing IBM. I guess that's what you lawyers do, you love to sue people. When we got into that room it was, near as I can recall, much the same as any other cabinet meeting where people had views and you discuss those views and you come to a consensus as to those opinions. As I recall it, Paul was prepared in the cool, hard light of day and the information that came to consider this, and we discussed it at some length about the pros and cons of doing it and we came to a consensus that going down the path of suing was going down the hard path where hell was paved.

10

20

If you turn to page 224, this is dealing with the issue, "CBRC members may question the urgency resolving outstanding contractual issues and the state's position with IBM." Do you see that? At the very last paragraph of that page, it says, "The public perception of a failed rostering and payroll system means that continuing with IBM and paying it more money is not an option." Do you recall that being discussed at all?---No, I can't recall it being individually, but that's consistent with the sort of discussion that was around at the time. Certainly, the public perception was anything but praiseworthy of IBM, or indeed the government for that matter, at that stage.

30

Do you recall that your press statement made in April 2010 was actually repeated in an IBM submission to the government responding to notices or formal notices issued under the contract?---No, I wasn't aware of that.

Can I take you to the settlement bundle, volume 3, page 88? ---I don't think I was aware of it anyway. Could you get me a cup of water, please? What did you say? 3?

40

Volume 3, page 88. This is actually a letter from Blake Dawson, the then solicitor for IBM, dated 13 August 2010. First of all, if you just note for me at this stage that in this letter from Blake Dawson - - -

COMMISSIONER: Mr Flanagan, I don't think we have that.

50

MR FLANAGAN: Page 85?

COMMISSIONER: You said volume 3, page 88?

MR FLANAGAN: Page 88, I have, but I'm starting at 85.

COMMISSIONER: Okay. All right.

1

MR FLANAGAN: There should be a letter from Blake Dawson - - -?---Yep, okay.

- - - dated 13 August 2010?---All right.

This is correspondence entered into between the parties whilst trying to negotiate a settlement, so it's probably correspondence that's not been specifically brought to you attention, Mr Schwarten?---Never.

10

Did it ever come to your attention, if you look at the second paragraph of that letter, that IBM, as part of their negotiation, were seeking to have the contract terminated by 31 August 2010 and services under the contract transitioned to the state by 31 August 2010?---No, I don't believe I was ever made aware of that. In other words, they were going to walk away from the contract.

20

Or have it terminated by 31 August 2010, with the transition to CorpTech by 31 August 2010. So the question is: were you aware of that at the time?---No, I don't believe so.

Thank you. If you then turn to page 88, this is IBM's response to systems issue which was issued under the draft settlement terms sheet. They used your press statement - - -?---Okay, right.

30

They said:

As stated by Mr Robert Schwarten, minister for Public Works on 13 April 2010, "The system, there is nothing wrong with it, they're not systems failures. There is no suggestion that it's a system failure, what it is, is an issue with regard to inputting of data".

Do you see that?---Yes.

40

Was it ever brought to your attention that the term sheets in terms of negotiation originally identified approximately 67 defects?---Yes. I couldn't say the number of defects, but, yes, certainly defects. I didn't regard that as a systems failure.

Ultimately, in relation to the supplementary agreement, do you recall that IBM were required to fix approximately 35 defects by 31 October 2010?---Again, I can't remember the number but there were certainly defects. Let me just clarify what I mean by "system", and I had this difficulty since day one of it, of explaining this. The SAP pay system, I said, paid people and the evidence of that it

50

pays QR Queensland Rail it pays. I was told over the weekend it pays one of the biggest coal mining companies in Australia, it pays Walmart and all of those so the system actually worked, the SAP system actually works and that was my point all the way along. There were defects in that system which may have been caused by lack of data cleansing or whatever the case may be, but the overall statement that the payroll system did not work was not true as far as I was concerned, and I still maintain that.

1

Did you ever investigate, in terms of the system having defects, who was responsible for those defect?---One of the things I did on quite a number of occasions was to actually go up to the Rockhampton payroll hub and sit down with the people there. In fact, I used to buy them champagne at the end of the week because they were putting in such an effort. They worked above and beyond the call of duty, people ringing them and abusing them and all the rest of it, it was dreadful. So I would have gone up there on half a dozen occasions and every single person that I spoke to there told me that it wasn't a systemic failure, it was a failure to get either the code right or some scope that was made that was left out or whatever the case may be. But nobody ever said to me, "It's a failure." In fact, one payroll woman said to me that she had been there since the days of the pay cart and that the problem always had been in Health, a lack of understanding of what there had been required for the number of people that were there. She said, "Even in those days they got it wrong," and she said, "And LATTICE for that matter doesn't get it right either." That prompted me to make the decision - make the statement that I did, but certainly defects I was aware of. What caused those defects may well have been a lack of correct information in the first place, the scope may have been wrong, the data may not have been correct. In one case that I took up from somebody who came to my electorate office, this person claimed that they had not been paid their termination pay, long service leave. When it was tasked right back, which I had CorpTech do through Natalie MacDonald, it came back to me that this person, as far as Queensland Health's concerned, was not entitled to long service leave because they weren't a permanent employee, yet they've been with Queensland Health for 15 years. So yet the data that came over from Queensland Health had said, "This person is not who they seemed to be," so that's why the person didn't get their long service leave. I don't know how that was ultimately resolved, but that would have been a defect in somebody's eyes when in fact the system was paying those people according to what it was told.

10

20

30

40

50

The problem that we have is this: you're the person who is advising the cabinet budgetary review committee, correct?
---Yeah.

And you're the person who's putting or signing your name to the submissions both on 22 July 2010 and on 26 August 2010, that cause them to bring about a decision whereby a settlement with IBM is done. Yes?---Yes.

1

And whereby there is a full release by the state of IBM's warranties and a full release by the state of IBM's ongoing responsibilities under the contract?---Yes.

And a release from the state being able to sue IBM in the future for damages. Yes? Correct?---You say the problem we have?

10

No, no. I'm saying this is what was ultimately decided that IBM would be released - - ?---Yes. That's what was decided, yes.

20

30

40

50

If they were to fix 35 defects by 31 October 2010. Yes? ---I don't know the number, as I said, but, yes, the defects were to be fixed.

1

It would seem, however, Mr Schwarten, from all the documents that one of the primary reasons for keeping IBM on was to fix defects. Yes? ---The primary reason for keeping them on, in my mind, was that there was no alternative. There was no alternative to keeping IBM on, as far as I was concerned. Everything that I ever read, every bit of advice that I ever gained from any person of any credit or merit said to me, "Do not, whatever you do, take IBM out of it," and I believe KPMG made that statement as well. The statement was consistently made to me that if you took IBM out of the game, the chances of the thing falling over - if they took their personnel out of the game, the chances of that whole thing falling over were indeed something to be considered.

10

But if you thought these defects were not system defects and IBM was responsible for delivering a system under the contract - - -? ---The defects were pretty - as I understand it, the defects were pretty considerable when the rostering system was taken into place. I mean, that's what they were working on. They were to fix those defects and people weren't getting paid and that's what the defects were about, but again I say the system worked and there were malfunctions that needed to be fixed, as you would in the warranty system.

20

You were going to explain to us what you mean by when you say, "The system worked - - -"? ---I'll have another go at it. The system was an SAP payroll system which paid people. That system worked because the majority of people got paid. What was the problem was that there were people who were on rosters, people who were in - as I understood it from talking to the - I'll give you one example, the groundsman at Rockhampton Hospital. He told me he never had trouble with his pay because it was the same every week yet the payroll people at Rockhampton told me of all these people who would ring in who would have problems because their pay hadn't been completely correct or in some cases it was completely wrong and in some cases didn't exist at all and the reason for that was some form of a defect. Now, the only people who could fix those defects, as I was told, were the people who were working on it and IBM was part of that deal.

30

40

We might try it this way? ---All right.

50

We understand that the state of Queensland settled with IBM. Yes? ---Yes.

They ultimately settled on your recommendation as minister for public works? ---That's right.

Yes?---Yes.

1

That was based on information given to you by Mr Grierson who conducted the face-to-face negotiations with IBM representatives?---That's correct.

Yes?---Yes.

In relation to the decision to settle, what ultimately informed you that the state of Queensland should release IBM from all future damages claims and settle on the basis of the supplemental deed of 22 September 2010?---Well, for a start, we tasked Mal Grierson with the role of getting the best deal that he could to keep IBM in the game to get the payroll system completed. Now, I use that word "system" again. I can't find another word to use although I accept that system is misleading, but to make sure that everybody got paid and everybody got paid correctly. It was his job to go out there and do the best he could with IBM. Why IBM? Because there was nobody else in the game at that stage that had the capacity, as I was advised, to make that happen.

10

20

Can I just stop you there just to clarify something, Mr Schwarten?---Yes.

Was that a writing instruction that you gave to Mr Grierson that in terms of the settlement negotiations, his primary objective was to ensure that everyone who should be paid correctly under the Health payroll system - - -?---No, no, it wasn't. No, it wasn't; no.

30

Can you tell us then what was your - did you give Mr Grierson a writing instruction?---No, I didn't. I didn't give him any writing instruction because that was given by the CBRC, but I would have assumed that that's what Mal would have taken to do. If you read the decision of the CBRC, he was sent out with CBRC approval, not with my approval, but CBRC approval, of which I happen to be part of, to go out and do the best deal that he could with IBM to get the problem sorted out. I'll put it that way.

40

But sitting as you are right now, can you just inform the commissioner what facts you took into account in deciding that it was best to settle with IBM? What was the primary factor that weighed on your mind?---Well, the thought that there were still people out there who weren't getting paid correctly. I mean, you would have to have been on the moon not to have realised that there were problems and, you know, people were visiting my electorate office. There were stories in the paper about Health workers being sent to charities and heaven knows what else. There was consider concern in the community, but that concern was diminished by comparison to my concern with what might happen had the situation been allowed to deteriorate and

50

how could the situation have been allowed to deteriorate if you took away expertise that was already there. What was that expertise? That expertise was with IBM, as I was advised. KPMG said it; that whatever you do basically to distil it down, don't break away from IBM. They've got a lot of skin in the game. They've got a lot of expertise in the game and I'll say it again, nobody ever said to me, "It is safe to take IBM out of the picture." No-one has ever suggested that to me. No-one has ever said to me, you know, "IBM is not worth two bob. They're not value adding anything into the process. You can take them away and you will have all your defects, all your problems solved." No-one ever said that to me. What they did say to me was, "You are going to have a problem if you take IBM out of it," and, quite frankly, the notion of a 30-year-old man with a rope around his neck because he couldn't pay his mortgages was something that I would take far more seriously than anything else. You know, people do all sorts of things when they haven't been paid and I didn't for one moment consider anything other than those people that were at the receiving end of this stuff and whatever had to be done to get that fixed, as far as I was concerned, that's what we should do.

10

20

30

40

50

Did you know as at 22 July 2010 what the possible quantum of damages the state may have against IBM?---No, I did not.

Did you know as at 22 July 2010 what were the prospects of success of the state suing IBM?---Yes. Well, I read the Crown Law advice. I read Malleons' advice and, quite frankly, that didn't give me a great deal of comfort because while it said the state had a strong case, there were a lot of ifs and buts about it. In my mind, it was like the two birds in the bush and the one in the hand. The two birds in the bush were, "Well, you know, you've got a really good case here, chase them down the path." You and I discussed recently that you were involved in the concrete case. That's something that I remember very well. It went on for, I don't know, eight years, something like that, that we were involved in that. I couldn't for the foreseeable future see a situation where you said in black and white, "Hey, these people might sue you," that you end up with six or eight years worth of litigation, as we did in the concrete case, ultimately we won there, as I understand it, due to some of your efforts, but in reality the - - -

Oh, no?---And a bloke called Scrivens from the Department of Public Works, but we of the never - you know, down the never, never path that may have been an option, but the real reality for me at the moment was that people weren't getting paid and the chances were - and there was every chance - that they would sue us, that they would prolong discussion - not discussion - prolong litigation. It would have been a picnic for lawyers, but, unfortunately,

it wouldn't have been a picnic for the people at the other end of the deal, those who were waiting to get their pay. 1

Did you ever turn your mind to briefing or having the solicitor-general briefed to provide advice on both prospects of success against IBM if you sued and possible or preliminary advice on quantum?---No. That never entered my mind. I mean, it was good enough for me to read what I thought was the two bob each way advice that you said, you know, "You've got a sound case to go IBM, but in reality they might sue you and, you know, we don't know all the facts that are associated with - this contract has been on foot for some time. We don't know what they've been told. We don't know what assurance has been given." There was a lot of ifs and buts when in fact there was only one issue, in my mind, and that was as a Labor minister to make sure people get paid. There's nothing more fundamental than that. 10

Thank you. Can I ask you one question that Mr Commissioner asked Ms Bligh before and I'll ask you the same question: would it have made any difference to your recommendations to settle with IBM as to the level of quantum of damages that the state may have been able to achieve?---No, I don't believe it would have. 20

Why is that?---Well, I mean, I wasn't in a mind set to consider going down that path because nobody could say, you know, "Here's a rolled gold 100 per cent, you know" - what do they say in consumer affairs, "If it's too good to be true, it probably is." It was too good to be believed that IBM, an international company with the resource that it had, would just lay down and just cop it and in fact Crown Law said in one of their items that you could expect a fight to the death from IBM over it because it wasn't going to sit by and let its name be trashed. As I said, that was the birds in the bush. We had the bird in the hand. The bird in the hand was the problem that we had and I, for one, wouldn't put 80,000 people at risk of not being paid at all - sorry - by the backside falling out of the whole thing which no-one ever said to me, "That won't ever happen." 30 40

Is that a convenient time, Mr Commissioner?

COMMISSIONER: Yes. Yes, it is.

Mr Schwarten, we're going to adjourn now until 2.30?--- Thank you. 50

THE COMMISSION ADJOURNED AT 1.01 PM 60

COMMISSIONER: Mr Flanagan?

MR FLANAGAN: Thank you, Mr Commissioner.

Mr Schwarten - I'm sorry, Mr Kent?

MR KENT: With my learned friend's leave, if I might just attend to another couple of pieces of housekeeping,

10

commissioner.

COMMISSIONER: Yes, yes.

MR KENT: Just in relation to matters that concern the last tranche of evidence prior to this one. I tender two further documents.

COMMISSIONER: Mr Kent, why are you doing it now?

20

MR KENT: It was felt to be a convenient time.

COMMISSIONER: All right.

MR KENT: One of them is the agreement for the professional services for the project director, which was the engagement of Mr Burns, signed by Mr Nicholls on behalf of Information Professionals on 18 May 2007.

COMMISSIONER: Have you got this (indistinct) do you?

30

MR KENT: It's relevant to the submissions that are going to be developed in that tranche, dealing as they do with the engagement of Mr Burns.

COMMISSIONER: I understand that. I'll ask you again, why are you doing it now as opposed to a time when there is no witness in the box?

MR KENT: I have discussed it with Mr Flanagan. It was felt to be convenient.

40

COMMISSIONER: All right. All right. The agreement called Provision of Services - 17 May, was it?

MR KENT: The 18th.

COMMISSIONER: 18 May 2007 is exhibit 140.

ADMITTED AND MARKED: "EXHIBIT 140"

50

COMMISSIONER: The minutes of the QHEST project directorate meeting of 22 December 2008 is exhibit 141.

ADMITTED AND MARKED: "EXHIBIT 141"

MR KENT: Thank you, commissioner.

1

COMMISSIONER: Yes?

MR MUMFORD: May I announce my appearance and seek leave - - -

COMMISSIONER: Mr Mumford, yes.

MR MUMFORD: - - - on behalf of Mr Malcolm Grierson to appear. My name is Mumford, initial B, counsel instructed by Howden Saggers lawyers. I'll be asking, commissioner, for the leave that you gave my learned friend Mr Haddrick this morning on that very narrow discrete area.

10

COMMISSIONER: Yes. I'll give you leave to appear on that basis.

MR MUMFORD: Thank you.

20

MR FLANAGAN: Mr Commissioner - - -

COMMISSIONER: Now it's your turn.

MR FLANAGAN: Thank you.

Mr Schwarten, before lunch we were dealing with the Cabinet Budget Review Committee decision of 22 July 2010 and may I take you to volume 2, page 226?---226, was it, Mr Flanagan?

30

MR FLANAGAN: Yes?---Thank you. It might help if I've got the right volume. Yes, that's the CBRC decision, decision number 3019, is it?

That's correct?---Okay. That's - - -

In relation to this decision, the preferred option that you took to the committee was to negotiate a settlement with IBM - - -?---Yes.

40

- - - and that negotiations were not to exceed a period of six weeks. Yes?---Correct.

So from that date it would take the negotiation period to on or about 2 September 2010?---Correct. Right.

Were you aware that in relation to the notice to show cause that if one was - if the state of Queensland was to act on terminating it that the due date for termination was on or about 23 August 2010?---I can't say with certainty, Mr Flanagan, that I knew that at the time. I presume I did. It would have - I just can't recall it, but commonsense would tell you that I did know it.

50

Even though the director-general Mr Grierson was authorised by the committee to conduct these negotiation proceedings,

it was done in accordance with certain parameters identified in table 1. Is that correct?---That's correct.

1

Could I take you to those parameters which you'll find at page 239 of the submission?---229 or 239?

239?---Sorry, 20 or - - -

COMMISSIONER: 239.

10

MR FLANAGAN: 239?---239?

I just want to draw to your attention point 6 on that table which contains the parameters that what was envisaged was no release for IBM in terms of a legal release of obligations, although it is noted there that IBM as part of the negotiation would undoubtedly insist on a full legal release - - -?---Yes.

- - - but the state's preferred position was no release or an acceptable position was a qualified release, for example, retaining rights in case system must be abandoned due to inability to overcome defects. Do you see that?
---Yes.

20

So what was envisaged by the parameters identified in table 1 in accordance with your submission to the committee and ultimately adopted by the committee was not a full release of IBM at any stage. Yes?---Yes.

30

Indeed, the safety for the state of Queensland in a partial release, at least, would have been that if ultimately it was demonstrated that this product or this solution did not operate so as to pay Queensland Health employees that the state of Queensland would be able to sue IBM. Yes?---I think that was the preferred - from memory, that was the preferred option to try and be in as superior a position as we possibly could and if we could have our cake and eat it, too, that would be a great position to be in. I think that, to put it in laymen's terms is - - -

40

Mr Schwarten, can I just test your knowledge a bit further then?---Yes.

Can I take you to page 227?---Yes.

Under the heading Summary in the second paragraph it says:

The high-level nature of the state's original system requirements, the uncertainty of its original tender requirements and the fact that IBM's response was not appended to the contract Q11 has meant that the state has not been able to successfully refute IBM's assertions on scope. Scope remains a significant area of ongoing contractual debate between IBM and the state.

50

You appreciated, did you not, and you knew at the time you made the submission to the committee that the contract had been varied by various contract change requests. Yes? ---Absolutely.

1

And you had personal knowledge of change requests 60, 61 and 184 which dealt with scope? ---Well, I'll take your word on the numbers, but scope was certainly an issue that was indicated to me by Mal. I remember one analogy that I said at the time was that it seemed to me like trying to build the Gallery of Modern Art and somebody asks you just to design and construct an art gallery without telling you how high they wanted it, how big they wanted it, what we were supposed to do or anything else, but I remember having that conversation with Mal, yes, but what prompted it, I don't know.

10

Yes, quite. But at least with change request 184 there had been an attempt by all parties to identify scope and to put the project, if you like, back on foot. Yes? Do you recall that? ---Oh, okay. Right. So 184 is the subsequent - okay. Right.

20

Right? ---To try and bring the thing back into - - -

Even though there were change requests after that, did you appreciate that the deliverable that IBM had to deliver by 30 April 2010 was a functional payroll solution?

---Absolutely.

30

Interim, albeit, but a functional solution. Yes? ---Yes. I would have been told, I think, that - I couldn't swear to the date, but what I could say is that what I was told was we expected to have a much more precise finish date and expectation than had previously been involved in the contract. In other words, it would be a guarantee - some sort of guarantee that the work would be done and finished, but whether that date was April, I couldn't say.

You see, what I'm suggesting is that that summary that was put and signed off by you to the Cabinet Budget Review Committee was inaccurate in this sense: it didn't take into account that there had in fact been change requests, that particularly with change request 184, a lot of scope disputes had been resolved and that ultimately as at 30 April 2010, there was a deliverable, 47, that IBM had to deliver. Yes? That is, a system that was free of severity 2 defects? ---By that date, yes.

40

Yes? ---I'm just having a looking at this 239 again. So what you're saying, Mr Flanagan, is that there had been a deliverable already reached that would circumvent the need for this clause. Is that what you're saying?

50

It would circumvent the need for a historical view of scope that was very much based on the sort of report put out by the auditor-general which was critical of the government - - -? ---Yes. 1

- - - both in terms of governance and in terms of determining scope in circumstances where the scoping difficulties had been identified and had been the subject of particular contractual change requests by the parties, so what I'm saying to you, and I'm asking if you knew this, that come 30 April 2010, there was a solution to be delivered by IBM. That solution was to be free of severity 2 defects. It was not delivered and a solution that contained numerous severity 2 defects that were not corrected within the two-day period meant that IBM were in material breach of contract as advised to you by Mallesons? ---Yes. I'm certainly aware after the event of that that that was the case but what I was struggling with was to try and work out exactly the sequence of events in that but certainly, I was aware at some stage that those defects had not - had meant that IBM had not met inside of the contract. 10 20

All right. Now, can I take you to page 228?---248?

228?---228. Pardon my hearing. I've been around too many things that go bang and in parliament too long, probably.

So at page 228, can I draw your attention to the second top paragraph?---Yes. 30

What is being put by you to the committee is that if they do settle with IBM for the purposes of having an orderly transition, as you call it, you say the consequences of taking this course of action means the state giving up an undefined set of potential legal claims against IBM which in the case of the damages claim cannot be fully qualified at this time. It's the case, isn't it, that IBM - that the possible damages claimed by the state of Queensland at IBM was never quantified. Correct?---That's correct too. 40

Were you aware that in the first term sheet, draft term sheet, not sent to Blake Dawson, the solicitors for IBM, but in its first draft done by Clayton Utz that a figure of \$12 million was identified as potential damages?---No, I have not heard that figure until you raised it with me when we were making the statement.

Were you aware of any advice from Mallesons - - -?---Pardon me, sorry. 50

Were you aware of any advice from Mallesons that the damages under the contract - that is, for a material breach of contract, was capped at the costs of the contract, namely approximately \$88 million?---Well, I didn't - I was aware but I thought the figure was 60, but anyway, 88 - is

that the figure? I thought the cap was \$60 million but I knew there was a cap so - - -

1

All right. My question is this: why didn't you seek to have the possible quantum of damages that the state could seek from IBM quantified for the purposes of negotiation? ---Well, I come back to what I said before, Mr Flanagan. My concern was not a quantum of damages and I guess this is the dividing line on the whole thing. My concern was that we were time-poor, we didn't have all the time in the world, we didn't have all the money in the world to go down a path of litigation with IBM and that was the path that I was being told would be trod so to me, it wasn't of any material concern at that stage of quantifying it. You know, in a perfect world, we have miles of money and miles of time, I guess the great thing would have been to have gone down and to have quantified it and sued IBM and see how we got on but we had several thousand people out there who payrolls weren't right and we had the public clamour for that to be done and I think while the public wanted us to proceed to sue IBM, they - if asked which preference they would have, my view was that their preference would have been to make sure everybody was paid first, and the only way that I saw of doing that, Mr Flanagan, as I've said before was to make sure that IBM was still in tent and we tried to make the best out of a bad situation.

10

20

In terms of IBM being in the tent, are you aware of evidence given to this commission by Ms Jane Stewart - you know Jane Stewart, don't you? ---Not really.

30

A CorpTech person, worked under Margaret Berenyi? ---Not necessarily, no. I mean, my discussions were at director-general level. I may have - I certainly met Ms Berenyi but Jane Stewart - I may have, I don't know.

40

But you did have this knowledge: you knew that some people from CorpTech thought that the best way forward was to immediately terminate IBM's engagement? ---No, I'm not sure that that was ever put to me as plainly as you say, Mr Flanagan. I wouldn't have been surprised if that was the case and it wouldn't have altered my judgment. Had it been their case, I mean, at the end of the day, their advice comes to me via the director-general, the department who wasn't of that view and it certainly wasn't my view but it wouldn't surprise me if that was the case. As to whether I was aware of it, I don't know.

All right. Can I just test you in this way: there were two schools of thought. One was, it's best to get IBM out of the way and terminate IBM because of the difficulties with warranties under the contract; that is, if CorpTech went to work on a particular defect that was - - -? ---Yes.

50

- - - a responsibility of IBM teams, and that CorpTech fixed it in a way that IBM didn't particularly like, IBM could say, "Well, not warranting that defect"?---Yes.

Like with a car, you have actually - - -?---(indistinct).

Quite. The second school of thought was this: it is still best to get rid of IBM but all we need to do is establish relationships with the relevant and pivotal subcontractors such as Infor and Itel - sorry, not Itel - - -?---Infor is one I do know. They are in charge of Workbrain, they were, weren't they?

Right?---I can't think of the other one either.

Yes, but to establish those relationships for the purposes of transition - - -?---In other words, going directly, engaged the subcontractors. I'm aware of both those schools of thought.

Quite?---I don't think they were put to me by anybody other than Mal Grierson or perhaps Natalie McDonald. The discussion around those, we - you know, as a public works department, we - in this very building when Wallace went broke at the end of it, we had reason to directly engage subcontractors, so it's not a foreign concept to us but in reality, I think trying to get Infor to come over to be direct subcontractors of the government might create a problem with their relationship which I understand is international with IBM. I honestly don't know how you would go about having a conversation with subcontractors in those capacities but again, I would say my view was that any of that was sub - what's the word I'm looking for - suboptimal by my view, always was that yes, in the worst case scenario, you can go in and take over the subcontractor but I know from my experience in building, that's nothing to be scoffed at and it relies in building - in this case here, the subcontractors wanted us to do that but there was nobody coming to me saying, "By the way, Infor" or any of the other subbies, "want to come and work for the government as opposed to IBM." I don't think that it would have been as easy as people would suspect and we will never know that but - - -

See, the highest this got was that IBM at one stage said, "Would you please stop talking to our subcontractors because, of course, it's interfering with our performance of the existing contract." Yes? And that is a statement contained in the document for the - - -?---And they probably have the legal right to do it, I don't know.

All right. So that's the highest it got but my question to you is if you're going to negotiate a settlement for the state of Queensland with IBM, shouldn't one investigate fully the nature of the risk that is being identified as

the driving force for releasing IBM from any claim for damages?---Well, I suspected that that work was done. I suspected that a risk of assessment of some sort whether it would be the back of envelope or whatever, was done to that. I mean, I certainly was never persuaded by that view and nobody put it to me in any sensible rigorous argument that we should go down that path and I would have taken a lot of convincing to do it because it's a high-risk strategy, Mr Flanagan.

1

But it boils down to this: it boils down to the fact that KPMG spoke to a number of people in relation to their report to say it's prudent in transitioning to make sure you have the established relationships with subcontractors and the best way to do that is to keep IBM onboard. Yes?
---Yes.

10

20

30

40

50

And for that purpose, they spoke to yourself - - -?---Yep.

1

- - - Mr Grierson, and down the line they included Ms Stewart. Yes? So ultimately it came down to a risk of identifying whether the state of Queensland as at August 2010 could directly contract with the subcontractors that were working on the project and with Infor as well as others. Yes?---I guess so, but I don't think that it was ever explored down to that level. I don't know.

10

No. And my point is: it should have been explored down to that level if one is releasing IBM from all potential claims to damages, substantial damages potentially, into the future. Yes?---That's your opinion, Mr Flanagan. Again, I come to what I said before. I would take a lot of convincing and still take a lot of convincing to go down to any part that were damaged our possibility of getting that payroll finished, and that was the biggest risk that I could see and as far as Mal Grierson, if I dare speak on his behalf, that was his view. And Mal's - you know, I'll say here that Mal's as straight as a gun barrel and somebody whom I have a great deal of respect for, and somebody who knew his way around contracts. You've got to remember, we had \$11 billion worth of building contracts or something like that on foot at that time and, you know, there's no - I don't think there's too many people who had more expertise in trying to negotiate their way through things than Mal Grierson, and he went to get the best effort that he got - that he could get out of this situation. And as for going in and cancelling contracts,

30

when anybody ever tells me about cancelling contracts, I always think of hundreds of cases that were in the BSA while I was running it and they always ended in tears. You ended up with people who had a half-finished home, blown with lawyers, and it took months and months, and months for that to finish, and we saw a situation where subcontractors were taking over to try and finish projects for houses for people and it always ended in tears, and that was a risk that I'm sure Mal (indistinct).

40

Mr Schwarten, these are commercial and sophisticated commercial negotiations between sophisticated parties? ---Yep.

One being the state of Queensland, one being IBM?---Yeah.

And what I'm suggesting to you: if the state of Queensland truly believed that the risk of terminating IBM's services was that they could not contract with subcontractors or directly contract with Infor, then inquiries should have been made to ascertain whether that was in fact the truth. Now, can I ask you this question: were you ever presented with any evidence that, if terminated, IBM would walk off the job?---No, I wasn't, but I wasn't presented with anything that said they wouldn't, either. I mean, there

50

were lots of suggestions made that they would but there was never anybody who suggested to me that they wouldn't.

Were you aware of Mallesons' advice that IBM, even if their services were terminated, still had obligations under the 5 December 2007 contract for disengagement?---Probably, but it still doesn't negate the possibility that they would refuse to cooperate in some shape or form. You've got to remember, we had a critical problem of a payroll. I mean, it doesn't come much closer to the bone of government than to have employees not being paid, especially in an area where you've got emergency wards being staffed by people who are worried about whether they're going to get paid or not.

10

Were you also aware of Mallesons' advice that suggested to the government or gave advice to the government that there was no legal hindrance on the state of Queensland contracting directly with existing subcontractors of IBM or with Infor?---I've read that advice since. I don't know whether I read it at that time, but perhaps it was - I just can't recall back then. I probably would have read it at the time.

20

Again - - -?---It would not have altered the fact in my mind - I can only say what I continue to say.

Well, is there any historical evidence that you knew of to support the fear that, if terminated, IBM would either walk off the job immediately or hinder the state of Queensland contracting directly with existing subcontractors and Infor?---No, I'm not aware of any.

30

See, I'm trying to get a feel, Mr Schwarten, for why this risk was identified as being so great in the circumstances I've just outlined to you that there was a full release of IBM from any future claim for damages?---Well, I can only just reiterate what I've just said and that is - and I'll keep repeating it, nobody ever came to me and said there is no risk in doing this. I mean, if you look at the legal advice that was coming from Crown Law, that came from Mallesons or anybody else, not one bit of it ever said to me, "By the way, there's no risk that they'll walk away from this." In fact, it went so far as in one piece of that legal advice to say that you could be sure that IBM would take steps to do what it had to do, and, I mean, you can read that whichever way you like. What it said to me was that you were going to end up in a protracted legal fight and at the same time expect that company to continue to work to its full extent and full cooperation to carry out the payroll. Now, I gave up believing in tooth fairies a long time ago. Human reality is that when you're in a blue like that, it's increasingly difficult to get some solutions. I mean, a major blue that I had on my - was a few thousand people out there who weren't getting their pay properly. And all the historical things that pushed that

40

50

up hill to make it the problem that it was were not going to be overcome by simply breaking the contract with IBM and hoping that had no repercussions.

1

There's a few other things you knew though, wasn't there? First of all, you knew that the first pay run was conducted on 23 March 2010. Yes?---I found out after the event.

Quite. And that there had been fortnightly pay runs from 23 March 2010 through to the date of this final submission that you make to the committee, which is 26 August 2010. Correct?---Yep.

10

So there had been numerous pay runs that have heard since then. Yes?---Yes, that's right.

You also knew that as each pay run took place - - -?---Got better.

- - - there were improvements and it got better?---That's right.

20

You also knew that with each pay run that took place, the defects were being identified and fixed. Yes?---Yes.

All right. You also knew that the Queensland Health, through their director-general and through their minister, Mr Lucas, had established a - - -?---A project.

A project, exactly, called the Payroll Stabilisation Project. Yes?---That's right.

30

You knew by July 2010 that payroll project had renamed itself to the Payroll Improvement Project. Yes?---I don't know whether I knew that.

You don't? All right. But my point is this: is that ultimately for the supplemental deed, what's signed off is that IBM finish on 31 October 2010; that is, the deed is signed on 22 September 2010, a little over a month later they're finished on 31 October 2010 having been paid most of their outstanding payments having been released entirely from any future damages claimed or having fixed 35 defects. Yes?---I guess so.

40

It doesn't sound like a great deal for the state of Queensland, does it?---Well, we're judging it from hindsight. I wonder what you'd be asking me had we have gone down the path of breaking the contract and the backside fallen out of the payroll industry, and 80,000 people without pay.

50

But what I'm asking you, there was no risk of that, was there? There's no identified risk in any of the documents that would suggest that the pay runs would not continue to improve - - -?---Only (indistinct) people were giving them.

I'll just finish my question?---Sure. All right.

1

At least would continue as they were as at August 2010. Whilst there were defects, people were getting paid. Yes? ---People were getting paid but I was also told that the reason that they were getting paid was because there were people involved in that project crucial and critical to that project from IBM, without whom the payroll system would not function.

10

Yes, but they were subcontractors, weren't they?---Well, I don't know who they were, but - well, I presume they are.

Yes. The KPMG report told you they were subcontractors. Yes?---Yes. But be that as it may, they were there in a contractual relationship with IBM.

My question is this: why was the transitioning period whereby ultimately it was agreed that IBM would fix 35 defects by 31 October 2010, why was that such an imperative for an identified risk that would justify the state of Queensland for going all rights to an unquantified claim for damages against IBM?---Well, again, I can only reiterate what I said before. The information that I had given to me uncorrected by and unchallenged by anybody else was that the removal of IBM, breaking of the contract with IBM could have absolutely catastrophic results.

20

30

40

50

Can I suggest that what you've identified there as a risk was not sufficiently investigated for the purposes of reaching any negotiated settlement?---I went on the advice that I received. They're your words, not mine.

1

Do you agree with me that in retrospect, at least, or at the time the risk that had been identified in your submissions to the committee loomed far too large in terms of being the reason to negotiate a settlement?---Could you put that another way please. I think I lost you halfway through that.

10

All right. If I put it this way: would you agree that it was a political imperative to make sure there were no problems with the Queensland Health payroll that the government kept on IBM?---Well, I think, the easiest political route of it would have been to say, "IBM is to blame here. Nobody is sitting around this table to blame for it. Let's see whether we can scapegoat them, go out and flog them to death and we'll all look nice guys. I mean, the reality is that we chose not do to that because there was a risk, as I said, and you may think the risk is slight or whatever, but you weren't sitting there at the time viewing these consequences for people on a personal level. You didn't have people ringing your electorate office and saying, "We haven't been paid for a fortnight." You didn't go to the payroll office and see the people tearing their hair out at trying to get people's pay sorted out. I mean, the consequences of what IBM was doing was of not much concern to me at this stage and I put it to you, it wouldn't have been of much concern to the people of Queensland either.

20

30

The events that you're just outlining then, when were those events taking place? Was that near the go live date or shortly after?---They remained - people were contacting my office for months after saying that they hadn't been paid their back pay or they'd been overpaid and Queensland Health was wanting the money back from them and, you know, there was - I can't recall ever reading anywhere in any of the media or hearing any of the media say, "Isn't it wonderful that we're making progress on the payment of people." Quite the contrary. The public confidence was that people were worse off come July than they were in May.

40

Can I ask you whether or not it was a consideration or a concern of the committee, either on the 22nd - - -?---The budget committee?

50

Yes?---Yes.

Either on 22 July 2010 or on 26 August 2010 that suing IBM rather than settling with IBM would expose the state's own conduct to further scrutiny in any subsequent litigation? ---I think that there was something in one of those - that

you showed me recently that suggested that not all was known about the state's exposure to risk in this matter either. I guess that's true.

Mr Schwarten, you recall that you were asked to look at a specific document which is in volume 3, page 150, which was a file note between Mr Charlston from Clayton Utz - - -? ---Oh, yes. I'm familiar with that and it's the subject of my statement.

Yes, thank you?---Sorry. What did you say that number was?

It's page 150, Mr Schwarten?---150? Thank you.

In terms of your knowledge, Mr Schwarten, were you aware that Clayton Utz were engaged by the department for the purposes of conducting the settlement negotiations with IBM?---Yes, I think so at the time, but I couldn't recall it when I was talking to you recently.

All right. Did you have any personal knowledge of when that process that had been established by Clayton Utz was departed from and that there were face-to-face meetings between Mr Grierson and Ms MacDonald on the part of your department and Mr Doak and another person on behalf of IBM?---No, I didn't, but I was made aware of it after the event. Mal may have said to me that he was going to go down that path at some stage. I mean, there were no secrets between Mal and I. I wouldn't have had any objection to him doing it, put it that way, because whatever it took, as far as I was concerned, to bring the thing to a head and try and get some resolution to it was okay by me.

Did you appreciate that Clayton Utz had actually put in a structured negotiation process using one of their partners, Mr Jeremy Charlston, who was identified, I think by Mr Grierson, in previous evidence as one of the best commercial negotiators around?---Sure. No, I wouldn't doubt that. I have no direct knowledge of it, but - - -

All right. And term sheets had been exchanged between the solicitors for IBM and the solicitors for the state government?---Yes.

Those term sheets had identified possible areas of agreement, but at this stage what I'm suggesting to you is that the final offer or what was described by the state of Queensland as its final offer under the term sheets had been provided to IBM and they were awaiting a response to it. It was at that stage that Mr Grierson met with the IBM representatives without lawyers present. Do you appreciate that?---I appreciate that he met without lawyers there.

Yes?---He was charged with the responsibility by CBRC to go about negotiating this within a six-week period and the

fact that he met with the head of IBM wasn't a surprise to me at all. That's the way that Mr Grierson resolved many problems that we had to deal with over the years.

In fact, you were aware of Mr Grierson meeting on a fairly regular basis - on his evidence it's probably once every month - on Mr Doak's evidence it's once every week, but they met regularly in relation to the management by CorpTech and by the department of the contract. Yes?---I won't try to confuse you by how regular it was, but I knew that he was in regular contact, as he was with many of our contractors that we had to deal with, especially when we had issues.

It's in that context that when Mr Grierson, after this meeting, comes up with what's called Settlement Principles. You became aware of those settlement principles, didn't you?---Yes.

Did you ever yourself check how those settlement principles negotiated between Mr Grierson and IBM at this one-on-one meeting - sorry, when I say that - one-on-one in terms of no lawyers being there. Right?---Yes, yes.

Did you ever look at how those principles departed from a settlement sheet that the state of Queensland had provided through their solicitors to IBM?---No, I didn't. No; and I wouldn't have done that.

All right. But did you - - -?---Because I had faith in Mr Grierson to try and get the best deal for the state of Queensland that he possibly could have. I mean, there's no more loyal public servant than Mal Grierson that I reinforce - - -

You knew Mr James Brown though, didn't you?---No.

You didn't?---No. I've not met him as far as I'm aware. He wouldn't have been someone I necessarily would have met. The people I met in this was what I told you before lunch - who I should say not what - Ms Berenyi, Natalie MacDonald and Mal Grierson. They're the three that I'd normally meet with. I went down to CorpTech on a number of occasions to see how things were going. I met Philip Hood down there on a couple of occasions, I think. I may have met James Brown there, but I certainly wasn't on speaking terms with him or anything like that.

Did you know this that IBM from the very beginning in terms of the settlement negotiations had sought to exclude lawyers and have direct communications with Mr Grierson for the purposes of working out a settlement? Did you know that?---No.

Did you know that the structure that had been put in place was to ensure that that one-on-one negotiation didn't take

place until an appropriate time? Did you know that?---No,
I didn't know that.

1

All right. Mr Brown, as recorded by Mr Charlston in his file note at page 151, says in paragraph 6, the second paragraph - this is after Mr Grierson had, if you like, departed from the negotiation process identified by Clayton Utz and he says:

James -

10

that's James Brown -

said his personal view is that this is the worst possible outcome.

This is a public servant, a Queensland public servant, who had engaged and been actively engaging Clayton Utz for the negotiations process?---Well, they're his words and I tell you what, he didn't choose them very well, I would have to say, and if he said them to me, I would have told him so because the worst possible outcome for me and for what he was supposed to be doing would have been people not being paid or somebody hanging themselves because of depression over not being paid. I can think of a lot of worse outcomes than that particular lawyer's picnic that he's talking about there.

20

Can I suggest though that Mr Brown, having been involved in the process throughout and, indeed, having participated in drafting both briefing notes for the director-general and briefing notes for you was very or acutely aware of the possible risk of not having a smooth transition?---I don't know what he was aware of. I don't know what his capabilities were. I have to say I read that whole statement there as a matter of opinion as recorded by somebody else of what somebody else said. I mean, I quite frankly don't put much store in it at all.

30

40

50

You recall that I took you to table 1 which is the committee's parameters for the negotiation?---Yes.

1

It did not permit a full release of IBM, did it?---Not from recollection. If you say that that's the case, I mean, quite frankly I think that our hope was that we would be able to proceed with IBM and enjoy the comfort of having the capacity to sue them down the path. Now, whether or not that could be actually negotiated was another thing. We didn't - I mean, I guess what we could have done when Mal Grierson came back and said, "This is what I've done", we could have said, "Well, no, we're not going to do any of that," but in reality, I think what we recognized the fact was he made the best out of a bad deal.

10

Finally if I take you to paragraph 6, the first paragraph there, Jane said confidentially that this is a political decision, the politicians are extremely nervous and driven by the fact that if IBM was removed, then there would be nobody to blame for the payroll problems outside government. First of all, was that part of your consideration - - ?---No, it wasn't. I've never spoken to this bloke, by the way, or formed a view what my view was on it. I don't know how many politicians he knew but he never spoke to me and he doesn't speak to me in that item there, I can give you the drum on that.

20

Thank you. Could you excuse me for a minute? That's the evidence-in-chief of Mr Schwarten.

30

THE COMMISSIONER: Thank you. Mr Traves?---Sorry, I didn't mean that to be offensive.

MR TRAVES: Mr Schwarten, I won't keep you long. Can I just ask you to direct your mind, please, to the time at which the Department of Public Works became responsible for CorpTech in or about July 2008?---Yes.

I think you said earlier that you, under no illusions, there were problems with the implementation of the new system. Is that right?---Yes, that's right. I think I've probably phrased it a little - - -

40

And that Mr Grierson after a survey effectively what was occurring confirmed your worst fears as to what was the state of the implementation?---Yes, that's right.

Could I ask you about that time; did you become aware, did Mr Grierson perhaps make you aware of someone within Queensland Health who believed that Queensland Health should separate itself from the whole of government program?---I had heard that. Whether it was Mr Grierson told me that or whether somebody else told me that, I don't know, but what wasn't uncommon. There were a lot of agencies who wished not to obey the cabinet decision to

50

have everybody in the same tent but yes, that wouldn't have surprised me.

1

Can I be a little bit more direct; do you have a recollection about when you took over at CorpTech of there being talks from the department, from people high within the Health department - - -?---I think there was public talk about it.

Sorry, I just have to finish. A proposal to separate itself from the whole of government program. Was that sort of talk happening?---Yes, yes, there was and I think there was even public discussion to that and I think at one stage I may have even responded to a media interview about it.

10

That QH, that Queensland Health, be provided in effect with its own contract for integrated finance and human resources payroll?---And I must say I was - - -

Sorry, just deal with my question first and then you can say what you like?---Yes, okay. Yes. And I just want to say that I would be persuaded by that view if I could have given somebody else the problem, I would have.

20

All right. And also from high within Queensland Health and perhaps through Mr Grierson, that alternatives should be looked at to an IBM-managed project, that alternative service providers might be looked at?---Yes.

And that was something being said at or about the time you took over CorpTech?---Yes.

30

And that if Queensland Health decided to continue the relationship with IBM, it should engage with IBM directly and negotiate a new contract, terms and conditions rather than through CorpTech?---Yes, I have heard that before.

All right. Did you hear that in or about August 2008?---I couldn't be sure but I presume it was around then.

40

All right. Could I direct your attention then to paragraph 23 of your statement where you say that you recall there was some consideration being given of removing IBM from the prime contractor role entirely?---Sorry, what was that, 23?

Paragraph 23, first sentence?---Yes, yes.

Can I suggest to you that some of the reasons why that was being considered were these things and that you were made aware of these by Mr Grierson, that IBM in the view of CorpTech and Queensland Health was not performing?---Yes.

50

That there had been at that time criticism of CorpTech's administration of the contract?---Yes.

I just need an answer for the record?---Yes. Sorry.

1

That the solution which had been implemented thus far through IBM included a number of manual workarounds post live that would have been implemented?---Yes.

That testing to that point was unsatisfactory?---Yes.

That UAT testing had recorded an unusually high number of defects?---I take your word for it - - -

10

I don't want you to - - -?---I don't know whether the word "unusually" was there or not - - -

But you knew that UAT - - -?---Yes, there were defects.

UAT had turned up a lot of defects; you knew that?---Yes, exactly, yes.

And that the relationship between IBM, CorpTech and Queensland Health had not been strong?---I think that's an understatement.

20

All right. But you were aware of that?---Certainly.

In or about the middle of 2009, September 2009?---Yes.

That the tripartite arrangement; that is, Queensland Health is the customer effectively but CorpTech and IBM was the contracting entities had weakened the governance of the QHIC project. That had been put to you at about that time?---I'm not sure about that. I'm not sure about that.

30

Do you know the point that I'm making?---Well, I'm just trying to consider what the point is that you make.

Sorry, let me clarify?---Yes.

That the contracting entities for the implementation of the payroll system - - -?---Yes.

40

Were CorpTech on the one hand?---Yes.

And IBM on the other?---Yes, exactly. Yes.

The entity receiving the service was Queensland Health? ---Was Queensland Health, yes, of course.

So that that tripartite arrangement, if you like, where Queensland Health was not one of the contracting parties had weakened the governance of the project - - -?---Well - - -

50

Because Queensland Health was always having to go through CorpTech?---CorpTech - yes, I'm wasn't sure - I'm not sure that I have been told that that has weakened it. That's

the point that I'm trying to recall, that it has actually weakened - that may have been the view of some people in it. I don't know. I honestly - - -

1

You can't recall that one?---I can't recall that.

All right. Finally, in that respect, that is in or about September of 2009, you were aware that the quality of the solution build had not been high, that there had been real problems with it?---Yes.

10

And that unless all defects had been identified and rectified prior to go live, there was a real risk that payroll calculation for Queensland Health would be incorrect. Do you agree with that?---Yes.

So is it fair to paint this picture; that from July 2009 through to go live, you were aware that there had been significant problems with the project?---Yes. Not necessarily just in that project; with the whole dealing with IBM. The whole way that CorpTech was run, there was - it was not - it was nothing like what we used to dealing with in the contractual arrangements that we had in Public Works.

20

All right. But if I can ask you to direct your attention to Queensland Health for the moment?---Yes.

Thee had been problems with the project. There was a risk that when go live occurred that there would be problems?---No. At no stage did anybody ever suggest to me that when they would go live that there would be problems. I was told on two occasions after the event - sorry, prior to the event that they weren't going to meet the deadline. I think the first deadline was July, the next one was December. Natalie McDonald advised me on both occasions that it has got to be put back. My recollection of what I said was better to be safe than sorry and when they actually did go live, I found out after the event, so it would be unlikely that anybody would have had come and - had anybody come to me, by the way, and suggested to me that there would have been problems, then I would have intervened by nobody ever did, I didn't intervene and there was no room for me to - sorry - - -

30

40

That's all right?---I thought I had turned that wretched thing off. My apologies.

THE COMMISSIONER: You have now, I hope. Can I just ask you on the point, if you had been told in the year of 2009, early in 2010 that there was substantial doubt about the capacity of the system to function adequately, that the UAT test suggested that there was problems with the system, what would you have done?---Well, when you look back in hindsight, there was very little that I could have done

50

but because it was a project border governance as the auditor-general has rightly identified as a weakness to it, but I certainly wouldn't have sat silently and just allowed the thing to go ahead. I mean, I would have at the very least have spoken to Paul Lucas about it and the premier and made damn sure that we did all we could to avoid what ultimately happened. I mean, while I have no direct influence on the day-to-day activities of managing a contract, I have an obligation that if something was brought to my attention to do something about it. Had something been brought to my attention, Mr Commissioner, I can assure you I would have done something about it but no such information ever came my way.

1

10

20

30

40

50

I understand that, but looking back now and hypothesising to the extent that you can, if it was brought to your attention that those involved with the project had serious reservations about its capacity to function adequately, but I hope they would have put a plan in place that they hoped would meet the situation. If that had come to your attention, what could have been done? There were pressures, as we've been told, to have the payroll system replaced, and you've gone a long way with IBM, so what could have been done? ---What could have been done? Well, for a start, you wouldn't go live knowing that those sort of problems are going to occur. Now, I'm not an expert in how IT systems are put together or payroll systems, but at the very least you would have made sure that you mitigated any chance of that happening. Now, if that meant putting - making IBM put more resources into it or whatever the case may be, that's what should have happened, but I think if had such a caution been made aware to me, that I'm sure that the government would have revisited the whole way the project was running and the governance of it, and made sure that we got on top of it, and received assurances that it would have done - that it wouldn't have turned out the way that it did, but, you know, the whole idea of having a board put this together which didn't have the two DGs, one from Health and one from Treasury as it was when we got it, and then ultimately would have been the DG. I mean, it beggar's belief quite frankly with an important payroll like that. Once we got it, that was all set in stone and - but as I say, you know, at no stage has anybody ever put that to me and had they have done that, I would have pulled out all stops to have prevented it occurring.

Are you saying that it's your view that the project board should have honoured that the two director-generals for Health and - - -? ---At the very least, I think the auditor-general made a comment something akin to that, that he couldn't believe that basically you had lesser beings that could - well, I shouldn't say "lesser beings", but people of less seniority there that really couldn't make decisions of their own bat, and I, you know, I know for a fact that Mal Grierson and I discussed about the rolling out of this into - of the payroll system into emergency services that he would sit on that board of governance, and I would insisted that he do so, but, you know, this was done before we ever got near it and I think the gravity of - quite frankly, I would have expected that somebody would have come to me and said, look, they're having dreadful problems over there, someone who's on that governance book, from what I've been told and what I've seen from Ms Berenyi, and Mal answered a question without notice of the estimates on this, he said that all the documentation had came to her, told her to go live, it was all Berenyi on one side, and he held that document up, so there was no - you know, right up to the date of go live, there was no market coming up saying, "This is a problem."

Mr Traves?

1

MR TRAVES: Thank you. And you're referring there to the advice coming to the project board from the project directorate, I think?---Yes, that's right.

I sense from your statement or I think you say in paragraph 23 that by September 2009 the project was so far down the road, if you like, it would have difficult, can I suggest if not impossible, at that point to effectively remove IBM and proceed in a different direction. Is that a fair comment?---Well, yes, it would, yeah, that's right. I mean, it wouldn't be the first contract that had ever come our way that the contractor was struggling to meet their - the performance indicators or whatever the case may be, but the state has always taken the view that you're far better off to try and assist the contractor to get the job completed rather than to break the contract and start all over again and risk losing all the IP that's involved in it.

10

20

Is that a view that you would have held, effectively, back before September 2009, back to, say, mid-2009, perhaps even into late 2008? Is it the same scenario?---I think it's a view that I've always had, regardless of whether it's this situation or any other that I was confronted with, that it's far better to - you know, they had more skin in the game than anybody else had and for somebody else to suddenly get into that game would have required a lot of resources and resources that we didn't have.

30

If I may just ask you to elaborate on that, what are the practical reasons why you can't simply turn around and go in a different direction, remove IBM? I suppose there's a prospect of legal action from IBM for one?---Well, the first one is that you had a contract with them, and I'm not a lawyer, but I'm sure that the lawyers in here can pick out all the problems with that. The second one is that the loss of personnel who may or may not want to come on board. There's no guarantee that Infor, for example, which I understand is the only mob that can handle Workbrain, that they might, you know, that they couldn't be enticed to come over or what cost they would come over. The whole practical notion of getting people up to speed on what was identified as the most complex system ever taken on by IBM, I think they were their words, and expecting somebody who fought in cold and take over where they left off, I think is fanciful, quite frankly.

40

So in your opinion, very significant disincentives to moving in a different to IBM?---Absolutely.

50

And those significant disincentives, can I suggest, existed from the time that Public Works took over CorpTech in about middle of 2008?---That's right, yes. That's correct.

Is that correct?---That's correct.

1

All right. Did you ever speak with the Health minister about the project at all, can you recall?---Not in any way detailed, no. As I said, by and large my discussions on this were limited to Natalie MacDonald saying to me, "By the way, the Health payroll is not going to go live in July," because they had run into a number of problems with it. Okay. Same story in November. I may have said to Paul along the way, "I'm sorry, that payroll is not going to go ahead, but my view always was: better safe than sorry." And I'm sure that - I could never rule out not speaking to Paul about it, but we spoke about many things, but I have certainly never ever availed him of chapter and verse concern about that. I mean, Health ministers, thank God I was never made one, that's all I can say. They deal with - we are dealt with truckloads of issues in Public Works, they deal with trainloads, so I never would have burdened down that path.

10

In about mid-2009 or September 2009, the Health minister had come to you and said, "Look, QH has got all of these problems with IBM. Can we go in a different direction?" What would have happened?---Well, I would have been inclined to have said, "Well, you put up a cab sub and we'll see how we go with cabinet."

20

A cab sub?---A cabinet submission, yeah. I would have said, you know, "Cabinet has decided this. That contract has been let. If you want to change that ball or if you want to change the arrangement, or Health doing its own things, we'll revisit the 2002 decision which gave it all to Treasury and then they brought the card over to us." That's what I would have said.

30

All right. But your strong predisposition would have been to have continued with IBM at that point?---Absolutely.

Thank you.

40

COMMISSIONER: Mr Plunkett.

MR PLUNKETT: I have no questions, thank you,
Mr Commissioner.

COMMISSIONER: Mr Mumford. Mr Haddrick.

MR HADDRICK: No questions.

COMMISSIONER: Mr Ambrose.

50

MR AMBROSE: No questions.

COMMISSIONER: Mr Foley.

MR FOLEY: Yes.

27/5/13

SCHWARTEN, R.E. XXN

COMMISSIONER: I'm sorry, you represent Mr Schwarten,
don't you?

1

MR FOLEY: Yes.

COMMISSIONER: I think you should go last, I think.

MR FOLEY: Yes.

COMMISSIONER: Mr Doyle.

10

MR DOYLE: Mr Schwarten, shortly after your department became responsible for the Shared Services, you became aware, I'm sure, of the particular QHIC replacement project; that is, the replacement for Queensland Health - - -?---Yep.

Okay. And I think you would have become aware of that as a result of what you described of Mr Grierson's due diligence or something to that effect?---Yes.

20

Very early on, you would have become aware of his expressed frustration at the continuing change of scope in the work to be performed for Queensland Health?---He had mentioned that to me on a number of occasions, yes.

Right. Would it be overstated to it as being his frustration?---No, I don't believe so. I mean, that's one of the fundamentals of contracting is getting the scope right in the first place.

30

The expressed concern was that Queensland Health's scope kept changing?---Yes.

One of the things he identified at the outset, in order to try to do something about it, was that scope had to be locked in or frozen, or words to that effect?---Yes, that's right.

Do you recall those expressions?---"Tied down", was that - "locked up", "tied down".

40

That will do; any one of those metaphors?---Something like that. Well, I think the discussion went along this way: at some point you've got to draw a line and say, "That's in, that's out, we get on and do that."

Now, do you recall when that first was discussed with you? ---I have no idea. It probably was a few discussions over a period of time down that path. I couldn't put a date on them, sorry.

50

Okay. Well, I'll see if we can just explore that a little. Was it shortly after his initial due diligence?---Possibly, but I can't remember when that date of due diligence reported to me was, so it would have been somewhere around

that time, I'm sure, because it made sense that he would have, having stuck his head into the vipers pit, would have worked out how many vipers were there and what we might do with them, and how we might try to get rid of them.

1

One of the things you mentioned, I think, was change requests 60 and 61. Do those ring a bell?---The numbers don't necessarily, but the whole idea of changing of whatever the changes were to the scope. It's not a foreign concept to me.

10

All right. In January 2009, so around about the same time as your meeting with the premier and that topic - - -?

---Yes, yes.

- - - the exact date doesn't particularly matter?---Yes.

20

30

40

50

Do you recall Mr Grierson, again, expressing to you his frustration at the continuing change of scope for Queensland Health?---Probably, yes. I mean, I just can't put a date on it. I think that that was an ongoing conversation that Mal and I had on a number of occasions of trying to resolve the conflict of scope and what was in and what was out. I mean, I think it became almost a perennial discussion.

Again, I'll test you if I may. It wouldn't be wrong to describe what he was saying to you as expressing a level of frustration?---Yes, absolutely.

And the frustration was - - -?---And it might even - - -

Okay. That will do. And it was that it was impossible, in effect, to bring this project on to a time frame because of the piecemeal delivery of requests for change of scope?

---He never ever expressed that it was impossible.

Difficult?---Difficult, challenging, hard, whatever the word was. I don't think he ever said, "It's impossible to do it," but I mean you don't have to have a PhD in contracts to understand that unless you can settle the scope, it's very hard to settle the contract and, more importantly, more difficult to deliver the contract.

That's really what I want to get to?---I gathered that.

Certainly, throughout the time that we've spoken about now from when you commenced until January, you were conscious of the change in scope, the difficulty in having that - - -?---I was conscious of the complaints of that.

It's really more than that, isn't it? You were conscious of the fact of it because ultimately you know change request 184?---Yes.

And you know that was signed in June 2009?---I'll take your word for it.

Please don't take my word for it?---I'm sure it's right.

It is the product of negotiations that have been going on for months?---Yes.

And it was about lots of assertions about things being outside scope, in scope, which you know had been vexing this project for months?---Yes.

And, indeed, from the moment your department took over that was one of the things that was causing difficulty in its administration?---Well, I presume it was burdening as well before that and that we actually had the job of trying to bring it to a conclusion.

Do something about it?---Yes.

1

Okay. So the whole of the time up until - if you'll accept from me - June 2009 when that's signed, you're conscious - - -?---I'm sure you're a very honest man. I'm sure you'll be spot on with the dates. I wouldn't rely on my memory.

At least remember it for the few minutes that I'm asking about it, but that was an issue - - -?---That's a challenge.

10

- - - which was expressing, about which Mr Grierson was expressing frustration and possibly (indistinct) and in the context of the need to lock down or freeze or tie down that scope. Is that right?---Yes.

Yes. You know that IBM was contending that that change was making it more expensive for it to perform its contract, that is - - -?---Well, it follows.

20

More difficult?---Yes. All of that follows. I mean, of course they're going to say that. The scope is not in. The contract was a lump sum contract, variations.

Yes. Just bear with me please. All the things that followed is it would be difficult, more difficult for the contractor to perform its job - - -?---Yes.

- - - take longer?---Yes.

30

It will have to replicate work, do it over and over?---It will be costlier.

And so on. So the suggestion that you could flog - I think was the word you used - bring IBM in and flog them would be met with the suggestion, "Well, it was really Queensland Health's fault," and you know that's in fact what would have been said had you attempted to do that? ---Well, it depends. I mean, you don't take a - my experience, you'll have to forgive me, was dealing with contractors who would go into a contract with their eyes open and in a form of contract that would make sure that it was delivered and this building, the one next door, the one over the road, are all examples of that. I mean, the thing I find interesting is that we delivered in my lifetime in Public Works something like \$11 billion worth of work without any of these sorts of problems and here's one that - I don't know, what is it, 60 million. I certainly don't accept the figure of \$1.2 billion being pushed out there by the government. That's the greatest lot of nonsense I've ever heard, but notwithstanding that, I have to say that a good contractor should go into these things with their eyes open and don't go into them if you don't think that you've got the scope right in the first place. I don't know. So when you talk about flogging people, I mean, yes, I'd want

40

50

to flog the contractor that went in there that said, you know, "We can do this" - you know if a contractor came to me and said, "We're going to build this building here" - and believe me, plenty of contractors would have said something like this - "for \$35 million in 35 weeks," I'd have referred the matter to Goodman to the mental asylum and the government would have been made to take them. What I'm saying is no credible contractor would have ever wanted to, you know, go into arrangements without being aware of all the risks that they had. So that's what my anger, I guess, or argument against IBM - - -

1

10

We'll deal with that?---Yes. That's all right.

I take it you haven't read the contract?---No. I never - the quick way to go to gaol for ministers is to get involved in contracts. There are few of them that - Bjelke-Petersen ended up that way.

No, I'm not asking you whether you got involved in it, whether you read it?---No.

20

Okay?---I never read any of the contracts that we have. I've got no business reading them. It's between the state and people are paid to do that, paid a lot more money than I was, by the way, too.

So I take it that you wouldn't know its structure in terms of providing the statements of scope and statements of work?---No, I wouldn't, but I would expect that the people who put those contracts together would be aware of all of those things.

30

True. On both sides?---Yes, on both sides.

That is that IBM were going in with its eyes open?---Yes.

As would - - -?---CorpTech.

- - - CorpTech?---Yes.

40

With the benefit of whatever lawyers CorpTech employed to advise it about the contract?---Well, I expect they knew what they were procuring and I would expect that IBM knew what they were delivering.

That would extend to looking at what the contract provided for about assumptions that had been made - - -?---Yes.

- - - the definition of scope in the contract and contract documents - - -?---Absolutely.

50

- - - the definition of scope in the contract and contract documents?---Absolutely.

And you would expect that the contract has been
administered in accordance with those provisions?---Yes.
I would also expect that it would be delivered with the
outcome that was desired and that was to pay people.

1

Including the application of all change requests being
properly conceded and approved?---Absolutely.

Very good?---I think that's the law, isn't it, that you
have to do that?

10

Very good. After June 2009, which I'll ask you to assume
is the date of change request 184?---Yes. We've agreed on
that.

Yes. You're aware there were continuing change requests?
---Yes.

And continuing scope changes?---I'm aware of those
discussions. Yes. Don't ask me to name what they were.

20

I won't?---Good.

But I want to give you a fact, if I may?---Yes.

Change request 208 was dated just before Christmas 2009?
---Right.

So between June 2009 and Christmas 2009 it goes from 184 to
208?---Yes.

30

I'm not suggesting every one of them is a scope change, but
you can see there's a number?---Yes.

That was consistent with your recollection of things you
were being told?---Yes. That things were changing, yes.
The statement was like nothing I'd ever seen before.

Very good. What, if any - can you help me please -
instruction was given to tie down or freeze or lock down
the scope? That is, what did you tell Mr Grierson to do
and what did he - - -?---I didn't tell him to do anything.
I mean - - -

40

I know it's an irresistible thing, what, if any,
instruction did you give him and what, if any, advice did
he give back to you as to what he had done to do those
things?---Right. Well, for a start, ministers don't direct
their director-generals to do anything in terms of
contracts. As I say, it's a pathway to prison, pretty
close to that. The reality is that any frustration that I
would have felt at that time would have been as a result of
Mal's frustration of trying to deal with it. I had no
direct involvement on a day-to-day basis, and nor would you
expect me to have, with IBM, CorpTech or anybody else

50

developing these problems or trying to fix these problems. What I expected Mal Grierson to do and what he was good at doing was resolving those sorts of problems.

1

Okay. Just so that I'm clear, he's expressed to you frustration or even anger at the fluidity of scope and as best you can recall it, you didn't tell him to do anything about that and you don't recall him reporting back that he had done anything about that?---I'm sure that he would have kept me informed as to what he'd done about it, but what he would have said to me, "This is what I'm going to do about it."

10

What that was - - -?---Pardon?

What was that?---I can't remember, but he would have said something like that. He would have said, you know, "We'll have to lock all this away. We've got to lock this down. They can't keep going like that," words to that effect.

20

30

40

50

Okay. Now, I'll jump ahead. It comes to a decision to go live, which was made by other people - - -?---Yes.

1

- - - as I should understand it?---Yes.

Not by you?---Not by me and I was notified after the event.

Okay, but you would expect, at least, to pick the people who were involved in that decision to look carefully at the state of the documentation, if you like, of the system at that stage, look at all the tests that have been done and the defects that have been identified, and to make informed decisions about whether the system was able to go live, that's what you'd expect?---Well, you'd hope so.

10

That's what they're there to do?---Yeah.

Very good. Now, can I move on to a different topic, and that is: it was really suggested to you something to this effect, and bear with me, please, Mr Schwarten, that when it came to negotiating a deal with IBM, there was, in something called deliverable 47, a breach that you could have relied upon, and that you either overlooked it or you didn't give sufficient weight to that consideration. Do you recall that?---No.

20

Well - - -?---What's 47?

I'm going to tell you. Mr Flanagan tells you that is a deliverable under statement of work 8 as amended by various things and it's for a report to be delivered which says, amongst other things, Mr Flanagan has asked you to assume, there will be no severity 1 or 2 defects. Do you recall that?---Yes.

30

And then he talks about it being remedied within two days?
---Yep.

That's the topic at least?---That's 47.

40

Yes?---Right.

And that it's suggested to you that, in effect, that you didn't have that in your mind or you didn't give it sufficient weight, overlooked it or whatever, that's the thing I want to ask you about, if I may?---Well, obviously I didn't give too much consideration.

Yeah. Have you ever looked at what it provides? That is, have you looked at the document that identifies what deliverable 47 is?---No, not that I'm aware of.

50

Okay?---I may have but I can't recall if I did. Hasn't stuck in my mind.

Well, I'll just see if I can help you. It calls for, as an acceptance criteria for something, that there has been completion of three pay runs?---Right.

Does that ring a bell?---Vaguely.

Let me put it differently. You know that it was at least contended by IBM that there had been three pay runs completed - - -?---Yeah.

- - - successfully?---Yep.

10

It also says no severity 1 or 2 defects. I'll ask you to assume it refers to no severity 1 or 2 defects?---Sorry?

I'll ask you to assume that the acceptance criteria includes there being no severity 1 or severity 2 defects? ---Right. Okay.

Just assume that?---Yep, yep. Okay.

20

Do you recall, in connection with the decision to go live, hearing of something called a defects management plan? ---No.

Okay. Have you become aware of there being, in connection with the decision to go live, an agreed plan for the dealing post go live with things identified as severity 2 defects, or defects generally?---Certainly there was - the one that I'm aware of was what Health put together, required a stabilisation. Is that it?

30

No. Are you aware of an earlier rendition of that? No? ---No.

Okay. You know at some stage - sorry, I'll try one more topic. As to the two-day fix proposition, right, the proposition that was put to you had to be fixed within two days, I want to suggest to you the contract contained a provision under the warranties clause that said defects which were identified had to be fixed within certain times depending on how important they were, and severity 2 defects were identified as being two days, and we apprehend that's what's being referred to. Did you ever read that warranty provision?---No.

40

If I suggested - see how I go with this - that the nature of the fix which was identified was one that could either be permanent or temporary, and it could be a physical workaround - - -?---Yeah.

50

- - - does that ring a bell?---No.

Okay. None of that is something you looked at before? ---No.

Thank you. You know there came a time in which a notice of breach was given - a notice to show cause was given to IBM and - - -?---Yep.

- - - a response was put in IBM, which set out its version of things, and that came before you as a member of the cabinet - - -?---CBRC, yep.

Which I assume you read?---Yes.

And you know that this deliverable 47 was one of the things which you've referred to in that response?---Okay. Yeah.

10

And do you recall that IBM contended it had not breached - - -?---That's right.

- - - deliverable 47 and gave various reasons?---Yep.

Can you at least, without going to the detail, you can recall that the facts, as IBM asserted them to be, were different from those which the lawyers on behalf of the Crown had been - - -?---That doesn't surprise me.

20

Well, that's exactly as you had expected, two views on - - -?---Exactly, two versions of events, two different people.

Yes?---A bit like Mr Brown and Mr Cults, or whatever their name was.

30

I think you're referring to that memo?---Yeah. Well, hearsay is what I'm saying to you.

Thank you. I have nothing further.

COMMISSIONER: Mr Kent.

MR KENT: Thank you, commissioner. Mr Schwarten, do you have your statement there?---Yep.

40

Can I take you, please, to page 4, paragraph 19. This was touched on earlier today but this is the conclusion of your account about the dinner at restaurant 98 in Rockhampton where Mr Salouk was there?---Yep.

What you say in paragraph 19 is that generally what you do when a contractor raises a concern, and he was referred to the director-general?---Yep.

My question is a bit broader. Was this the type of thing that came up every now and then, contractors would raise this type of concern with you?---Well, every time a contractor missed out - and you've got to remember there would be four in the panel and three would miss out, and you might able to function or whatever, and somebody would

50

say, "We missed out," and, you know, the other mob can't do it for the price, or whatever the case might be. I would always say to them, "I didn't award the contract. Go and talk to the director-general. I'll make sure that you get an appointment."

Happen fairly regularly, these contractors - - -?---Well, happened from time to time. The latest in the - I think the latest - last one I dealt with was about Mackay Hospital, where a mob who had done all the previous work then missed out.

May I take you to paragraph 24 on the next page. Speaking there about Mr Grierson's view getting IBM and reading the riot act of support?---Yep.

You say in the last sentence of that paragraph, "I knew that LATTICE was soon to be unsupported and the project was time critical"?---Yep.

If by 2009 LATTICE was in fact already unsupported by its original vendor, would that make a part of that concern? ---Yes, and I'm glad you brought that up because I had forgotten that. That was another imperative - the idea of going back to LATTICE was not an option, as far as I was concerned. I mean, in the normal event, if you could have gone back, and I think this answers your question a bit before, commissioner, too, the idea of going back to LATTICE and then spending the time delivering was, as I understood it, not an option. I think Mal once said to me it's kept together with band aids, so I got the idea that it wasn't long for this life.

May I take you to page 6, please, paragraph 33 of your statement, and you there set out a passage from the KPMG report on 21 July that it was considered in the budget review clearly the next day?---Sorry, where am I - - -

Paragraph 33 of your statement, which is on page - - -? ---Paragraph 33. Sorry. Yes. Okay.

Yes. You have set out there the quote from the KPMG report?---Yep.

I'll take you to the end of the paragraph:

Any option considering the contractual position of IBM needs to take into account the importance of maintaining continuity of the support currently being provided by CorpTech and IBM.

Is it correct from your evidence that was a major driver of the decision that was then taken the next day?---Absolutely.

Okay. Can I take you to paragraph 47 on the next page, page 7? I think this is actually expressly mentioned in the following statement, but I'll just trouble you with it here. You say in that paragraph that you didn't have any direct knowledge or recollection of how the settlement negotiations were conducted by Mr Grierson or indeed any representative or Clayton Utz. You've set out, I think you recall, in your other statement, that it's true, isn't it, that Director-General Grierson was authorised to or delegated to do the negotiations by the CBRC decision of 22 July?---Absolutely. Correct. You know - yeah, okay.

1

10

When Mr Flanagan was asking you questions before lunch, I think it was, at some stage, one of the topics that he does discuss with you was your perception about the concern that if you went down the legal path, IBM might walk off, is the phrase being used?---Down tools, walk off, I think.

Yes. I'm just going to ask that you look at a document and what it is - you may have the volume there - it's volume 2 of the tender bundle?---Volume 2?

20

It might be the one that's open there. I'm not sure? ---It's volume 3. To think we spent a fortune on all the IT in this place and went back to paper. Yes. What page, sorry?

Page 224. Can I just direct you to page 222 so you can see what the document is? This is the Cabinet submission briefing note for the meeting of 22 July 2010. Okay? ---Yes.

30

40

50

If you would just look at the top of page 224, the first paragraph and perhaps you could just read that first sentence to yourself?---That:

Mallesons Stephen Jaques advise it is likely that should the state terminate the contract, IBM would walk off the job. The state takes a significant risk. Crown Law also advised that it's almost inevitable that IBM will bring counterclaims against the state for breach of contract and unpaid fees if the state begin proceedings against IBM.

1

In any case, that was one of the sources of your concern that there was a real risk that IBM could walk off the job? ---Absolutely.

Correct? Now I'm going to ask you to change volumes? ---You're doing it on here now so it's good.

That's good. Volume 1 of the tender bundle?---Here we go.

20

I'm going to take you to page 131, but for this one we should go to 129 first. We're doing this - it might be out of order?---We're back to paper, are we?

COMMISSIONER: Yes. The more things change, the more they stay the same?---I'm sorry, commissioner, I missed that?

The more things change, the more they stay the same?---Stay the same; exactly. The only thing - like change of babies. Sorry, where were before?

30

MR KENT: I'll take you first please to page 129, the first page of Mallesons Stephen Jaques option paper of 2 June 2010 and having identified it, can I take you to page 131 and the second dot point:

A key risk to the state of terminating a contract is that it would need to find a third party to rectify the defects in order to be able to continue using the system?

40

---Yes.

That is someone to step into IBM's shoes. Correct?---Which is what I've made the point before that they don't grow on trees, those people.

So perhaps expressed in another way, that's the kind of concern that you were talking about, is it?---Absolutely.

50

In the same volume which (indistinct) I think almost filing. Can I take you to page 91. This is a Mallesons - - -?---Yes.

Mallesons Stephen Jaques opinion of 30 April and under the heading Opinion it sets out a number of things, which I won't spend much time on, but the idea is that the contractor is likely to be in material breach. There's reference in the next paragraph to schedule 26 and resolving defects within two days. I'm going to ask you to go down another two paragraphs and this is the last big paragraph at the bottom of the page:

Further investigations also needed to ascertain whether in fact the problems that are occurring are as a result of the contractor's design or implementation of the system or, eg, the reasons or example -

10

and they give example of issues that may have arisen on the project, the reason for the delays, the agreed scope; over the page -

whether the customer has accepted a reduced performance level or reduced scope and/or waived rights under the contract; whether the customer has given up rights -

20

and so forth. I don't need to go on. Are these kinds of disputes or the two sides of the story potentially for them to stay on one side and IBM on the other - - -?
---Absolutely.

- - - the kind of thing that made you a bit concerned about immediately going to litigation?---Yes. It reminded me of two cattle dogs fighting in the cattle yard, both of equal strength, both with a lot to lose.

30

All right. Yes, nothing further. Thank you, commissioner.

COMMISSIONER: Mr Foley?

MR FOLEY: Yes, thank you.

40

Mr Schwarten, you were asked some questions by my learned friend Mr Flanagan about the meeting which Mr Grierson had with senior officers of IBM. Do you recall that?---Yes.

It was suggested to you that this was a departure from the settlement sheet which had been arrived at by Clayton Utz solicitors as part of the negotiation process?---Yes.

Can I take you - or perhaps you'd recall the Cabinet Budget Review Committee decision of 22 July 2010 at paragraph 4 which provides that the committee decided to authorise the director-general of the Department of Public Works to act as the state's delegate in progressing the preferred option?---Yes.

50

Given the history of discussions and negotiations, was it a matter of concern to you that Mr Grierson had decided to go directly to negotiate matters with senior officers of IBM? 1
---No, not at all.

And were you satisfied that he had the proper authority of the Cabinet Budget Review Committee to do so in accordance with that decision?---Yes, I was.

Very well. You were asked some questions by Mr Flanagan about the position of the state with respect to subcontractors of IBM. Do you recall that?---Yes, I do. 10

May I take you please to the attachments to the Cabinet Budget Review Committee of 22 July 2010 which appears at volume 2, page 226?---We have to do it again, commissioner.

If you keep out volume 3, if you've got that. I'll take you to both volumes and give - - -?---Volume 2, sorry?

20
Volume 2 - - -

COMMISSIONER: 226.

MR FOLEY: - - - page 226 is the start of the Cabinet Budget Review decision which is attached to your submission as the responsible minister dated the 21st - - -?---Yes. Okay. I've got it. Yes.

Can I take you then to page 347 of that volume which is attachment 13 to your Cabinet Budget Review Committee submission?---Sorry, page 347? 30

That's correct?---That's a letter to Mr Brown.

Yes?---Okay.

It's an advice from Crown Law to Mr Brown in his capacity as executive director of CorpTech?---Yes.

40
All right. Can I take you two pages further on to page 349 towards the bottom of the page and to the paragraph headed 4.3 Inducement and 4.4 Summary?---4.3, sorry?

COMMISSIONER: D?---D? Inducement and summary? Okay.
Right.

50

MR FOLEY: I'll just read that passage because do you recall you were asked some questions about the considerations as to whether there was a hindrance to your entering into contract or to the state entering into contracts with subcontractors?---Yes.

1

All right. Now, this is a document which you attached to your cabinet budget review - - -?---Okay.

- - - committee decision - - -?---Yep.

10

- - - for completeness, and this is the Crown Law advice, for completeness I note that even if the state does terminate the payroll contract, the risk of a claim of inducing breach of the contract by IBM subcontractors remains present in the state's dealing with those contractors. While, as noted in paragraph 4.3(b), it is unlikely that the subcontractors have agreed not to engage directly with the state in their subcontractor agreements, the subcontractors' contracts with IBM will not necessarily terminate on termination of the payroll contract and IBM may continue to have right under those contracts to require subcontractors to engage in work as directed by IBM, the state might be seen as interfering with the relationship between IBM and a subcontractor if it seeks to directly engage a subcontractor to do work that would detract from the subcontractor's capacity to carry out its obligations to IBM.

20

That was the state of legal advice from Crown Law - - -?
---Yep.

30

- - - to your agency of which you are the responsible minister?---Exactly. And at the time, I would have been aware of that.

Yes. And that was accordingly attached by you to your cabinet budget review committee submission?---Yeah, the ministers would have then read.

40

And it was, in turn, attached also, was it not, to your cabinet budget review committee submission that led to the decision of 26 August 2010?---Yep.

Can I take you to volume 3, page 178, please?---Is it that email, is it, this one?

No. Page 178?---Oh, 178.

178 is the cabinet budget review committee decision of 26 August 2010?---(indistinct) worse handwriting than yours, Mr Foley.

50

That's saying something?---Sorry.

All right. So that's a copy of the decision to which is attached your policy submission dated 23 August 2010? ---Mine's 26 August. Have I got the wrong page again?

1

The decision is on 26 August?---Yes. Sorry, yes.

If you go forward four pages to page 182, the date of your - - -?---Right, yeah.

- - - submissions the 23rd?---23rd, yep.

10

And that includes a number of attachments?---Yep.

And if you turn to page 223 - I'm sorry, page 221, towards the bottom you see the same passage of the Crown Law advice?---Yes.

Yes, which you drew - you attach to your submission for the purposes of drawing - - -?---Yep.

20

- - - to the attention of the cabinet budget review committee in making its decision?---Yep.

Yes. Nothing further, thank you, Mr Commissioner.

COMMISSIONER: Yes, thank you. Mr Flanagan.

MR FLANAGAN: May Mr Schwarten be excused.

COMMISSIONER: Mr Schwarten, thank you for your assistance?---Could I just say thank you to you, commissioner, and thank you to Mr Flanagan and for the commission, especially David Mackie, who has kept me in the loops at all times? It's been very good. I thank you for the courtesy that everyone has extended. Thank you.

30

MR FLANAGAN: Thank you, too.

WITNESS WITHDREW

40

MR FLANAGAN: Commissioner, I call Jeremy Charlston.

COMMISSIONER: Mr Kent, can I ask you, is this agreement, exhibit 140, recently come into - recently found by the Crown? I think we asked for it earlier. I'm not being critical.

MR KENT: I have to get instructions but there is - our impression is that it was provided to the commission in response to the very first request.

50

COMMISSIONER: Well - - -

MR KENT: I'm not sure if - - -

COMMISSIONER: - - - I know we asked for it; I think this is the first time we've been given it, so I assume it's taken some time to - - -

1

MR KENT: I know. I think our impression is we provided it. There might be a difference between the commission and us on that. I'm not sure.

COMMISSIONER: Anyway, while I've got you on your feet, what's the relevance of the next exhibit, 141?

10

MR KENT: It really is relevant to the decision made by the board made on the following day. Both of these are relevant to the submissions that you are going to receive at the end of this week, and they're documents that we hope to refer to in the submission, which is why they're being tendered now.

COMMISSIONER: What was the decision made at the end of September 08?

20

MR KENT: That is - yes, the question is whether the gate had been met contractually at that stage - - -

COMMISSIONER: Oh, I see.

MR KENT: - - - and this is a shift away from the condition precedent to what eventually becomes 184.

COMMISSIONER: Yes, all right. Thank you.

30

MR FLANAGAN: While Mr Charlston is coming, I will need to take him to Mr Brown's supplementary statement, which is yet to be tendered, so I might take the opportunity to tender both Mr Brown's main statement and his supplementary statement.

COMMISSIONER: What we'll do, we'll deal with 142 A and B of Mr Brown's two statements.

40

MR FLANAGAN: So the addendum statement is dated 26 May 2013 and the primary statement is dated 21 May 2013.

COMMISSIONER: Is Mr Brown being called?

MR FLANAGAN: He is, yes, tomorrow. Mr Commissioner, can I just also make it clear, we're yet to receive Mr Grierson's statement, that's expected today, so after we have called Mr Charlston, Mr Reid and Mr Brown, it's intended to adjourn and call Mr Grierson first thing on Wednesday - - -

50

COMMISSIONER: All right.

27052013 28 /CH(BRIS) (Chesterman CMR)

MR FLANAGAN: - - - because it's a fairly lengthy statement to digest. Would you like a five minute adjournment while we find Mr Charlston?

1

COMMISSIONER: Yes, all right. When you have found him, let me know.

MR FLANAGAN: Thank you.

THE COMMISSION ADJOURNED AT 4.10 PM UNTIL
TUESDAY, 28 MAY 2013

10

20

30

40

50

27/5/13

32-112

60

