

**In the matter of the *Commissions of Inquiry Act 1950***

**And in the matter of the *Commissions of Inquiry Order (No 2) 2012***

**Further submissions on behalf of  
Mr Gerard Bradley and Ms Barbara Perrott**

**Introduction**

- [1] Following the first stage of hearings, Counsel Assisting delivered written submissions on the procurement issues investigated in that stage. Those submissions were published on the Commission's website. They criticise Mr Gerard Bradley and Ms Barbara Perrott. Leave has been sought and obtained to deliver these further submissions to allow Mr Bradley and Ms Perrott to protect their reputations in response to the criticisms of Counsel Assisting.
- [2] The criticisms of Mr Bradley and Ms Perrott are – it is respectfully submitted – overstated and, unlike the balance of the submissions, made without reference to convincing supporting evidence.

**Direct response to criticisms by Counsel Assisting**

- [3] The criticism in paragraph 6 of the submissions proceeds on the completely unsupported assertion that there was an "unjustifiable" sense of urgency when conducting the procurement process. The urgency was real and immediate. Every relevant piece of evidence, from the Meuleman report<sup>1</sup> to the evidence of Atzeni<sup>2</sup>, Jones<sup>3</sup>, and Hood<sup>4</sup>, backs up the real and genuine concerns about the urgent need to respond to the Lattice risk. The only voice to the contrary may be Mr Uhlmann, who to be frank had nothing like the hands on knowledge and expertise of those outlined above. Once this is recognised, the criticisms in paragraph 6 fall away.
- [4] At paragraph 7 of the submissions, Counsel Assisting write:

The evidence demonstrated deficiencies in the managerial control imposed on, and maintained over, not only Mr Burns, but in ensuring the whole procurement process

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<sup>1</sup> Exhibit 131.

<sup>2</sup> Transcript 31-65.1.

<sup>3</sup> Transcript 20-27.40.

<sup>4</sup> Transcript 3-52.10.

was regular and fair. Responsibility for this falls to senior public servants – principally Mr Bradley and Ms Perrott ...

- [5] Counsel Assisting do not point to the evidence that demonstrates those matters. Mr Burns was appointed at a time of crisis for the Shared Services Initiative. It had failed substantially to meet expectations. Mr Burns was engaged on solid recommendations and representations to the effect that he had the necessary expertise in project turnaround, not merely troubleshooting.
- [6] Counsel Assisting do not identify any particular management control not imposed or maintained. The evidence makes clear that Mr Burns was in constant contact with Ms Perrott who received reports from him regularly. Ms Perrott had confidence, based on experience of Mr Burns' conduct and recommendations from trusted sources, in Mr Burns' ability. Subject to what is discussed next, there was no reason for her to call into question what Mr Burns was reporting to her.
- [7] At paragraph 18 of the submissions, Counsel Assisting assert:
- Very soon after completion of the snap-shot review, Mr Burns was engaged ... to conduct a five week review of the Shared Services Initiative. Again, the contractual basis for this is absent. It is, accordingly, difficult to know the scope of the engagement. What is clear, however, is that Mr Burns had very quickly (in a matter of little more than two weeks and only having participated in one project for the State), obtained the confidence of the most senior Treasury officials: Mr Bradley in particular. It is clear now that Mr Bradley saw Mr Burns as the means by which then existing government policy regarding shared services could be displaced and a new, quicker and cheaper alternative be found and implemented. In reality, however, that involved putting hope over realistic expectation, displacing ordinary governmental control over the formulation of policy of this kind and being ignorant to the inevitable interests which a contractor which [*sic*] in Mr Burns' position would bear: to outsource immediately as much as possible of the work to be undertaken.
- [8] That paragraph has several difficulties.
- [9] *First*, the suggestion that there is no definition of the scope of the engagement to conduct the five week review is at odds with the evidence. Terms of reference were developed by Mr Nicholls and Mr Burns. Those terms were, as Mr Nicholls said, "presented to Geoff [Waite] and he was comfortable with that".<sup>5</sup>
- [10] Mr Nicholls was not asked to identify those terms. They were recorded in a document disclosed by the State on 27 February 2013 in response to the Commission's Request 9, item 12. The document was not tendered in evidence. This is an oversight for which we apologise. A copy is attached and leave is sought to tender the document.
- [11] *Secondly*, Mr Burns' success in quickly gaining the confidence of senior people such as Mr Bradley is explicable by reference to his apparently competent conduct of the review processes for which he had been engaged. His access to those people – that being the avenue through which the rapport was established – was unremarkable. Mr Burns was a

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<sup>5</sup> Transcript 7-15.33.

person of such experience as to suggest that people such as Mr Bradley and Ms Perrott were his natural peers.

- [12] That proposition is put in parallel with, rather than as an alternative to, failure by Mr Bradley and Ms Perrott sufficiently to scrutinise and supervise Mr Burns. It is difficult to reconcile the two criticisms: how can they have been too aloof at the same time as being too closely in contact with Mr Burns?
- [13] *Thirdly*, the criticism that, in taking Mr Burns' advice, Mr Bradley put "hope over realistic expectation" is neither justified by reference to the evidence nor readily to be accepted as a rational induction. At the time of conducting the five-week review, and during it, the state of Mr Bradley's knowledge was that:
- (a) the SSI was failing;
  - (b) Mr Burns had been introduced as a person with significant experience in turning around such projects and recommended by trusted persons;
  - (c) Mr Burns had, in execution of the snapshot review, made recommendations which no-one has suggested were obviously open to question;
  - (d) Mr Burns was in the process of conducting a more extensive review arising from his earlier work;
  - (e) Mr Burns had requested direct contact with Mr Bradley because it was possible that those at intervening levels of management were part of the problem in the sense that they had been responsible for the project failure to date and may, however innocently, prevent important information from getting to those who needed to hear it.<sup>6</sup>
- [14] The recurring suggestion that Mr Burns' direct line of contact to Mr Bradley is evidence of some managerial failure does not stand close scrutiny. Mr Burns had been engaged to give advice on a matter of great moment. Mr Uhlmann had warned of the danger of information not flowing from Mr Burns to senior management and this concerned Mr Bradley.<sup>7</sup>
- [15] Mr Bradley's priority at that point was to find a solution which had not been forthcoming from those within CorpTech. He relied on new expertise to identify such a solution. At the point at which Counsel Assisting submit he put hope above realistic expectation, he was yet to have a recommendation made as to how to solve the problem confronting him. How is one to conclude that he has made an unrealistic assessment in circumstances where the matter for assessment is yet to be put before him?
- [16] In any event, after the completion of the May 2007 review, the reporting structure reverted to normal and Mr Burns reported through Ms Perrott.<sup>8</sup> It is clear that the special reporting

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<sup>6</sup> Transcript 7-88.20 and 14-78.30.

<sup>7</sup> Transcript 6-17 and Uhlmann statement par [48].

<sup>8</sup> Transcript 7-79 (20) and 17-68 (20).

arrangement was only put in place for particular, justifiable reasons and only remained in place for a short period of time, while it was reasonably necessary.

[17] *Fourthly*, to suggest that Mr Burns' brief was with respect to policy formulation is to misunderstand that brief. He was asked to identify solutions. He was asked to make recommendations as to practice. There was no suggestion that government policy was to be abandoned. Counsel Assisting do not go on to identify how Mr Burns' recommendations departed from government policy.

[18] *Finally*, there is simply no basis for saying that it was inevitable that a contractor such as Mr Burns would seek to outsource as much as possible of the work to be undertaken. Mr Burns was not leading some large organisation. Whatever the conclusion as to his eventually apparent partiality, there was no obvious indication at the time that he had anything to gain from outsourcing everything.

[19] One senses that this is something of a circular argument: Mr Burns' recommendation was that most of the operation should be outsourced, so that must have been what he was always going to recommend. Whether or not that is so, there is no basis for saying that it should have been apparent to Mr Bradley or Ms Perrott. When he did recommend significant outsourcing, it was in the context of significant failure of the project as it had been pursued "in-house". Outsourcing was an obvious alternative unlikely to raise alarm bells. Indeed, the Prime Contractor model seems to have gained broad support. The Prime Contractor model was a credible alternative to the path that had been tried and was, by that time, years late and millions of dollars over budget.

[20] The next criticism is set out at paragraph 27. There, Counsel Assisting say:

Mr Burns was too pervasive in his role. Those who should have maintained authority over him, such as Ms Perrott and Mr Bradley, failed to do so and failed to act appropriately in response to the warnings they received in relation to him. The welcoming, almost naïve, reception which Mr Burns enjoyed is in unexplained contrast to the perfunctory treatment of longstanding relatively senior officials in CorpTech who were encouraged to seek alternative employment or who were perceptive enough to see that, with Mr Burns' engagement and the autonomy he was permitted, their positions were at risk and their roles unnecessary. Mr Bond is one such official. Mr Waite is another (and in whose departure Mr Burns was 'instrumental').<sup>9</sup>

Ms Perrott (who replaced Mr Waite as Executive Director of CorpTech) was warned about Mr Burns' conduct by Mark Nicholls and Darrin Bond. She largely ignored them. Mr Bond warned Ms Perrott that Mr Burns was interfering in the evaluation process.

[21] Counsel Assisting do not expand upon their meaning in saying that Mr Burns was "too pervasive". We infer that they mean to say that he was allowed too much autonomy, but as Ms Perrott made clear in her evidence, she supervised him and received regular reports from him.<sup>10</sup> Ms Perrott's preparedness to accept Mr Burns' advice should not be

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<sup>9</sup> The proposition that Mr Burns was "instrumental" in Mr Waite's departure was put to Mr Burns by the Commissioner and accepted: Transcript at 13-84.26.

<sup>10</sup> Transcript 16-70.23.

equated with some suggestion of failure to consider the import of that advice. Ms Perrott gave evidence of occasions on which she questioned Mr Burns' approach.<sup>11</sup>

[22] Mr Burns' reception at CorpTech is described as "almost naïve", but no groundwork is laid for that charge. The suggestion, effectively of a lack of sophistication in engaging and supervising Mr Burns during the review process, is simply not supported by the evidence. At the risk of repetition, Mr Bradley and Ms Perrott each acted on advice as persons in their positions must do. That advice, by any reasonable standard, was more than plausible. It came from trusted sources. It was backed up by effective work from Mr Burns during the early review processes.

[23] Further, Ms Perrott's evidence is consistent with a sophisticated assessment of Mr Burns' abilities and suitability for particular roles. She gave evidence in response to questions from Counsel Assisting that Mr Burns had not been appointed on a permanent basis to the Solution Design Authority because she had assessed him as unsuitable for a more permanent role.<sup>12</sup>

There are a number of reasons for it, but the first reason was just in terms of cost you had a contractor on a daily basis as opposed to a permanent public servant that ultimately fulfilled the role, yes?---No, that wasn't the primary. The primary reason is that I didn't believe Mr Burns had a long term role within CorpTech, I think he was good at what he did with the short term role in terms of reviewing and perhaps shaking the place up a bit, but in terms of a long term role in the organisation I never viewed - and hence the PDD role, I never filled it while Mr Burns was there because I knew he wasn't the person for the role.

Why was that?---(1) because of his style, I think his style suited the reviewer, you know, unsettling things, making recommendations; the other was he wasn't someone who was strong on detail. I don't believe he had strong management skills [*sic*] that I would have expected in a senior public servant with a line responsibility.

[24] The suggestion without more, that they were unreasonable, or naïve, in preferring the advice of Mr Burns over the advice of established CorpTech personnel cannot be accepted. The best that seems to be said in favour of their views is that they were "longstanding relatively senior officials in CorpTech" as though that is determinative. They lacked the experience of Mr Burns in turning around troubled projects. In that connection, it is hardly surprising that Mr Burns' advice was preferred.

[25] Moreover, there was evidence that there was consideration of competing opinions. For example, Mr Bond, having taken the view that the prime contractor model was not the right one, prepared a paper as a basis for raising that concern with Mr Bradley.<sup>13</sup> At the time, Mr Bradley was, according to Mr Bond, well aware of Mr Bond's views.<sup>14</sup> Contrary to the proposition that Mr Bond was given only "perfunctory treatment",<sup>15</sup> Mr Bond was of the

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<sup>11</sup> For example, Ms Perrott took Mr Burns to task over his attempt to forbid Mr Bond from communicating with Mr Bradley: Transcript 16-78. See also Transcript 16-83.9.

<sup>12</sup> Transcript 16-79.29.

<sup>13</sup> Transcript at 2-83. It appears that Mr Bradley was not given a copy of the paper, but Mr Bond met with him and spoke to the paper: Transcript at 2-84.27 and following.

<sup>14</sup> Transcript at 2-84.4.

<sup>15</sup> Submissions of Counsel Assisting at paragraph 27.

view that his concerns would have been taken seriously.<sup>16</sup> He was confident, given their long working relationship, that Mr Bradley was interested in hearing his opinion. Mr Bond was also not given any "perfunctory" or otherwise improper treatment by Ms Perrott and he confirmed that she was always willing to listen to his position and engage in vigorous discussion. He did not allege any animosity their relationship<sup>17</sup>.

- [26] Those facts make it apparent that both Ms Perrott and Mr Bradley were engaged, took advice, and made up their minds on the basis of that advice. It is important that what we now know about Mr Burns' conduct during the evaluation process should not be confused with what Ms Perrott and Mr Bradley knew at material times. The allure of a counsel of perfection based on hindsight should, it is respectfully submitted, be resisted.
- [27] It is too much to say that Mr Burns' conduct was the subject of a warning from Mr Nicholls. The letter upon which Counsel Assisting rely has nothing to say about the ability of Mr Burns or his ethics. It merely says that Mr Nicholls is unable to vouch for him, having missed the opportunity properly to supervise Mr Burns' work to that point. It was written by someone who was apparently unhappy with the turn of events. It is hardly surprising that little weight would be placed on that letter.
- [28] The warnings from Mr Bond came during the evaluation process. They were, in the end, principally with respect to Mr Bond's view that the role being carried out by Mr Burns should have been undertaken by a permanent public servant.<sup>18</sup> He made no particular criticism of Mr Burns' conduct.
- [29] Next, at paragraph 29, Counsel Assisting imply that Mr Burns' intervention to prevent Mr Bond from communicating with Mr Bradley reflects poorly on Mr Bradley. Mr Bradley gave evidence on the point.
- [30] Counsel Assisting end this passage by accusing Ms Perrott and Mr Bradley of dereliction of duty, that is, deliberate, conscious or wilful neglect thereof.<sup>19</sup> That charge, with all respect, is couched in very strong terms and made on the thinnest of evidence.
- [31] None of this is to say that Ms Perrott and Mr Bradley deny all responsibility. As senior persons, they accept that, later in time, as Mr Burns moved from consulting to operational roles, greater scrutiny and supervision was warranted. They accept as reasonable, the criticism that Mr Burns' commitment to and understanding of relevant policies and ethical requirements should have been established. Such concessions are reasonable and thus are a bulwark to the creditworthiness of the witnesses. General allegations of dereliction of duty are, with respect, an overstatement of an *ex post facto* analysis of the conduct of honest hardworking public servants doing their best in difficult circumstances.

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<sup>16</sup> Transcript at 2-84.38.

<sup>17</sup> Transcript 2-95.1.

<sup>18</sup> Transcript 2-64.3, statement of Darrin Bond, paragraph 19.

<sup>19</sup> Submissions of Counsel Assisting at paragraph 30.

## **Conclusion**

- [32] It is an overstatement and unfair to characterise the conduct of Mr Bradley and Ms Perrott as a dereliction of duty.
- [33] The criticism also tends to dull some matters that are plain as a result of the procurement stage. The overblown criticism of Ms Perrott and Mr Bradley tends to equate their errors of judgment with what amounted to bad faith and dishonest conduct on the part of IBM, principally through the conduct of Mr Bloomfield. There is simply no comparison. IBM's conduct in the evaluation process is a key feature of the ultimate difficulties experienced in implementing the interim payroll system solution.

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