

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

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

**Submissions on behalf of the State of Queensland**

**(Procurement issues)**

**Preliminary**

- [1] These submissions are directed to the following topics in which the Commission has indicated it is primarily interested:
- (a) the engagement of Mr Burns by CorpTech;
  - (b) his suitability for the role;
  - (c) the scope of his engagement;
  - (d) whether IBM received or misused, or attempted to misuse confidential information during the RFI, RFP or ITO;
  - (e) whether Mr Burns exhibited partiality in favour of IBM;
  - (f) whether Mr Burns intervened in the ITO Evaluation Process;
  - (g) software selection and the proposal by IBM to use WorkBrain.

**Overview of the State's position**

- [2] Mr Burns' original appointment as a consultant was on the advice of another trusted consultant. He had recent experience in turning around difficult IT projects. Whatever criticism might be made of his eventual conduct, the original appointment was sound. Whilst, as Ms Perrott and Mr Bradley appropriately conceded, there is scope for criticism of his later appointments, that needs to be seen against the background of Mr Burns' represented experience and the approach which CorpTech had adopted to overcome the failure of the project to date.
- [3] IBM's use of data as demonstrated by exhibit 32 and related evidence raises questions as to its honesty in the procurement process. In particular, Mr Bloomfield's identification of the prospect that the State might ask for a "Not To Exceed" ("NTE") price as a risk invites further

inquiry as to whether it always expected to charge much more than the \$98 million figure cryptically suggested in its ITO response. In turn that raises questions as to whether IBM's success in the ITO process was based on a fundamental misrepresentation, that being that IBM had impliedly given its best estimate in its ITO response.

- [4] As to the question of Mr Burns' alleged partiality and intervention in the evaluation process, the State considers that there is insufficient evidence to come to the conclusion that Mr Burns sought dishonestly to act in IBM's interests to the expense of other tenderers. The better view, it is respectfully submitted, is that Mr Burns did not appreciate the special obligations of government agencies in procurement situations to act transparently. In any event, the elaborate evaluation process is likely to have overcome any such partiality.

### **Terry Burns**

- [5] Mr Burns' engagements by CorpTech are summarised in the attached schedule.

- [6] The roles to which Mr Burns was appointed included:

- (a) conducting the April 2007 review;
- (b) conducting the May 2007 review which recommended creation of the Solution Design Authority, the appointment of an interim Program Delivery Director (a consultant) to be succeeded by a permanent public servant after 12 to 18 months, a Program Management Office;
- (c) engagement in June 2007 to develop implementation plan for recommendations from previous reports as well as other strategic considerations;
- (d) extension of that appointment in September 2007, but this time through Cavendish Risk Management, the extension being for purposes including completing the Rebuild Project, contract negotiations, establishment of the SDA and the Strategic Program Management Office;
- (e) appointment of Burns as Program Delivery Director in March 2008.

### *Matters of judgement in appointing Mr Burns to various roles*

- [7] Mr Burns was initially recommended by Information Professionals. That firm represented that:<sup>1</sup>

Terry is a highly experienced program director with 18 years' business and IT management experience in the financial services, government, retail banking and transport industries. Terry has an exceptional track record in implementing large, complex IT projects. He has led teams of more than 250 people and has won three IBM management awards.

- [8] It was reasonable to rely on that recommendation. It came from a firm with which CorpTech had a longstanding relationship. The appointments then contemplated were short-term review projects for which Mr Burns was apparently well qualified.

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<sup>1</sup> TB1, item 29.1.

- [9] Mr Uhlmann, through Arena Consulting, indicated to CorpTech that it would check Mr Burns' references.<sup>2</sup> Information Professionals subsequently undertook those checks.<sup>3</sup> Mr Uhlmann's evidence indicated that there was deliberation in recommending Mr Burns:<sup>4</sup>

And who did you think could do the job?---Well, I certainly thought Terry would be able to do the job.

Did you recommend Mr Burns to the under-treasurer?---I can't remember doing that, but it is possible.

Why didn't you recommend yourself?---I don't think I have the technical skills for that kind of project rescue and that really did need - I think it needed real serious project turnaround experience.

- [10] That evidence is also important in the sense that is consistent with a particular skill-set ("real serious project turnaround experience") having been identified as necessary. Project turnaround experience is not limited to conducting reviews, but extends to the 'hands on' work associated with getting a project back on track.
- [11] The first two stages of Burns' engagement referred to in paragraph 6(a) and (b) involved the reinvention of the Shared Services Initiative following its failure to meet previous expectations. The work contemplated in the reviews fitted easily within Mr Burns' represented experience.
- [12] The first point at which Mr Burns arguably stepped outside what might be regarded as area of expertise was in the course of planning and executing a government procurement process. Mr Burns' resumé did not disclose experience in government procurement. Government procurement has particular requirements of transparency and probity beyond those necessary for strict compliance with the law.
- [13] Mr Burns' appointment to be closely involved in a procurement process is open to the criticism that someone without experience in government procurement might not appreciate the elevated need for transparency and probity inherent in such a process. Mr Burns' interludes with staff from IBM tend to vindicate that concern, but they were not matters known to those to whom he reported at the time.
- [14] Even acknowledging the room for such criticism, it has to be borne in mind that CorpTech had reasonably come to the view, that the public sector processes had failed and that some different approach was required. Looking for that approach, they selected Mr Burns, his having been favourably recommended by a trusted and trustworthy source. He was hired for his project turnaround experience. He was understood not just to be someone adept at reviews but at making failing projects actually work.
- [15] Having reasonably formed the view that Mr Burns was well-qualified in that area, it is just as easily to be argued that CorpTech and the State could trust Mr Burns not only to make recommendations as to how to turn around the project, but implement those

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<sup>2</sup> Arena's proposal for Policy and Program Office Consultancy, TB1, item 3.1, page 14. This document was produced by the State at the Commission's request.

<sup>3</sup> TB1, items 29.2.1 and 29.2.2.

<sup>4</sup> Transcript 6-18.32.

recommendations. His professed experience, backed up by Information Professionals, was in project turnarounds, not just project reviews.

[16] Ms Perrott has given evidence that:<sup>5</sup>

- (a) she denies the suggestion that she delegated management of the procurement process to Mr Burns and did nothing more than sign-off on his recommendations;
- (b) she managed the process and, in the course of that, managed Mr Burns who was answerable to her;<sup>6</sup>
- (c) as far as the procurement process was concerned:

Mr Burns was recruited for a short term contract due to his apparent experience in risk assessment, high level contract negotiation skills and advising on the appropriate governance arrangement when working with a Prime Contractor. It was my belief that these skills transcend jurisdictions and were ones that we were lacking in CorpTech. I surrounded Mr Burns with people on his team who were highly conversant with the Queensland Government procurement process, and he also reported regularly to myself and other member [sic] of the CT management Team on progress. I was also of the belief that while these skills were important in the set-up period with the Prime Contractor, Mr Burns would never be a long-term employee/contractor of CorpTech.

[17] Ms Perrott's oral evidence included her having formed the view that Mr Burns was suited to the role of a reviewer because his style was to unsettle things and make recommendations. She did not see him as remaining in the organisation in the longer term in a management role.<sup>7</sup>

[18] So, it can hardly be said that Mr Burns' circumstances did not remain the subject of close consideration. Ms Perrott took the time to consider, at later stages, whether the new tasks that were being set for Mr Burns were ones to which he was suited. Also, as she has indicated in evidence, when she found occasion to address difficult behaviour, she did so.<sup>8</sup>

[19] There has been some suggestion that the letter from Mr Nicholls of Information Professionals to Mr Ford of 27 September 2007<sup>9</sup> should have been seen as a warning sign. That proposition is without merit.

[20] The letter came the day after Mr Burns, through his company, Cavendish Risk Management, contracted with CorpTech for the purpose of Mr Burns taking on the role of Project Director of the SSI Program Rebuild. Put in its best light, the letter was an indication that, given Information Professionals would be playing no further role in provision of Mr Burns' services, and the lack of opportunity to sufficiently review his work to date, they offered no warranty as to his suitability for the new role.

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<sup>5</sup> Statement of Perrott, 14 March 2013, paragraphs 6 – 7.

<sup>6</sup> See also, Ms Perrott's evidence at transcript 16-70 and following.

<sup>7</sup> Transcript 16-79.42.

<sup>8</sup> Transcript 16-77.48 and following.

<sup>9</sup> TB1, Vol 32, Item 29.5.3.

- [21] The letter is carefully worded and makes no suggestion that Mr Burns was unsuitable for the role or that Information Professionals had cause for concern about his work to date. Indeed, it would have been difficult to make such a statement given the apparently impressive references which Information Professionals had obtained when it did carry out reference checks.
- [22] It is possible to elevate the concern that Mr Burns lacked public sector experience beyond its real importance. If there is substance to that criticism, it is that private sector people may be less attuned to public sector practices; however, any person with Mr Burns' high level commercial experience would be expected to understand that, in a tender process, the principal will potentially be at risk when any sort of preferment is shown to one of the tenderers. Such a person could reasonably be expected to understand that commercial ethics were conspicuously important in such a situation.
- [23] Mr Bradley was questioned by Counsel Assisting on the issue of Mr Burns' increasing authority over the relevant period:<sup>10</sup>

Mr Bradley, did you see anything wrong in empowering Mr Burns in the way that you empowered him by giving him a direct line for his May review and empowering him by having a direct line to you, and then, having written his report, appointing him to the very position he had recommended in that report and continuing his role by also appointing him or through Ms Perrott to head the solution design authority? That is, do you see anything wrong with empowering Mr Burns in those 10 situations in preference to the long serving public servants who had been carrying out this program since 2002, namely Mr Bond and Mr Waite?--Well, I wasn't seeking to empower Mr Burns in preference to any existing person within CorpTech. Indeed, he worked within the structures that I set up at that time in terms of having a steering committee overseeing his work, whether he created a different perception or not, I'm not sure. The role that we appointed him to after the May report was a reasonably focused role, had a - it didn't oversight large staffing 20 resources or anything of that nature, or overlap with a particular role of any other person within CorpTech. It was focused on doing a strategic piece of work around how we could develop a forward program beyond the current implementations. I think in retrospect allowing him then to get to play more active roles through the tender process, in retrospect we perhaps should have done something differently there, but at the time he was a resource who appeared to have the relevant skills.

- [24] Whilst Mr Burns' conduct has been impugned through the investigative processes of this Inquiry, the matters apparent to decision-makers at times material to his various engagements did not suggest the difficulties of judgment now suggested.
- [25] The main criticisms of Mr Burns in the course of this inquiry relate to suggestions of partiality on his part to IBM's interests. That partiality is suggested to have manifested in private encouragement before evaluation of the tender and exertion of favourable influence during the evaluation process. Those matters are dealt with in further detail below, but they were not matters that could have been apparent at the time that Mr Burns was re-engaged in June 2007; nor were they matters which the State should have been expected to discover on its own initiative.

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<sup>10</sup> Transcript 17-85.1 and following.

[26] It is respectfully submitted that too much store can be placed in the status of Mr Burns as a contractor rather than a public servant. If Mr Burns had been recruited to the public service to turn the project around, he would have brought the same skills to the table. As things were, he was a contractor who owed the ordinary legal and equitable duties owed by a person in such a position of trust.

*Private discussions with IBM*

[27] Mr Burns' discussions with IBM in contemplation of the RFI, RFO and tender processes were inappropriate. Best practice in procurement requires that competitors all receive the same information. That approach aids transparency as well as promoting effective competition. Effective competition in turn ensures the best chance of obtaining value for money.

[28] The most troubling of Mr Burns' private interactions with IBM was the "coaching" meeting.

[29] It is a matter of notoriety that, on 2 May 2007, Mr Bloomfield reported to his colleagues at IBM that Mr Burns, having formed the view that IBM was "grossly under-represented" at CorpTech, was "almost at a stage [where he was] coaching [IBM and was] already strongly recommending the position [IBM] should take in some areas."<sup>11</sup>

[30] IBM's explanation for this was that "coaching" had a particular meaning within IBM: to get the best out of someone. Mr Burns readily agreed with Mr Doyle's articulation:<sup>12</sup>

Can I ask you if you agree with this: that you would be 1 endeavouring to focus him, Mr Bloomfield, on bringing up the best that he possibly could?---Yes.

To get IBM to - his language is "to get IBM to the starting line to ensure a competitive contest"?---Yes.

You may well have said that?---Yes.

If you said that, you were doing so in order to provide 10 what you perceived to be the best possible outcome for your client CorpTech?---Yes. In simple terms, I would have loved to have seen four very competitive bidding strategies from the four major vendors and possibly some from some smaller, if that's helpful to you.

[31] Taken at its best, there is still reason to be concerned about this conduct. There does not seem to have been any similar attention to other bidders. The concern that one potential competitor was obtaining a private advantage must have been apparent to any reasonable person.

[32] Taken less credulously, there is cause for significant concern.

[33] It is to be noted at this point that Mr Bloomfield had, by 2007, experience when it came to government procurement. He had only just joined IBM but had many years' experience in the field thanks to his time with Accenture.<sup>13</sup> He may be taken to have been familiar with government procurement processes, including the requirements of the State Procurement

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<sup>11</sup> TB1, Item 25.5, page 230.

<sup>12</sup> Transcript 14-94.1.

<sup>13</sup> Statement of Bloomfield, 18 March 2013, paragraph 4.

Policy. That policy required ethical, honest, fair behaviour.<sup>14</sup> IBM provided him with training as to matters of ethics and honesty.

*Mr Burns and the ITO process*

[34] In opening, Counsel Assisting put the concern with respect to Mr Burns' conduct in the ITO this way:<sup>15</sup>

... Evidence has emerged that about two thirds the way through the evaluation process, Accenture was ahead. Mr Burns, at this time, met with sub-team leaders and urged them to reconsider their assessments.

Mr Darrin Bond's evidence, for example, is that this occurred and that as a result and feeling uncomfortable about it, he revisited the provisional scoring he had adopted. The result was that at a time when it looked as though Accenture was in front, IBM took the lead on the provisional scoring. Not all team leads have this recollection. There are others, however, who do have a recollection similar to that of Mr Bond.

[35] The evaluation was conducted according to a settled process set out in the evaluation reports completed by each evaluation team.<sup>16</sup> The process included a section entitled "3.0 EVALUATION PROCESS". The evaluation process is broken up into a number of stages which are described in terms of objectives, processes and deliverables. It is apparent that:

- (a) the purpose of stage 1 was to review the vendor offers and prepare draft scores as part of draft team reports;
- (b) the purpose of stage 2 was to review the draft reports and, to that end, "review and moderate scores considering holistic evaluation".

[36] Part of the process for stage 1 was for "Offerors" to provide Q&A session." Those sessions were held, and it was after those sessions that Mr Burns called for the scoring to be revisited.

[37] Mr Bond gave evidence that after the first round of scoring took place, Mr Burns spoke to the evaluation panel and told them that they had not really considered all of the capabilities within the offers.<sup>17</sup> He recalled that "Terry made some reasonable points".<sup>18</sup> That observation is inconsistent with a view that Mr Burns was apparently exercising a malign influence. Mr Mander expressed a similar sentiment and stated that it was a natural step following the clarification process to go back and re-evaluate based on additional information.<sup>19</sup>

[38] Mr Bond seemed more concerned with Mr Burns being engaged to run the tender process than with the content of his advice on the occasion in question.<sup>20</sup>

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<sup>14</sup> TB1, Item 23.3, page 43.

<sup>15</sup> Transcript 1-15.5.

<sup>16</sup> See, for example, TB1, Item 18.1.1, page 4.

<sup>17</sup> Transcript 2-62.32 and following.

<sup>18</sup> Transcript 2-63.18.

<sup>19</sup> Transcript 7-51.1.

<sup>20</sup> Transcript 2-64.3.

How did you react to this meeting?---Yep. I didn't really appreciate it. I felt that - my main concern was around someone external to government leading the process and I raised those concerns with Barbara Perrott over the next day or two.

- [39] Mr Bond expressed a similar view in his statement.<sup>21</sup> He went on to say that he has “no evidence that Terry Burns was other than independent in [the] process.”<sup>22</sup>
- [40] Mr Bond did not suggest that Mr Burns was being partial; much less deliberately so.
- [41] Whatever Mr Burns’ attempts at intervention in the tender process, one should be careful not to over-state the likely impact of his calls to members of the evaluation panel to reconsider.
- [42] Even assuming he attempted to do so, the likelihood that Mr Burns ultimately affected the ITO process so as to change the result from what it would otherwise have been is low. There were too many people involved, most of whom, have no recollection that Mr Burns did anything approaching a partisan recommendation.
- [43] In any event, assuming the efficacy of the IBM bid (that is, that what was proposed was possible within the timeframe proposed), there is a fair case to be made that the IBM response was in fact the superior bid. Whilst hindsight has demonstrated that the IBM bid was unrealistic both in terms of price and in terms of timeframes, what IBM proposed to do, if it could be done, was arguably the superior proposal.

## **Misuse of confidential information**

### *The Accenture e-mail*

- [44] The State has two principal concerns arising from the apparent misuse of confidential information by IBM in the RFI, RFO and ITO processes (“the procurement processes”). Both ultimately go to the efficacy of the tender process.
- [45] First, the use of the e-mail from Mr Porter to Mr Pedler by Mr Bloomfield on 3 August 2007, invites the concern that IBM was aware at an early stage, at least of the significant possibility, that IBM’s tender response was unrealistic both as to timeframes and price.
- [46] Secondly, the use of the e-mail indicated the preparedness – at least on Mr Bloomfield’s part – to act dishonestly in the process.
- [47] Mr Bloomfield’s receipt of the e-mail was not widely published. He did not tell Mr Cameron about it.<sup>23</sup> He did not raise it with his superiors, despite his knowing that was what IBM’s code of conduct required.<sup>24</sup> He used the information in it to prepare his presentation to the Complex Deal Meeting held within IBM on 20 August 2007.<sup>25</sup>
- [48] Mr Bloomfield sought to brush that use aside by saying that it made no difference to what was eventually presented to CorpTech, but even if that is true, it misses the point. The

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<sup>21</sup> Statement of Darrin Bond, paragraph 19

<sup>22</sup> Ibid at paragraph 25.

<sup>23</sup> Transcript 11-33.5.

<sup>24</sup> Transcript 12-62.1 and following.

<sup>25</sup> Exhibit 34.

information was used for the purpose of investigating a risk as part of a strategy. It was used so as to be prepared for the fact that the question of a “Not to Exceed” price might arise.

- [49] Mr Bloomfield’s answers on the question of the Accenture e-mail cast a more general cloud over his credibility. Mr Bloomfield frequently answered questions by saying he had no recollection because the events in subject had happened so long ago. Whilst one might readily accept that he would forget the minutiae of day-to-day dealings, it is difficult to accept that he would not have remembered who had sent him the Accenture e-mail. It was a seminal document, which, as he said in his own words at the time, had been sent to him by “a mutual friend”. His unwillingness even to hazard a guess at who it might have been invites suspicion as to his credibility.
- [50] The e-mail identified the following facts:
- (a) the government had a budget of \$100 million which it knew was insufficient to get the work done;
  - (b) as a bidding strategy, Accenture intended to offer the NTE so as to give the comfort that comes with greater certainty;
  - (c) Accenture assessed there to be a real risk that relevant government officials may be persuaded by a bid within the government’s remaining budget;
  - (d) Accenture assessed any such bid to lack credibility because it was impossible to deliver services for that price;
  - (e) Accenture anticipated the need for a six-month transition period.
- [51] Those matters must at least have raised the apprehension at IBM that the bid they intended to put forward was unrealistic, both as to price and timeframes. It must certainly have given Mr Bloomfield pause. As history demonstrates, the price was nowhere near sufficient and the timeframes were preposterous. Mr Doak acknowledged in his letter of July 2009 that normally this type of project would be one of 3 – 5 years’ duration.<sup>26</sup>
- [52] It must also be noted that IBM knew that it had a much lower level of engagement with the Shared Services Initiative than Accenture. Mr Bloomfield acknowledged as much in the notorious “coaching” email.<sup>27</sup> The assessments and conclusions set out in the e-mail must have been valuable to the less well-informed IBM. It is implausible to assert, as Mr Bloomfield did, that the information did not colour IBM’s subsequent approach.
- [53] Equally, Accenture’s assessment of the situation must have coloured IBM’s assessment as to whether the bid it made in the ITO was realistic.
- [54] The purpose of the procurement processes, apparent to all participants, was to acquire professional services that CorpTech was not able to provide itself. The processes came about because, as Counsel Assisting put it in opening, by April 2007, “something had to

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<sup>26</sup> TB2, Item 264, page 285.

<sup>27</sup> Exhibit 32.

change”.<sup>28</sup> It is not in dispute that, at that stage, the Shared Services Initiative was not in good shape. Mr Waite had told Mr Bradley that Mr Waite was uncertain of where to go from that point on and ... needed guidance”.<sup>29</sup>

- [55] It must have been apparent to IBM during the procurement processes that, at least to some extent, its estimates as to price and timeframes would have to be taken on faith. Of course, proper processes would have to be employed to scrutinise responses at the various stages, but it cannot be denied that it was much better placed to estimate the cost and timeframes of the solution it was proposing. That better position was informed not least by the specialised skill and knowledge that IBM had and which, as it knew, CorpTech lacked.

*The Jensen (nee Bennett) e-mail*

- [56] Ms Jensen’s e-mail disclosing the interim position of the evaluation panel in the RFI process is of concern inasmuch as it demonstrates significant lapses in ethical conduct; however, it does not seem to have had any real impact. There was little that IBM could do with the information provided. Certainly, there seems to have been no impact on the responses to the ITO or their evaluation.
- [57] Of course, the e-mail also raises questions about the security of government systems at the time. The State proposes to comment further on such issues at the end of hearings.

**Workbrain**

- [58] Workbrain was first adopted in 2005. It was not proposed then that it be tasked with the award interpretation activity subsequently proposed in 2007.
- [59] The fact that Workbrain had already been adopted, although not implemented, is an important matter of context in understanding the adoption of the proposal in the ITO response to use it as the primary awards interpretation engine. That proposal did not mark the first time Workbrain had been mentioned. There was a reasonably held measure of confidence that Workbrain was sufficiently robust software. That confidence was enhanced by IBM’s representations as to the suitability of Workbrain.
- [60] The State sought to establish suitable contractual protection against the possibility that Workbrain might fail. Clause 4 of the warranties set out in schedule 26 to the contract specifically provided for the exclusion of Workbrain as the award interpretation software if it failed relevant testing. The warranties required that IBM provide an alternative solution. Schedule 46 also contained a requirement for scalability testing.
- [61] Whilst the State accepts that there is force in the criticism that the novelty of the Workbrain proposal necessitated a working demonstration of its capability as an awards interpreter, the State took a fairly sophisticated alternative approach. It did not merely seek a contractual obligation to make Workbrain work, but the better comfort of an obligation to provide an alternative solution. It is true to say that this involved an act of faith in IBM, but so does any act of reliance on professional advice.

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<sup>28</sup> Transcript 17-94.33.

<sup>29</sup> Transcript 17-94.37. See also Statement of Perrott, 14 March 2013, paragraph 8.

- [62] It is also important to take account of the fact that, right or wrong,<sup>30</sup> the State was operating to a tight time-frame. Its goal was quickly to obtain a replacement for existing systems because those were outmoded. The choice was to reject the prospect of using Workbrain or to attempt some contractual protection and take the (justifiable) gamble that IBM would make good on its representation.
- [63] IBM professed the necessary skill to develop a complete solution for the government. Whilst it may be argued (with the benefit of hindsight) that the State should have been more sceptical of IBM's representations, particularly given that the decision to undertake award interpretation in Workbrain rather than SAP was recognised to be unconventional, any client receiving such a representation from a tenderer with recognised skills in the area would be justified in placing significant confidence in the tenderer's representation.

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Amanda Stoker  
Barrister-at-Law

26 April 2013

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<sup>30</sup> This submission is made conscious of the fact that some witnesses held the opinion that the concern over Lattice going out of support was something of a fiction. The State does not, however, concede that concern about Lattice was other than genuinely held and, indeed, reasonable.

### SCHEDULE

<b>Date</b>	<b>Role</b>	<b>Company</b>
24.04.07 to 01.06.07	Project Director	Information Professionals
31.05.07 to 01.09.07	SSI Program Build	Arena
24.09.07 to 21.12.07	Project Director, SSI Program Rebuild	Cavendish
22.12.07 to 28.03.08	Project Director, SSI Program Rebuild	Cavendish
29.03.08 to 30.06.08	Program Delivery Director	Cavendish