



## SPARK AND CANNON

### TRANSCRIPT OF PROCEEDINGS

Telephone:

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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 28/05/2013

Continued from 27/05/13

DAY 33

**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

THE COMMISSION COMMENCED AT 10.04 AM

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MR FLANAGAN: Mr Commissioner, just two corrections to the transcript from yesterday. It's day 32, page 109, at line 40 in the paragraph commencing, "And it was in turn hatched". The word should be "attached".

COMMISSIONER: Let me find it.

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MR FLANAGAN: 32, 109, line 40.

COMMISSIONER: Yes.

MR FLANAGAN: "And it was in turn attached," rather than hatched.

COMMISSIONER: All right.

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MR FLANAGAN: My learned friend Mr Foley has been kind enough to bring this to my attention, but the second correction is of more significance. It's the same page 32, 109, line 52 where Mr Schwarten refers to, "Worse handwriting than yours, Mr Flanagan." It should be Mr Foley.

COMMISSIONER: All right. I'll make those changes.

MR FLANAGAN: Mr Commissioner, I call Michael Reid.

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**REID, MICHAEL ANTHONY** affirmed:

MR FLANAGAN: Thank you, Mr Commissioner.

Mr Reid, would you give your full name to the commission, please?---Michael Anthony Reid.

Mr Reid, you've previously given evidence to the commission and a statement, which is exhibit 9, has been tendered. You've provided a further statement to the commission in relation to this tranche of evidence concerning settlement. Is that correct?---That's correct.

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And that's an 11-page document dated 23 May 2013. Would you look at this document, please? I think I said exhibit 9. It should be 90.

COMMISSIONER: 90. Yes.

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MR FLANAGAN: Yes.

Mr Reid, is that the statement that you've executed?---That is.

All right, thank you. I tender that statement,  
Mr Commissioner. 1

COMMISSIONER: Yes. Mr Reid's further statement is  
exhibit 143.

ADMITTED AND MARKED: "EXHIBIT 143"

MR FLANAGAN: Mr Reid, it will come shortly, but you've  
also done a brief statement in reply to a statement of  
Mr Kalimnios. Is that correct?---I have. 10

May I tender and show you first of all - would you mind  
stapling it for me - a further statement of yourself dated  
15 May 2013 and, again, you've sworn that the contents of  
that document are true and correct to the best of your  
knowledge and belief?---It is.

Yes. I tender that document, Mr Commissioner. 20

COMMISSIONER: Yes. Mr Reid's statement of 15 May 2013 is  
exhibit 144.

ADMITTED AND MARKED: "EXHIBIT 144"

MR FLANAGAN: And for completeness at this stage,  
Mr Commissioner, Mr Reid's second statement that I tendered  
was dealing with exhibit 91, which was the document he  
marked up to which Mr Kalimnios has actually filed another  
statement in reply to that. At this stage can I tender the  
further statement of Mr Kalimnios dated 13 May 2013. 30

COMMISSIONER: Yes. Mr Kalimnios' statement of - the date  
again please?

MR FLANAGAN: 13 May 2013.

COMMISSIONER: 13 May 2013 is exhibit 145.

ADMITTED AND MARKED: "EXHIBIT 145" 40

MR FLANAGAN: Mr Reid, after the go live date on or about  
23 March 2010, you became aware that there had arisen a  
dispute, a contractual dispute, between IBM and the state  
of Queensland?---Correct.

You were generally aware, were you not, that the state of  
Queensland had issued a notice to remedy on or about 12 May  
2010?---That's correct. 50

And that on legal advice from Mallesons and Crown Law, the  
state served IBM with a notice to show cause why the  
contract should not be terminated on or about 29 June  
2010?---I was generally aware of that, not specifically.

Yes, thank you. You're aware that on or about 6 July 2010, the solicitors for IBM provided its response to the state's notice to show cause and formally submit certain remaining deliverables?---I wasn't specifically aware, but I accept that. Yes. 1

All right. In paragraph 8 of your statement, if I could ask you to turn to it, you refer and annex an email that was sent both to the director-general of premier and cabinet to Mr Ken Smith and yourself and Mr Grierson, which enclosed certain advice from the crown solicitor. Is that correct?---That's correct. 10

That advice was advice dated 23 June 2010?---Correct.

What was requested in the email from Mr Grierson was that both yourself and Mr Smith read the advice overnight and give comments tomorrow. Did you in fact read the advice? ---I read the general advice, yes. 20

Do you have any actual recollection of receiving this email from - - -?---I don't recall it, no.

Do you recall that Mr Grierson made moves, at least, to keep you as director-general of Health informed of the progress of negotiations between the state of Queensland and IBM?---We had general discussions. Yes.

All right, thank you. In relation to those general discussions, we heard evidence yesterday from Mr Schwarten, who was the then relevant minister for public works, who suggested that as at two dates, namely, 22 July 2010, which is the date of one Cabinet submission for the Budgetary Review Committee?---Yes. 30

And a second date of 26 August 2010 that had IBM not been maintained on the job of fixing defects that the system or the solution that had been provided by IBM was in - that it could fail completely. What do you say to that?---I couldn't comment specifically on his comment, but certainly the concern of Queensland Health in the discussions with IBM was predominantly around to ensure that the things that were in train to be fixed were fixed and that we didn't compromise the system further. 40

The difficulty we're having with that proposition is this: the first pay run was on 23 March 2010. Yes?---Yes.

Problems were identified at that stage?---Correct. 50

But they were not viewed as problems that could not be fixed. Correct?---Yes, that's correct.

All right. From 23 March 2014 (sic) there were numerous pay runs on a fortnightly - - -?---Two thousand and ?

2010. There were numerous pay runs on a fortnightly basis until the date that the final submission went to the Cabinet Budgetary Review Committee - - -?---Yes. 1

- - - on 26 August 2010. Yes?---Yes.

You were the chair, were you not, of - sorry, just going back to those pay runs, as director-general of health you were generally aware that with each pay run there were improvements?---I wouldn't say it that way, Mr Flanagan. 10

How would you say it?---Initially it wasn't clear, the extent of the problems, so indeed the extent of the problems became more apparent as people successively weren't paid or concurrent pays didn't occur or casuals weren't paid or things which were asked to be rectified in the previous pay weren't rectified, but then, as you said, over a period of time there were rectifications put in place. 20

Yes. You were chair of the payroll stabilisation project, were you not?---That's correct. 20

To which Mr Walsh had been appointed?---That's correct.

And you are aware that in July 2010, the name of that project changed from the payroll stabilisation project to the payroll improvement project?---That's correct. 30

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Sometimes as a meaning to a change of name, what meaning can we ascribe to that change of name in July 2010?---The meaning is - there was an endeavour first to identify all the errors, to have them fully listed so we knew what was occurring. To get a better understanding, they had to put additional staff in place to accommodate the slowness of the system, to try and rectify some of the backlog, particularly those 20 odd thousand LATTICE backlogs that lasted a few weeks, Mr Flanagan, as you remember, to try and address the backlogs that occurred from pay one which was significant. As you infer, the ascribed - the word did have a purpose, and the purpose was that it was now to try and start to move forward and improve the aspects of pay rather than merely trying to get on top of the problems as we encountered them.

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Can this commission take it that once the word "stabilization" ceased to be used and the word being used was "improvement", that the system had by July 2010 stabilised?---Yes, to the extent of which I described. I should hasten to add, not all the problems had been fixed at that time, as you're aware, but we felt we got on top of the major initial issues.

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There was perception, was there not, at least until July 2010 that the solution was in crisis?---Yes.

And that crisis, we've heard evidence, may have been over emphasised, if you like, by the public pressure and reaction to Health employees not being paid. Yes?---I would not say that.

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You would not say that?---No.

How would you describe the concept that it was viewed, the solution was viewed, as being in crisis up to July 2010?---I would describe it as a system which was - I think I indicated last time, Commissioner, it was a significant breakdown of public policy, and I still believe that to be the case. I described it as such because there were many people who, notwithstanding efforts to rectify their pay time and time again, still were getting no pay, underpay, half pay, whatever it might be, concurrent employees and those types of things. There were a large number of people who couldn't get there leave rosters up and done accordingly. We had increased the number of staff to do workarounds by factor of two and a half times, I think the number is around 700 or thereabouts. That, to me, was a system which displayed elements of significant problems.

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Is it accurate to say that the solution ceased to be in crisis when the program changed to the improvement program? ---That was definitely the intention we were trying to put out, yes.

Would you agree with me then that having left the crisis stage the solution was no longer viewed by Queensland Health, and you as director-general of Queensland Health, there being an imminent change of its complete collapse?---Correct.

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We've heard evidence that one of the primary considerations in the settlement negotiations and the ultimate settlement that led to the supplemental deed of 22 September 2010 with IBM was the fear that if IBM services were terminated the system would be left unsupported. You appreciate that?---I do.

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What steps did you take yourself through your department to investigate the prospects of that risk coming to fruition? ---My understanding is that Michael Walsh had discussions with CorpTech and Public Works around that, always stressing the view that - stressed by my minister of course - anything that we did should not compromise the movement, as you termed it, from crisis into still trying to rectify a large number of problems over a period of years.

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All right. Would you agree that concern was the paramount concern in terms of the settlement negotiations that you knew of - - -?---That was the paramount of my concerns.

COMMISSIONER: Mr Reid, as best you can recall, by what time had you got the payroll system to a stage where people were being paid accurately fortnightly, albeit with a large number of pay clerks?---I'd have to reflect upon that a little bit, Commissioner, but it certainly took a large number of months. Even at the time where we might be moving into the terminology of improvement, that was not to imply that people were still not having their rosters - - -

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No, you said that. At what stage after the change of name of the crisis that - - -?---I think on reflection - again, I would like to go back and think about this - maybe I think we were feeling much more comfortable within a six-month period after that.

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MR FLANAGAN: Can I take you then to annexure MR 1 to your statement, which is the email from Mr Grierson? Can I take you to the advice then from Crown Law, which is at page 10 of your annexures, and it's actually 9 of 14 of the advice? ---Sorry, my numbering is slightly different, Mr Flanagan. It's the start of it, the start of the first page of the - - -

No, page 10 of your annexures, but it's actually page 9 of 14 of the Crown Law advice?---I'm with you, sorry. Yes, I've got it.

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Thank you. No doubt having been requested by Mr Grierson to review the advice, you did review the advice?---The advice was reviewed within the agency, yes.

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Did you review the advice?---I didn't specifically review all aspects of this advice but I read it. I had it reviewed, if you're saying the review process was done in the agency. 1

And you forwarded this advice to Mr Lucas' chief of staff on 23 June 2010?---I did, on the day I got it, if I recall.

All right. And you discussed this advice with Mr Lucas? ---I don't recall whether we discussed it. I'm trying to think of what I said in my statement. I don't recall whether I did discuss it with him, but I certainly forwarded it to him. 10

It's in issue C that I want to take you to:

*While IBM does not have a right to stop work on issue of a notice to show cause, the state should be prepared for IBM to cease cooperating with the state where IBM has no contractual obligation to do so.* 20

That's at statement from a Mallesons advice that the Crown solicitor is commenting on, and the comment from the Crown solicitor is this:

*As discussed in section 2.2, rights on termination of this letter above, the state does have certain rights under schedule 43, disengagement, to require IBM to continue to provide services even after termination.* 30

You were aware of that, were you?---I wasn't aware of that, no.

*Exercising those rights, however, needs to be handled carefully and if such services are required the exercise of defining those services should commence now if termination is likely.* 40

And this is an advice given on or about 23 June. Yes? ---Yes.

All right. Do you know of any steps that were taken by Queensland Health in identifying the type of disengagement services that would be required from IBM if the step was taken by the state of Queensland to terminate the services of IBM?---My understanding is that Michael Walsh did provide advice to Public Works around those steps. 50

Are you aware of what that advice was?---I don't recall it at the moment.

Did you have discussions with Mr Walsh in relation to how one would transition if IBM services were terminated?---No, I don't think we had those discussions. As I said earlier,

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our general discussions were more around ensuring that any of these steps did not impact upon where we got to with the payroll stabilisation or payroll improvement.

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In paragraph 10 of your statement, if you'd like to turn to it, you state that the contract with IBM was not within Queensland Health so you were not asked nor did you seek to become involved in further discussions regarding possible courses of action. Do you see that?---That's correct, yes.

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Why was that?---The cabinet decided who the negotiations would be led by, and that's how it took place. We were a customer to that arrangement, and the cabinet did make a determination that both ministers should be involved, and that was appropriate given that it could impact upon the unstated rationale which I believed to be in that decision was that notwithstanding the fact that Mr Lucas, deputy premier, was more to the point that anything had to ensure that it didn't impact upon the payroll as it was.

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But you accept that as director-general of Health, you were director-general for the actual system - - -?---Yes.

- - - or solution that had been presented, and it was your employees for whom you were responsible to be paid - - -? ---Correct.

- - - that you had, or could have, input, and genuine input in relation to how one should transition from the project to termination, for example?---Yes.

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Did you have such input?---The agency did, yes. 1

Was that through Mr Walsh?---Yes.

Did you have any direct contact with Mr Grierson in relation to that input?---No.

Did Mr Grierson ever seek such input from you?---Not specifically to that. He kept me informed from time to time as to where it was at but nothing specific to that. 10

How can we understand your lack of involvement in the negotiation process?---This is - the concern of the agency was around ensuring - and the concern of the minister and indeed the premier, was around ensuring people got paid and that was the full engagement of the agency in doing that. Mr Walsh did provide advice to ensure that that transition did not impact upon that but the actual negotiations or the discussions with IBM occurred within - - - 20

So you had no personal specific knowledge as to whether it was necessary to keep IBM after termination?---No. 20

And you have no specific knowledge of what steps were taken by CorpTech in relation to dealing with IBM subcontractors and indeed directly with Infor?---No.

Can I take you then to 22 July 2010, decision of the cabinet budget review committee? You will find that in vole 2, page 226?---Sorry, Mr Flanagan, page - - - 30

226, Mr Reid. Now, were you involved at all in the creation of this submission to the cabinet budget review committee which ultimately decided to negotiate a settlement with IBM?---No.

All right. Were the contents of this document subsequently brought to your attention?---Yes.

Who brought them to your attention?---It would have been through the normal process in the cabinet budget review committee, so probably out of their offices. 40

Once they were brought to your attention, did you read the submission?---I would have read it generally but not in detail.

Is it accurate to say that for the purposes of conducting or Health playing a role in the negotiation process, you left to that Mr Walsh?---That's correct. 50

Now, do you know the extent to which Mr Walsh was consulted by the Department of Public Works in identifying the issues for the submission of 22 July 2010 and the submission for 26 August 2010?---I'm not aware but he certainly didn't raise any concerns with me.

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But you have no direct knowledge of the extent of consultation between Queensland Health and the person of Mr Walsh and the Department of Public Works?---No.

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All right. Would you agree with this proposition, that Queensland Health had a reservoir of knowledge in terms of how the payroll system was actually working in terms of its payroll stabilization project and payroll improvement project. Yes?--- Yes, bearing in mind, Public Works are on both of those.

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Yes. We know from Mr Walsh's statement that he had hardly any contact with IBM because he didn't view that as his role. Now, we also know from a Ms Stewart from CorpTech, the Department of Public Works, that her view was it would have been better for the project if IBM had been terminated soon after to go live date. Were you aware of any such perceptions by those on the cold front?---No.

Cold face?---I didn't know Ms Stewart.

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All right, thank you. Even though the cabinet review committee decided it was Mr Grierson who would conduct the negotiations or be responsible for the negotiations as director-general of Public Works, he did seek to keep you informed of the progress of those negotiations?---He did.

What was the purpose of that?---I think it was more just staying engaged with us and we were the ones who were expressing our concern that the negotiations must not impact upon where we are and Mr Grierson had had that advice from his minister and from the premier and from the actual wording of the CBRC document, and so I think he would have been keeping me informed on that basis.

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Can you be more specific as to your conversations with Mr Grierson in terms of him keeping you informed of the process and what your concerns that you are expressing to him?---I couldn't remember specific conversations but the general tenure from my side would have been more to the point that we are endeavouring to stabilize and improve this payroll system and we need to make sure that any determination or arrangements with IBM doesn't jeopardise that, that was the extent of that discussion, and generally he would have been informing me of where those discussions were up to.

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If I then take you to page 247 of this document which identifies those persons who are consulting for the purposes of making this submission to the committee, you will see there that the consultation with Queensland Health is through Mr Michael Walsh?---Yes.

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And that is consistent with your evidence that you in effect delegated him to deal with this aspect of it?---Yes.

Thank you. Can I then take you to the committee's decision of 26 August 2010 which you will find in volume 3, page 178. Again, the same questions, Mr Reid; were you at all involved in the creation of this submission?---No. 1

Were you asked for any input in relation to it?---Not personally, no.

All right. Again, did you speak to Mr Grierson after this submission had been made?---I don't recall specifically whether I did. 10

Do you have any personal view at director-general of Health as to the appropriateness of a settlement that was arrived at between IBM and the state of Queensland?---No, I don't have a personal view. Clearly as you're aware, the concerns have been expressed to me through the agency over a few - some years. It was still my view that many of those issues which have been identified were being rectified, particularly through that 09 period. I wasn't immersed in the actual contract or the issues around the alleged breaches of the contract or issues around the nature of the settlement that made me have a formal view, personal view, other than to ensure that people continued to get paid. 20

There is one thing in terms of Mr Walsh as your delegate for this purpose of being consulted, did Mr Walsh ever express to you his opinion of the settlement that was arrived at between the state of Queensland and IBM?---I think he expressed a view to me and this was in Mr Grierson's statement, I think, that a settlement of the nature that was proposed was a reasonable settlement and would not impact upon the payroll and that was the nature of his view subsequent. 30

All right?---Although he was - he, like others at the very start, was clearly - he had strong views around the nature of IBM's involvement. 40

Can you turn to page - - -?---In terms of the settlement, I don't think he had. I think he was accepting of that outcome.

All right. Can you turn to page 189? This again lists who was consulted in relation to this particular submission and for Queensland Health this time, it's not just Michael Walsh, it's also Terry Mehan?---Yes.

Who was that?---Terry Mehan, you might recall from my earlier evidence, was - when the first pay went live, I immediately - within a matter of days when we realised there were issues, appointed Terry Mehan to actually go online and manage that. He was another deputy director-general of Health. He did that for a period of 50

two weeks, I think, two to three weeks and then I felt - a more comprehensive - once we got the knowledge that this was a much more serious concern than what we - initially was in place, I appointed Michael Walsh together with the support of the deputy premier and Terry Mehan acted as his deputy as a worker for that period of time.

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You'll see there that they were consulted on 20 August 2010. Yes?---Yes. 1

All right. Were you aware that Mr Grierson actually had met together with his associate director-general Ms MacDonald with Mr Doak and another IBM representative on 19 August 2010?---I wasn't aware of that.

Were you aware at that meeting certain principles or settlement principles were identified and agreed upon between IBM and the director-general of public works?---I wasn't aware. 10

So this consultation seems to be taking place when, in effect, an agreement, at least in principle, had already been reached. Is that the sort of consultation that Queensland Health was envisaging, that is, a consultation after the event?---Well, first off, I'd have to accept your sequence of events, which I do. I would have hoped if that was the case that either Mr Mehan or Mr Walsh had been informed of what had occurred. 20

Do you have any personal knowledge of the fact of that meeting between Mr Grierson, Ms MacDonald, Mr Doak and another IBM representative?---No.

You certainly don't have any recollection of any phone calls between yourself and Mr Grierson in relation to the result of that meeting on 19 August?---No. 30

Can I take you in the same volume, Mr Reid, to page 299?

COMMISSIONER: What page?

MR FLANAGAN: 299.

This is the joint submission of both yourself and Mr Grierson to the relevant ministers, namely, Mr Lucas and Mr Schwarten. It's a document that is signed by you on 8 September 2010. Do you know how the submission was prepared and who prepared it?---This submission was prepared within Public Works. It was prepared with the assistance of Michael Walsh and, presumably, other officers that he might have indicated within the agency, but it was predominantly done within DPW. 40

Were you personally involved in the preparation of it? ---No.

It states that IBM is to rectify a list of priority items. Can you assist this commission by telling us how those items were identified? It's approximately 35 of them? ---From memory, they were identified through the payroll stabilisation process. I think I indicated last time there was a very large process of getting people to identify 50

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things that were occurring within payroll. There was then a detailed process of prioritising those, assessing their risk, determining the ability of rectifying them and putting them in some priority order. So I would have thought that that would have formed the basis for these items. 1

Because the CBRC decision of 26 August 2010 required both Queensland Health, the responsible minister of Queensland Health, to also agree to the final terms of any settlement agreement with IBM, it was necessary for you as director-general to endorse that recommendation, wasn't it? ---That's correct. 10

You refer to the advice received in paragraph 16 of your statement. Do you have any recollection of who gave you that advice referred to there?---From memory, it was Michael Walsh.

Again, can you recall, because we don't have a document that contains the advice, what the advice was from Mr Walsh?---There isn't a document around, so I think the advice from him that this was satisfactory to be signed off. 20

All right. Mr Lucas in his statement, which is yet to be tendered, in paragraph 106 he says this: he says:

*I was particular in wanting such a document -*  
which is a reference to this submission -  
*signed by Messrs Grierson and Reid to come to me and Minister Schwarten as it made clear what actions had taken place in terms of negotiation and what was recommended to ministers and CBRC.* 30

As we read that statement by Mr Lucas, he was actually looking to you and Mr Grierson to assure him that this was the appropriate settlement deed to execute on behalf of the state of Queensland with IBM. Yes?---That's correct. 40

Beyond the advice you received from Mr Walsh, did you take any other steps to satisfy yourself that this deed or this settlement agreement called the Supplemental Agreement was in the best interests of the state of Queensland and, more specifically, in the best interests of Queensland Health? ---On the departmental advice, no.

All right. Did Mr Lucas speak to you directly, that is on a one-on-one basis about this submission?---From memory, no. 50

Can I take you to the submission itself then. You, of course, read the submission at or about the time?---Sorry, Mr Flanagan?

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You read the submission - - -?---Yes. 1

- - - at or about the time prior to signing it?---Yes.

You appreciated that IBM under this agreement were to fix 35 defects by 31 October 2010?---Yes.

You also appreciated, did you not, that IBM would be released if they fixed those defects by 31 October?---Yes. 10

They would be released from all further liability and, indeed, released from their warranties under the contract of 5 December 2007?---I am.

So you appreciated that the state would have no rights if this system was to fail in the future. Yes?---Yes.

Did you yourself as director-general of health before signing this document weigh up what the benefits were to the state of Queensland as opposed to what the benefits were to IBM?---On reflection, I suspect I didn't, Mr Flanagan. I more weighed up whether the issues that were identified to be rectified would be rectified within the process and that other steps wouldn't be taken which would compromise it. 20

Did you ever turn your mind to the fact that the project was now out of crisis, or at least the Queensland Health solution was out of crisis, that defects were being identified and corrected, that CorpTech were certainly, to your knowledge, having a greater involvement, were they not in the correction of defects?---Yes. 30

Did you have any knowledge that CorpTech were also establishing closer relationships with existing IBM subcontractors and closer relationships with Infor?---I wasn't aware of that, but I'll accept that.

All right. In those circumstances, when one comes to assign a deed on the - or recommend the signing of a deed - that you recommend on or about 8 September 2010, which is when you affix your signature to the submission - did you turn your mind at all to the fact that this system is no longer in crisis and the state seems to be giving up a lot for the correction of 35 defects by 31 October 2012. Yes? ---I don't believe I did turn my mind to that. 40

Can you assist us at all? What was the imperative - what was the imperative in having the subcontractors of IBM fix these 35 defects by 31 October 2010?---My understanding is we were trying to rectify those issues which were still outstanding and which were still causing angst within Queensland Health staff and the sooner they were rectified, if they were identifiable and could be rectified, the desire was to get them done. 50

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But for our analysis in terms of this settlement, how can we tell whether these 35 defects identified in the supplemental agreement are defects that were actually affecting people's pay and if they were affecting people's pay, how many people's pay and in what respects?---Well, we would have to go and do an analysis on that. That's something that would have been considered at the time.

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Yes. But, see, what I'm suggesting is that for giving up an unquantified damages claim against IBM that could have run into the tens, in fact on one suggestion from Clayton Utz, the hundreds of millions, albeit with difficulties, the usual difficulties with litigation, it seems that that right to damages is being surrendered by the state of Queensland in circumstances where we can't identify the analysis that is done of how many people were losing out on pay and whether it was in respect of meal allowances or whether it was in respect of long service leave in relation to these - I won't say "mere", but in relation to these 35 defects being corrected at a very late stage, that is, the improvement stage, for the Queensland Health payroll?---I wouldn't draw that connection as you do. I acknowledge that's the connection you might see. I received advice that - my understanding is the possibility of successful litigation against IBM might not work, given the nature of the contract and the nature of the extent to which Queensland Health participated in adding additional requirements to what was expected from the payroll, many of which were external to Queensland Health. They might have been through national health agreements or whatever. So I took that view which was expressed to me both through DPW and through Michael as this was the most appropriate way to resolve the issue.

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You read the auditor-general's report by this stage, hadn't you?---I had. 1

And you had acted on the auditor-general's report, hadn't you?---I had.

You appreciated, however, that in July 2009 a change request 184 was agreed between the parties. Yes?---I now know that. 10

Yes. Which resolved a long running dispute in relation to scope - - -?---Yes.

- - - that stretched back sometime but at least stretched back for the period of January to June 2009, but that scoping difficulty had been resolved, had it not?---Yes.

Did you know that under the contract it was required by IBM through various change requests to deliver the solution free of severity 1 and severity 2 defects by 30 April 2010? ---I'm aware of that now, yes. 20

And you appreciate that deliverable, at least in the view of the state of Queensland, was not made because what the solution that was available clearly had severity 2 defects. Yes?---That's correct.

At one stage it's identified that it has approximately 135 severity 2 defects. Yes?---That's right. 30

I'm not suggesting for a moment that all those defects can be laid at the feet of IBM, but at least in IBM's own correspondence with the state of Queensland, albeit on a without prejudice basis, IBM suggests that they will stay on until 30 September 2010 to fix approximately 67 to 68 defects for which they seem to be taking responsibility. Yes?---Yes.

In that sense, the deliverable that was required, the ultimately deliverable required under the contract, you had at least seen the Crown Law advice that was suggesting that constitutes, consistent with the Mallesons advice, a material breach of contract. Yes?---I was informed of that, yes. 40

Why should this commission then make the connection between what the state is giving up in terms of the 35 defects, or the correction of the 35 defects by 31 October 2010, with an unquantified right to damages?---I think the commission could make that connection. From my point of view, I had advice that this was a satisfactory outcome and probably the most likely outcome that would be successful. I took that advice generally from Mal and the legal agencies within the department, and from Michael who consulted other groups, and acted in accordance with that advice. 50

It's a little bit more than that, isn't it?---Can't we tell from Mr Lucas' paragraph 106 that he was looking to you as a responsible director-general of his department to assure him that the execution of this document, that is, the final sign off by both Mr Swarten and Mr Lucas was appropriate in the interests of the state of Queensland. Yes?---That's correct. 1

Some of the issues I've raised with you, can I take it that those issues were not raised with you by Mr Walsh?---That's correct. 10

Can I also take it that you didn't turn your mind or investigate any of those issues we've raised?---To that degree, that would be correct.

That's the evidence-in-chief of Mr Reid.

COMMISSIONER: Thank you. Mr Traves? 20

MR TRAVES: No questions, thank you.

COMMISSIONER: Mr Plunkett?

MR PLUNKETT: No questions, thank you.

COMMISSIONER: Mr Mumford?

MR MUMFORD: No questions, thank you. 30

COMMISSIONER: Mr Haddrick? Didn't you want to go second last?

MR HADDRICK: Not for this witness; maybe for the ministers.

COMMISSIONER: Do you have to change readily? Why can't we stick to the order?

MR HADDRICK: I'm happy to do that. 40

COMMISSIONER: All right. Mr Haddrick?

MR HADDRICK: No questions, Commissioner.

COMMISSIONER: Mr Ambrose? Sorry, you should go last. Mr Foley?

MR FOLEY: Yes, no questions, thank you. 50

COMMISSIONER: Mr Cregan?

MR CREGAN: Thank you.

Mr Reid, do you have your statement with you?---I do.

The 23 May statement. Just a few things. In paragraphs 3 and 4, I know we talked about this last time, when you say "problems and errors there", that's a term you've used to deal with any problem how so ever caused?---Correct. 1

That's not merely a computer system problems?---Absolutely.

So you meant dealing with the backlog?---It could be the extent to which we communicated with staff around some of the issues. 10

The time sheets - - -?---Time sheets.

- - - back network?---Whatever it might be.

All right?---I'm not attributing any group, person or individual, they are things that occurred.

You were just asked by Mr Flanagan about the deliverable, ultimately deliverable of the computer system. You're aware that IBM disputed that it hadn't delivered the computer system?---I am. 20

And that IBM said that was just factually wrong, it delivered the system properly?---I am.

You're aware IBM disputed the liability, essentially?---I am.

No further questions, thank you, Commissioner. 30

COMMISSIONER: Thank you. Mr Kent.

MR KENT: Thank you, Commissioner. Mr Reid, you were asked by Mr Flanagan a series of questions about the problems with the system at go live and then its gradual improvement, as he points out the terminology changed? ---Yes.

I think the eventual conclusion of that was, to use his words, that, "It ceased to be in crisis by July"?---That was the - we changed the words, that was his statement, I indicated that I wouldn't have actually used that terminology but I acknowledge we tried to use the word "stabilisation" to "improvement" with a particular point in mind. 40

I think you did agree with the proposition that by July, as you've perceived it, there was not an imminent change of complete collapse of the system?---That's correct. 50

As you understood it. Of course, IBM were still on the ground at that stage?---Correct.

Had something happened that caused all of the IBM resources to suddenly down tools and not be working there, were you

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concerned about that circumstance perhaps giving rise to another chance of a complete collapse?---Absolutely. 1

Thank you, Commissioner.

COMMISSIONER: Mr Flanagan. Mr Ambrose, I'm sorry.

MR AMBROSE: Just on that very same point. After July 2010, was Queensland Health, in your view, confident that no new serious defects would be found within, say, the next six months?---Yes. 10

COMMISSIONER: Mr Flanagan.

MR FLANAGAN: May Mr Reid be excused?

COMMISSIONER: Mr Reid, thank you, again, for your assistance?---Thank you very much.

You're free to go?---Thank you. 20

I'm sure for the last time.

WITNESS WITHDREW

MR FLANAGAN: Mr Commissioner, I call Jeremy Charlston, and whilst he's coming may I tender the statement of Mr Kevin Killey, K-i-l-l-e-y, which is signed 24 May 2013?

COMMISSIONER: Mr Killey's statement is exhibit 146. 30

ADMITTED AND MARKED: "EXHIBIT 146"

**CHARLSTON, JEREMY CHARLES** sworn:

COMMISSIONER: Yes, sit down please, Mr Charleston. Yes, Mr Flanagan.

MR FLANAGAN: Mr Charlston, would you give your full name tot he commission, please?---Jeremy Charles Charlston. 40

Mr Charlston, have you provided an undated statement of yourself to the commission together with annexures?---Yes, Mr Flanagan, it should be dated.

I'm just trying to find the date. I don't think I can? ---Sorry, I looks like it's not dated.

It's not dated?---I beg your pardon. 50

Can you just look at this statement, please. What's the approximate date that you signed the document?---The day I sent it to the commission.

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Are the contents of that statement true and correct to the best of your knowledge and belief?---Yes, they are. **1**

I tender that statement.

COMMISSIONER: Yes, Mr Charlston's statement is exhibit 147.

ADMITTED AND MARKED: "EXHIBIT 147" **10**

MR FLANAGAN: Mr Charlston, you were a partner at Clayton Utz between 1973 and 2011?---Yes, that's correct.

And you became a consultant to that firm thereafter?---Yes, that's correct.

You were involved in settlement negotiations between the state of Queensland and IBM Australia Ltd that occurred between 2 July 2010 and 22 December 2010?---I was only involved until the end of August, Mr Flanagan, not until September. **20**

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Following a CBRC decision made on 22 July 2010 to attempt to settle the dispute with IBM over the payroll contract of 5 December 2007, you were engaged by Mr Boyd Backhouse, the executive director, legal services, at the Department of Public Works. Is that correct?---That's correct.

1

In what capacity were you and Clayton Utz engaged for that process?---We were engaged to assist the state to develop a negotiation strategy and process and then to assist in the conduct of the negotiations themselves.

10

All right. You had had experience, had you not, in relation to commercial negotiations?---Yes, that's correct.

Had you had experience in relation to commercial negotiations involving IBM?---Yes, I had.

Had you had experience in commercial negotiations concerning other IT companies?---Yes, that's correct.

20

Can you just briefly outline to us what was your experiences and how long the experience was in relation to commercial negotiations?---Well, I've been a partner of Clayton Utz since the early 70's and throughout my career, I've been involved in commercial negotiations. That's a core part of what I've always done. Since about 1990 or around about 1990, I established the firm's technology department and since then I've practised as a terminology lawyer.

30

Thank you?---And that involves extensive negotiation technology contracts.

When you came on board, you were aware that there was a dispute between the state of Queensland and IBM?---Yes.

You were aware that the state of Queensland had acting for it in terms of general contractual advice, the firm of Mallesons Stephen Jaques?---Yes, that's correct.

40

And, in particular, Mr John Swinson?---Yes.

Who you knew?---Yes.

All right, thank you. You were aware that on or about 12 May 2010 the state of Queensland had issued a notice to remedy to IBM?---Yes, that's correct.

And subsequent to the notice to remedy, IBM and the state exchanged a series of letters that you were briefed with? ---Yes.

50

Then on 29 June 2010, you were also briefed with the fact that the state of Queensland served on IBM a notice to show cause why the contract should not be terminated?---Yes.

And so when you came on board, that notice to show cause had already been issued?---Yes. 1

By letter dated 6 July 2010, another letter that you were briefed with by the state of Queensland, you were aware that IBM had Blake Dawson acting for it?---Yes.

And they had responded to the state's notice to show cause? ---Yes, that's correct. 10

Thank you. And the work that you were engaged to perform was an attempt to settle that dispute. Correct?---Yes, that's correct.

And for you and Clayton Utz, your role occurred between approximately 2 July 2010 and the end of August 2010? ---Yes. That's correct.

Thank you. Who from the Department of Public Works supplied you with your instructions?---Primarily, Mr James Brown and Mr John Beeston instructed us on the more technical issues. 20

Your firm and you yourself were never briefed to provide an opinion on quantum of the cost of damages?---No.

Nor on prospects of success?---No.

Can I just ask you this though: in terms of negotiating a commercial settlement between two sophisticated commercial parties, such as the state of Queensland and IBM, is it necessary to have some view of what the state's possible quantum of damages may be as against IBM?---Yes, that's correct. 30

Is it also necessary to have some appreciation of what the state's prospects of success are in terms of potential litigation - - -?---Yes.

- - - if the contract was to be terminated and not otherwise settled thereafter?---Yes, that's correct. 40

All right, thank you. Can I take you to volume 2, page 98. We appreciate this is not your file note. It's actually a file note of Mr Boyd Backhouse in relation to a meeting in July 2010. You'll see that the file note itself is actually signed by Mr Backhouse and dated 15 July 2010? ---Yes.

Do you recall attending a meeting with Mr Brown, Mr Beeston, Mr Swinson and Ms Bowe who was also from Mallesons, Mr Dunphy from Clayton Utz and yourself to discuss the legal position?---Yes, I do. I don't recall the exact date. 50

Thank you. But it was fairly early on in terms of your engagement?---Yes, exactly. 1

Did Mr Dunphy remain engaged for Clayton Utz with you in relation to this process?---Mr Dunphy was really only involved in the early part of the process not in the later parts.

Did you have a team that you had from Clayton Utz for the purposes of conducting the commercial negotiation process? ---Yes. There were other people involved, but I was certainly leading it and conducting the vast bulk of the communications and discussions. 10

All right, thank you. This is as at 15 July 2010, you'll see in the third paragraph:

*There was discussion on whether it would be possible to have this work done by other contractors, that is subcontractors to IBM, while IBM continues work. The answer from Mallesons is yes.* 20

Was that in terms of your best recollection the legal opinion of Mallesons that there was no legal impediment to the state of Queensland having the work conducted, that is in relation to the Queensland Health payroll solution, by subcontractors?---I see the file note goes on to mention the prospect of inducing a breach of contract. That was certainly an issue in the discussions about contracting directly with the subcontractors. 30

Did you ever come across in the course of your role any evidence that IBM were actively or intended to actively stand in the way of the state of Queensland after termination dealing with subcontractors, including Infor? ---I don't recall any such impediment from IBM, although I do recall IBM expressing concern at one stage that the state was talking to subcontractors and that that was causing IBM some difficulties. 40

We find that in a Cabinet Budgetary Review submission as at 26 August 2010, but was that a concern more dealing with the fact that IBM - sorry. Can you tell us what that concern was?---The concern was that the subcontractors were contracted to IBM and that the state not get itself into the position where it was inducing the subcontractors to breach their subcontracts with IBM.

Thank you. Did all parties appreciate, who were present at this particular meeting, that once deliverable 47 was accepted by the state of Queensland that CorpTech was to be responsible for the solution?---I don't think I can answer that, Mr Flanagan. 50

All right. Deliverable 47 was the Queensland Health solution to be delivered by IBM. Yes?---Right. Yes. 1

It was to be delivered on 30 April 2010. Yes?---Yes.

Do you recall that after it was delivered and accepted by the state of Queensland - and I'm not suggesting it was accepted by the state of Queensland on 30 April - but once it is accepted by the state of Queensland that CorpTech rather than IBM would be responsible for supporting the Queensland Health payroll?---Yes, that's my recollection. 10

Thank you. In this file note it identifies the number of severity 2 defects as being approximately 167. Do you see that? Sorry, the defects being 167 and the severity 2 now being between 30 and 30.

COMMISSIONER: I read those as saying that there were at one stage 167 severity 2 defects, but by the time of this meeting they reduced the number to 30 or 40. Is that how it should read, though?---Yes. Severity 2 defects were 30 to 40, according to this file. 20

Reduced from 166?---I'm sorry, Mr Commissioner?

Reduced from 167, or does 167 include lesser categories? ---I think 167 included other categories, severity 3 in particular.

All right. Thank you. 30

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MR FLANAGAN: Mr Dunphy then ascribes certain comments, and I want to take you to them. The first is that: 1

*There is likely to be scrutiny by the auditor-general and others in regard to the manner and terms of any resolution of the state's claim. Whatever options are put forward need to address this.*

That was a factor that was in people's minds at the time, namely, that any negotiated solution with IBM would be subject to public scrutiny and perhaps scrutiny by the auditor-general?---Yes, certainly. 10

And then the following paragraph, Mr Dunphy recommends:

*Any decision by the director-general to either pursue or compromise a claim for damages by the state will need to address the quantum of the claim and the prospects of success.* 20

Do you see that?---Yes.

*All agreed that this should be included in the options put forward for government decision-making.*

You became aware, did you not, that Mallesons did a damages hence opinion?---Yes.

It would seem that at no stage was the solicitor-general briefed to provide an opinion either in relation to the quantum of damages or in relation to prospects of success. Do you know why that was?---I don't, Mr Flanagan. I'm certainly not aware of the solicitor-general having been briefed. 30

Quite apart from the solicitor-general, there was certainly no brief or opinion sought from senior counsel in relation to quantum or in relation to prospects?---Not that I'm aware of. 40

Do you know whether that was ever discussed?---I don't recall it being discussed in my presence.

There's a comment there - and I'm going to ask you if you have a specific recollection of it - JB, which could either be James Brown or John Beeston, "A new replacement system might cost \$100 million." Do you know what that is a reference to?---I expect that's a reference to if the state were to have to start again with a new system then the cost of contracting the new system would be of that order. 50

Going back to the contract negotiation parameters for the settlement, between 28 July and 3 August 2010 the basis and protocols under which the settlement negotiations would be conducted were agreed. Is that correct?---That's correct.

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Can you tell us what you were seeking to achieve and what those protocols were?---What was sought to be achieved was an orderly negotiation process with IBM that led to the articulation of the issues to be negotiated, and a statement of the respected positions on those issues as well as a time frame.

1

As well as a time frame. Did you gather that IBM were more keen to have face-on-face meetings with the director-general without lawyers being present?---I understand that IBM expressed that preference, yes.

10

Is that a negotiation tactic that you had previously encountered?---Certainly, commercial parties often prefer to negotiate without lawyers.

And here we knew that Mr Grierson, the director-general of Public Works, had met with Mr Doak during the course of this project, according to Mr Doak on a weekly basis, according to Mr Grierson on a fortnightly or monthly basis, so there was an established relationship between Mr Doak of IBM and the director-general. In terms of your protocols for the settlement negotiations, what was your view of simply one-on-one meetings between Mr Grierson perhaps accompanied by his associated director-general and IBM representatives for the purpose of trying to settle this dispute?---The preference was to conduct the negotiations as far as possible lawyer to lawyer, and once those negotiations got down to the more obdurate issues then there might be an appropriate time when face-to-face commercial negotiations with lawyers present would be held.

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From your experience as a commercial negotiator, why is that a preferable course of action rather than simply having the director-general deal with Mr Doak directly? ---Apart from objective third party considerations and input, it is sensible to have the client a step away so that reference can be made when issues outside the negotiating people when issues need to be discussed so that interpersonal relationships between the commercial people do not act as a barrier to a negotiated outcome, or on the other hand influence the basis on which proper settlement is arrived at.

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There then followed a series of correspondence between Mr Grierson and representatives of IBM. Initially there's a letter, which I won't take you to, dated 28 July 2010, from Mr Grierson to Mr Bloomfield outlining that negotiations were to be conducted on a without prejudice basis commencing on 2 August and concluding on 20 August. That was the time frame for the negotiation, was it not? ---That's correct.

50

You're aware that the CBRC decision authorising Mr Grierson to conduct the negotiations on behalf of the state of Queensland required Mr Grierson to report back to the committee within six weeks?---Yes. 1

That is, by on or about 2 September 2010?---Right.

But the negotiation period itself was to be conducted between 2 August and 20 August?---Yes. 10

Those were dates that you picked as appropriate for the negotiation period given the time constraints?---20 August was a date that I was instructed to set as the end of the negotiations.

Can I then take you to the letter of 29 July 2010 to Mr Grierson from Mr Doak, which is a letter that you would have seen. It's in volume 2, page 452. This is the letter in response to Mr Grierson's of 28 July 2010. That letter outlined how the negotiation would take place. Yes?---Yes. 20

As between lawyers, conditionally at least. Yes?---Yes.

That was a process that Clayton Utz had advised the government to follow. Yes?---Yes.

For the very reasons that you've outlined to the commission already?---Yes.

This is a response from Mr Doak of IBM, and if you look at point 5, "IBM considers that it's in the best interests of achieving prompt and efficient commercial resolution for the initial period of negotiation to be conducted by representatives of each party in the absence of legal representatives." Yes?---Yes. 30

That was not a surprising response from IBM?---No.

But it was a response that you were going to advise against?---Yes. 40

Sorry, not a response, it was a suggestion that you advised against?---Yes, that's correct.

Very much for the reasons you've already outlined?---That's correct.

In your discussions with Mr James Brown, who was the primary source of your instructions. Yes?---Yes. 50

Was there any conversation you had with him in terms of protecting Mr Grierson from negotiating an outcome himself with IBM without lawyers present?---Yes, I think that was a concern of Mr Browns that flowed through the course of my involvement.

Could you tell us as best you can the effect of what  
Mr Brown said to you in terms of that concern he held?---I  
think Mr Brown's concern, or the effect his concern, was  
that there was a regular relationship between Mr Grierson  
and Mr Doak and that Mr Brown felt that may have some  
influence on the course of negotiations and the outcome of  
negotiations, and that it was therefore better to endeavour  
to keep the negotiations between the lawyers, in essence,  
at least until it got to the point where there had to be  
face-to-face negotiations.

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All right. Can I then take you to - if at this stage, actually just sticking on why we have lawyers and these sorts of negotiations, can I take you to volume 3 page 68. This is by way of clarification to your evidence that you have given to the commission already as to why the negotiation process of Clayton Utz had advised on was one where it was initially between lawyers, this - - -?---I'm sorry, Mr Flanagan, would you just tell me the page again?

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THE COMMISSIONER: 68.

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MR FLANAGAN: Yes, sorry, it's page 68?---68.

THE COMMISSIONER: In volume 3?---Yes, I have it.

MR FLANAGAN: All right. Again, this is Mr Backhouse's file note of a conversation with - it's reporting on a conversation with Clayton Utz. Clayton Utz report IBM not showing signs of genuinely negotiating. I said their tactic might be to stonewall the lawyers and wait until they get an audience with the DG before putting their real position. They may try to exclude or minimize the department's use of lawyers. John said this was their tactic last time and an agreement was reached after six months. I said the state may have to consider taking a tough line with IBM in order to preserve its negotiating position. Apart from your own concerns in relation to having lawyers excluded from the negotiation process, were there concerns also being expressed to you by Mr James Brown?---Yes. About IBM's approach to the negotiating process?

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Yes?---Yes.

Mr Beeston?---Yes.

And Mr Backhouse?---Yes.

All right. So in terms of the CorpTech lawyer group, if you like, of Mr Backhouse and then Mr Beeston and then Mr Brown, what did you understand Mr Brown's role to be in CorpTech? ---So far as Clayton Utz was concerned, I understood his role to be essentially one of an executive officer charged with the day-to-day tasks of trying to bring about the settlement with IBM.

40

But all of those and yourself had a clear view that it would not be in the state of Queensland's interest to permit at least at the initial stages of Mr Grierson to be conducting these negotiations with Mr Doak directly?---I think that's correct; certainly, so far as I was concerned.

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Thank you. Can I ask you then to turn back to volume 2? If you could to page 454 in volume 2. Now, it's the case

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that a submission went to Mr Grierson seeking his approval to follow the negotiation process advised by Clayton Utz. 1

Yes?---Yes.

If you look at page 454 in this submission to the director-general, you will see that the Clayton Utz - sorry, this is under Issues, the second paragraph, Clayton Utz has recommended a particular planned approach to negotiations to ensure the state achieves an optimum outcome that can pass scrutiny in terms of probity and public interest test. Yes?---Yes. 10

And they were annexured to - that is indeed the advice from Clayton Utz, dated 26 July 2010, an that's an advice that you wrote. Yes?---Yes, that's correct.

And that recommendation is consistent with the advice that you were giving?---That's correct. 20

If you turn then to page 455 for the same document in the second-top paragraph, Clayton Utz advises that in order to achieve the desired outcomes presented to the cabinet budget review committee, the state controls the negotiation process and agenda, IBM's letter, 29 July 2010, if accepted fundamentally erodes the state's ability to control this negotiation. That is a particular reference, is it not, Mr Charlston, to direct meetings between Mr Doak and Mr Grierson for the purpose of settling the dispute?---It's certainly a reference to the process that I had recommended and no doubt the consequences, it relates to the direct discussions between the director-general and IBM. 30

Thank you.

THE COMMISSIONER: Was that a thing that you thought would erode the state's ability to control the negotiations, meetings directly between Mr Doak and Mr Grierson?---Yes, Mr Commissioner. I think it was as much a reference - I mean, I'm not sure that I've seen this before but I think it was as much a reference to the desirability of the state being in charge of the process and ensuring that it's a disciplined and orderly process rather than having discussions being carried on at a commercial level as well as a legal level and parallel, so I believe that was what it was referring to. 40

Thank you. 50

Can you just go to then volume 3, page 27? That's the letter you drafted?---Yes, Mr Flanagan. 1

And in consultation with Mr Brown, Mr Backhouse and Mr Grierson, you also caused the settlement term sheet to be drafted?---Yes, that's correct.

The structure of the settlement term sheet was that the state's requirements and reasons could be put forward and then once a response was received by IBM, that could be incorporated into the document and the status each item identified. Yes?---Yes. 10

Before this settlement sheet is taken, there is a draft settlement sheet which you've already been shown which has an actual figure for the quantum of damages of \$12 million. Yes?---Yes.

So the state's position in terms of its commercial negotiations with IBM was to seek damages in the amount of \$12 million. Yes?---Yes. 20

Can you tell the commission how that \$12 million was arrived at?---It was essentially arrived at by CorpTech doing an analysis of its own direct costs excluding the Health Department's costs and having that figure put into the settlement term sheet as a proposal.

COMMISSIONER: But CorpTech's costs on fixing the payroll system of work to date on making it function? ---Mr Commissioner, I don't recall the detail of how that figure was arrived at. It was additional resourcing - were certainly part of it over whatever the period was that they were assessing those costs that CorpTech had been put to. 30

Thank you.

MR FLANAGAN: There is an indication in an earlier document that Clayton Utz suggested that quantum could be as high as over \$100 million?---Yes. 40

And there was a suggestion that in relation to the contractual damages, and only for contractual damages, Mallesons were saying under the 5 December contract that was capped at the cost of the contract, being approximately \$88 million?---Yes.

Is that correct?---I thought the figure was around \$60-something million. 50

All right. The documents we have suggest 88?---Yes.

But 60, 88, it doesn't really make any difference?---No.

But when the terms sheet is sent to the solicitors for IBM on the first occasion it doesn't contain an actual quantum of damages. Correct?---No. 1

Did you ever receive further advice, either from counsel or from other solicitors what the actual quantum may be?---I don't recall that a full claim was ever quantified, bearing in mind that these figures were for the purpose of endeavouring to reach what it was thought was a possible basis for a settlement with IBM. 10

But in terms of releases, the parameters were either no release or a partial release. Was that on top of the damages being sought at that stage?---That damages were being sought and there would be no release.

And there would be no release. All right. So that the \$12 million was viewed as, in effect, a payment that IBM had to make because of the expenses that CorpTech had been put to in terms of fixing the existing system?---Yes. 20

Whilst the state would reserve for itself any claim for future damages by not releasing IBM or giving a partial release in case there was catastrophic failure of the solution as delivered?---Yes, that's correct.

Now, we see from the term sheet that it still required, apart from the two aspects that were considered, namely, liquidated damages and releases, it also required all outstanding severity 2 defects to be rectified by IBM? ---Yes. 30

All right. It required a transfer of knowledge in relation to documents and data to the state of Queensland?---That's correct.

And can you tell us did you receive specific instructions that the state of Queensland was, at least in the initial stages of these negotiations, to pursue damages claims?---I certainly received specific instructions to frame a claim in terms of this settlement term sheet. Yes. 40

To your knowledge, did that settlement term sheet go by Mr Grierson for approval?---I understand it did.

All right, thank you. Can I take you to paragraph 11D of your statement?---I have my copy. May I refer to that.

Yes, of course. 50

COMMISSIONER: Yes, of course.

MR FLANAGAN: Here you refer to a letter dated 6 August 2010 from Clayton Utz to Blake Dawson sent by email to Mr Brooks. The letter followed the proposed telephone

conference which had been held on 5 August. Do you have now any recollection of what was discussed at that telephone call of 5 August?---The telephone call on 5 August, as I recall it, was to really explain to Blakes or articulate to Blakes what was in the settlement term sheet, IBM particularly - and it was a sensible suggestion that we have a discussion with Blakes at the outset to just walk them through the settlement term sheet and the state's requirements.

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This is an exchange of correspondence between solicitors. To your knowledge were any representatives of IBM and CorpTech meeting at this stage?---I think I understood that there were no meetings to do with the settlement - the operational meetings going on between the operational people at both CorpTech and IBM.

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Good. Thank you. On 6 August 2010, you received a letter from Blakes in response to the initial settlement term sheet which you have as annexure L to your statement - you don't need to go to it because, unfortunately, your annexures aren't numbered and they're a little bit hard to find, but it states that IBM instructed Blakes to express concern that the term sheet was not a genuine attempt at compromise. That was the allegation coming from IBM. Correct?---Yes.

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But sought to impose additional obligations on IBM. Do you agree with that assessment?---No, no. I didn't agree with the assessment. I don't agree with the assessment. The settlement term sheet was designed as a starting point to get an agenda of the matters to be negotiated and to articulate the state's position. There wasn't - as far as I was concerned, there was no intention to put a compromise position and I wasn't instructed to put any compromise position in the settlement term sheet at that stage.

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We appreciate that there were time constraints. As you said, the period of negotiations from 2 to 20 August, you sent the term sheet to Blake Dawson on 4 August. When was the first time you received a response to the term sheet? ---The communication you just referred to was, I guess, the first response after we had had the tele-conference, but the first substantive response was on 13 August when we received back from Blakes a version of the term sheet containing IBM's position.

40

Were you becoming concerned in relation to time delays on the part of IBM?---I was certainly concerned about time passing in the period up to the 20th being passed by and not leaving enough time for proper negotiations.

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Can we just put this in context. You appreciated that a notice to show cause had been issued. Yes?---Yes.

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That there had been a response to that notice to show  
cause?---That's correct.

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But that the state in the ordinary course of events under  
the contract would need to terminate IBM's services on or  
about 23 August 2010?---That's correct.

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33-36

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All right. So all parties knew that if the state of Queensland wished to rely on the failure to deliver deliverable 47 and to accept deliverable 47, and the failure to fix severity 2 defects within two days under the relevant schedule, 46 if I recall, if that didn't happen - sorry, if the state of Queensland didn't terminate on the basis of that notice to show cause, you would have to find a different basis to terminate. Correct?---That's correct. Certainly the Mallesons advice and our working instructions, if you like, were that if the state didn't elect to terminate, then it would have the effect of electing to affirm the contract.

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Can I just make this clear. From your experience as a commercial negotiator, if one terminates a contract, does that bring to an end a commercial negotiation?---No.

Why is that?---Because it just - a termination crystallises the position at that point in time and, typically, there would - depending on the circumstances, but typically in these sorts of circumstances you would expect there to be negotiations after termination.

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We've heard evidence from Ms Bligh yesterday that without seeing anything in writing, there was a suggestion that there was a fifty-fifty chance of prospects of success for the state of Queensland. You were aware, were you not, that Mallesons' advice that the state of Queensland had a clear contractual right to terminate because of the failure to deliver deliverable 47. Yes?---Yes.

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And the clear failure on IBM's part to correct severity 2 defects within two days. Yes?---Yes.

And that gave the state of Queensland a fairly crystal clear case of its right to terminate, at least, did it not? ---Yes. Mallesons' advice was quite strong on the state's right to terminate.

There were certainly suggestions that IBM would strenuously resist any litigation - - -?---Yes.

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- - - as would be expected. Yes?---Yes.

And that they may well counterclaim in relation to any litigation. Yes?---Yes, or claim wrongful - - -

Termination?--- - - - termination.

Yes. But the wrongful termination here was in the context of a failure to deliver the solution by a certain date, namely 30 April 2010, without severity 2 defects?---That was the default, yes.

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From your experience as a commercial negotiator, if one has a fairly clear right to terminate and one could in fact terminate with some confidence in relation to a material breach of contract, is that a tool one should use as part of a commercial negotiation?---Mr Flanagan, I think that depends on the circumstances. 1

Can you talk about these circumstances here, then?---In these circumstances, I think it's fair to say that the CorpTech people were working largely on an assumption that if the negotiations were not successfully concluded by the 20th, then the state would probably move to terminate, and my recollection is that CBRC's submission was prepared to that effect in that last week, culminating the 20th. 10

In terms of negotiations up to 20 August, one at least, or indeed termination, you continue to negotiate 21st, 22nd, because the review committee gave Mr Grierson a reporting back time of 2 September, but one could have negotiated right up to 23 August, couldn't you?---23 August, as I understood it, was not a hard date. I think the Mallesons advice, as I recall, was that the longer it went on, the less the prospect was that there was a - that the ground for termination was solid. In other words, more it was likely that the contract was affirmed. 20

Yes. Now, we know with the supplemental agreement, it actually constituted a variation of the contract of 5 December 2007. Again, in terms of commercial negotiation, one can vary a contract or one can agree that a right to terminate is reserved whilst negotiations are going on. Yes?---Yes. 30

And that is not an unusual step to take in commercial negotiations?---No.

It would require, of course, agreement?---Yes, it requires agreement.

Quite. Now, on 13 August 2010, you received a response from the solicitors for IBM putting forward IBM's proposals under the settlement deed - sorry, under the settlement sheet. Yes? I won't take you to it, but from memory, do you agree that IBM were actually suggesting that IBM had delivered to the state of Queensland a working payroll system in accordance with the contract?---I think that's correct, Mr Flanagan. I'm not absolutely - - - 40

You can take it we're reading from the document itself, so - I can show you it, if you wish, but you accept that IBM did not accept the state's position in terms of releases and required full releases?---Correct. 50

All right. So that was a primary difference between the two negotiating parties?---Yes.

The state was insisting on no releases and IBM were insisting on full releases?---Yes. 1

And IBM certainly rejected the state's proposal to pay damages?---Yes.

Now, at paragraph 12 of your statement, if you could turn to it, Mr Charlston, you refer there to a meeting held between yourself and Ms Natalie MacDonald, who is an associate director-general of Public Works?---Yes. 10

Also present were Ms Berenyi, Mr Brown and Mr Backhouse? ---Yes.

As you recall, what was discussed at this meeting?---The meeting was to update the associate director-general on the status of the negotiations and to discuss, in view of the circumstances, what steps might be taken.

All right. Then at paragraph 13 of your statement, you say that on 16 August 2010 you attended a meeting with Mr Grierson at his office?---Correct. 20

Attended by those persons you identified there. Mr Grierson was briefed on the status of negotiations with IBM and the options for proceeding, a discussion paper was distributed by Mr Brown, which is annexure R to your statement. I might ask you to turn to annexure R, if you would, and for that purpose, Mr Commissioner - I think it's around two-thirds, halfway through the annexures, but it's called 'IBM Contract Negotiation Discussion Paper'. 30

COMMISSIONER: Does it start, "Summary response to state's term sheet of 4 August"?

MR FLANAGAN: That's it, yes.

COMMISSIONER: Now, what was this? This was given - - -

MR FLANAGAN: To Mr Grierson. Is that correct?---Yes, that's correct. 40

By Mr Backhouse?---By Mr Brown.

By Mr Brown, I'm sorry?---Possibly by Mr Backhouse.

No, it's by Mr Brown. Now, first of all, what was the purpose of that meeting with Mr Grierson?---The meeting with Mr Grierson had been set up sometime before then and it was - pardon me - just to touch base with Mr Grierson or to brief him on the status of the negotiations at that stage, so it was a touch point with the director-general. 50

All right. Now, this document gives a summary but it also says under a hearing Where to From Here, but you had reached the view, had you not, at this stage, that

agreement on settlement terms and conditions was highly unlikely within a reasonable time frame. Yes?---Yes. 1

All right. And that any significant delay on reaching agreement past 20 August 2010 further erodes the state's option to terminate the contract for default based on current notices and that was based on Mallesons' advice? ---That's correct.

Thank you. Then if you look under Summary, the third-last dot point, "IBM is aware of the timing issue associated with the show cause notice," which we've talked about. Yes?---Yes. 10

"And its response may be a tactic to seek to neutralise the notice, thereby limiting the state's options"?---Yes.

Did you view the state's ability to be able to terminate on the basis of the original notice to show cause as an important consideration?---Certainly an important consideration in the negotiations because that represented the states negotiating leverage to a fair extent. 20

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So it's identified there then that time is IBM's strongest negotiating lever?---Yes. 1

And that termination of the contract for default is the state's best lever?---Exactly.

What's considered there as option 1 is the immediate termination of contract for default. That wasn't followed, was it?---No. 10

Why was that?---Ultimately, as I understand it, the decision was taken by at least the director-general and Mr Smith from the Premiers that the state did not have an appetite for termination; that at this point in time the meeting - this meeting - was left on the basis that Mr Grierson would consider the position and decide what to do, but that he had an inclination to contact IBM directly.

COMMISSIONER: Mr Charlston, you could substitute "carriage" for "appetite". Did Mr Grierson say anything to you which indicated why the state, or he personally, was reluctant to take IBM on?---Not to me, Mr Commissioner, no, and I don't recall anybody ever articulating to me a reason why other than that there would be risks involved in that type of litigation. 20

Life is not risk free?---No.

Litigation, of course, is risky, but was that the only explanation offered in your presence that there was a risk in suing IBM or bringing the contract to an end?---Yes. 30

Did you have a discussion of the magnitude of the risk?---I didn't, Mr Commissioner, but then that really was not - - -

I understand. Your role was to negotiate?---- - - an arena that I was in.

Yes, thank you. 40

MR FLANAGAN: If you look at the second page of that document and the third dot point on that page it's suggested:

*It's probable that if the state pursues claims, IBM would seek to negotiate a settlement following contract termination rather than litigate.*

Whose view was that?---That was probably Mr Brown's view, but it would be a view that I would hold as well. 50

"Outcomes from other contract terminations support this as a likely cause of action." Do you know what other contract terminations were being referred to there in respect to IBM?---I think that probably came from me in discussions

with Mr Brown about the types of outcomes that happened in these sorts of circumstances. 1

"Although litigation by IBM for wrongful termination cannot be totally discounted"?---Yes.

All right, thank you. If you look then at the bottom of the page, process, and this is what's being suggested - first of all, I should ask you, it's being suggested: 10

*The DG or delegate to meet IBM on Wednesday, 18 August, following development of an adjusted term sheet within the parameters set by Cabinet Budget Review Committee. Clayton Utz' negotiation advisers to be present.*

Do you see that?---Yes.

*DG or delegate to table an adjusted state position within the parameters approved by the CBRC and IBM to be given 24 hours to respond to the state's best and final offer.* 20

And then it's said there that:

*It's highly unlikely that IBM would agree.*

Yes?---Yes.

And then what would be put to Cabinet would be flowing on from this process approval to terminate the contract for default with IBM. Yes?---Yes. 30

So at this stage the way forward, having received IBM's response to the state's term sheet was to take this from Mr Grierson, to suggest a way forward was Mr Grierson meet with IBM representatives with Clayton Utz present and that the final term sheet terms be put as the state's final offer to IBM, if not accepted by IBM, which was viewed as unlikely, that the Cabinet Review Committee would be advised to terminate. Yes?---Yes. 40

That's not what happened, is it?---No.

This is where the whole game changes, does it not?---It does. That's correct.

It changes in this way: Mr Grierson does meet with IBM, does he not?---Yes. 50

Not on 18 August, but on 19 August. Yes?---On the - yes, that's right.

And he meets in the presence of his associate director-general Ms MacDonald?---Yes.

And he meets with Mr Doak and another IBM representative. 1  
Yes?---Yes.

You're not present?---No.

Why?---I can't answer that. I wasn't invited, is I guess  
my answer.

You did, however, Mr Charlston draft another term sheet for  
the state of Queensland, didn't you?---Yes. 10

You put in that, on instructions, the state's final  
position. Yes?---Yes.

If we can come to that term sheet. I'll just have to find  
it. In any event, the term sheet speaks for itself, but  
it was the final offer put and you were encouraging  
Mr Grierson through Mr Backhouse and Mr James Brown to put  
this as the state's final offer that IBM could either  
accept or reject. Yes?---I think the suggestion that it be 20  
put as a best and final offer came from Mr Brown on  
instructions to me rather than from myself.

Thank you. The best way to find this is it's actually  
annexure U to your statement or we could go to volume 3,  
page 136.

COMMISSIONER: I have found annexure U.

MR FLANAGAN: We might start at 136 of volume 3 which is 30  
the introductory emails from Mr Brown to you, Mr Charlston,  
where - - -

COMMISSIONER: I'll follow you in that volume,  
Mr Flanagan.

MR FLANAGAN: Thank you, Mr Commissioner.

COMMISSIONER: What page - - - 40

MR FLANAGAN: Page 136 of volume 3.

COMMISSIONER: Yes, thank you. I have got that.

MR FLANAGAN: All right.

Mr Brown is writing to you and he says in the third  
paragraph:

*As indicated in my email yesterday, we need to 50  
ensure that Blakes are aware of the state's  
expectations on the response from IBM. Can you  
please formally communicate with Blakes by letter -*

which you do, do you not?---That's correct.

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Yes -

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*Indicating that the revised proposed terms of settlement represents a significant movement in its original position in the interests of seeking to reach agreement on finalising the contract by negotiations? You can also advise IBM that it should not rely on the prospect of further concessions from the state. Can you also please inform IBM that the state requires IBM's response on or before close of business, Friday, 20 August.*

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The instructions you're getting from Mr Brown, who is the primary source of your instructions - - -?---Yes.

- - - is that there is a meeting to be taking place between the director-general and IBM, but your understanding was that meeting was a meeting following on from your meeting with Mr Grierson on 16 August. Yes?---Yes. On that day. That's right.

20

So even though you weren't invited to it, you still had an expectation that what would be presented at this meeting to the IBM representatives was the term sheet that you had drafted?---I don't think at that point in time I had heard any more about the director-general's decision on what he was going to do because this is in the morning of the day of the meeting and I only found out about the meeting later on in the morning. That's later on in the morning of 19 August.

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All right. Can you tell us this then: to your own knowledge had Mr Brown, Mr Backhouse or Mr Beeston conveyed to you that the state of Queensland were moving away from the protocols established by Clayton Utz for this negotiation process?---No.

And then if you then look at page 138. This is again an email from Mr Brown to you. Again, it's the day before, but it's emphasising:

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*Can you please ensure that when discussing with Blakes that you indicate that this is the state's best final offer.*

Yes?---That's correct.

118. Thank you. And the term sheet is found at volume 3 at page 118.

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THE COMMISSIONER: 118?

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MR FLANAGAN: 118, yes.

Can I take you to page - first of all, 122 in relation to damages claim. For the state's response of its final position, one looks at the entry for Wednesday, 18 August 2010. Is that correct?---Sorry, Mr Flanagan; would you remind repeating that?

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Yes. If you go to page 122 - - -?---Yes.

- - - if you want to look at the state's final negotiating position, it's for Wednesday, 18 August 2010. Is that right?---Yes, sorry.

Yes?---That's correct.

There, the state is willing to settle the damages claim subject to item 12 below with the issue of the state releasing IBM on the following basis; the state will retain and IBM will release the state from any liability for payment of items, so there is a payment that is an offset of outstanding moneys to IBM against any damages claim. Yes?---Yes.

20

The also in terms of contractors, there's a requirement for them to cooperate in terms of subcontractors upon termination?---Yes.

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So too with the knowledge transfer?---Correct.

Then if you look at item 12 on page 126 in teams of releases, there is a limited release, is there not? ---That's right.

That is, the release that has been reserved to the state of Queensland is a release limited to liability for an agreed list of obligations relating to problems that are apparent to the state; that is, if the system at a later stage was to fail completely, the state would have a right to sue IBM?---Correct.

40

All right, thank you. That was the release that was contemplated as one of the possible parameters for releases by the cabinet review budgetary committee?---That's correct.

Thank you. Now, can I then take you to volume 3 page 142. This is the letter that you were requested to send to Blakes by Mr Brown. Is that correct?---That's correct.

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Then if you look at page 144, this is a file note made by you of an attendance from Cathy from Mr Grierson's office. Yes?---Yes.

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Do you know who Cathy was?---Mr Grierson's secretary, I understand. 1

All right. It just tells you that you're not required this afternoon but Margaret - do you know what that means? ---Look, I'm sorry, Mr Flanagan. I dictated that from my file note from three years ago and I can't quite interpret my own writing.

Your own writing?---But I think it was to the effect that I wasn't required for the meeting, possibly that Margaret and Natalie, the associate director-general and Margaret Berenyi from CorpTech - - - 10

Was it explained to you why you weren't required for the meeting?---No. No, it was just a - well, no, it was just a note from the director-general's secretary and I received a similar message from Mr Brown's secretary as well, that by then events had moved along and there had been the meeting. 20

All right. But before that, before you were uninvited to this meeting, you were asked to brief Mr Grierson on how he should conduct this meeting, face-to-face meeting, with IBM. Yes?---I had a very quick conversation with Mr Grierson at 11 am that day and he was meeting at 11 am and yes, he told me that he was going to meet and I think he probably said, "What can I discuss?" and I said, well, you know, "I understand that you're going to discuss the general status with the negotiations and other matters that the state has on with IBM," and confine it to those things. 30

Yes. Can I take you to two documents that might assist you in this regard. First of all in volume 3 at page 133. This is an email from Mr Brown, dated 19 August at 10.17 am, so this is prior to the meeting with IBM. He says to Ms McDonald who was to attend the meeting, "Prior to meeting with IBM, you and Mal may care to phone Jeremy Charlston from Clayton Utz to seek additional advice on the conduct of the meeting." Yes?---Yes. 40

All right. So Mr Brown is advising both of them to contact you for that purpose?---I see that.

"It would be advisable to indicate at the outset that all discussions are without prejudice and are within the protocol agreed between the state and IBM for the conduct of settlement negotiations," that is, Mr Brown is encouraging both the associate director-general and the director-general to maintain this meeting within the protocols that Clayton Utz have established for the commercial negotiation. Yes?---Yes. 50

That was your understanding about how this meeting would be conducted. Yes?---That was my hope.

Hope?---Yes.

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All right. Is it fair to say that what was occurring here was exactly what you and Mr Brown had been advising against?---I think that's correct but this is the day before the end of the negotiation process and the disputes were a long way from being settled and negotiated and it was up against the deadline, so the fact there might be some discussions involving the commercial people was not such a surprise or so unusual that, you know, one would hope it would involve the lawyers as well, who had been conducting the process to date.

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But the discussion paper had identified that if the settlement negotiations didn't work prior to termination, that the cabinet review committee would be advised to terminate and then negotiations could continue thereafter in any event?---That was certainly my understanding of what the process was intended to be.

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Then he said:

*Below are some suggested responses to IBM on contract and current negotiation process. It is strongly advised that no additional commentary on the contract or process be discussed as this may compromise the state, the state's legal and negotiating position, particularly in relation to preservation of the state's legal rights as a result of IBM's material breaches.*

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Then over the page it says:

*It would be important that a file note recording the key points discussed is prepared and forwarded to mark it for filing.*

Now, that's a file note, that's a very commonsense suggestion that there should be a file note made by Mr Grierson and Ms McDonald of their meeting with the IBM representatives. Yes?---Yes.

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Do you know of any such file note?---Pardon me. I don't, but I understand that after they met with IBM, Mr Brown and Ms Berenyi were called in and told what the principles were that had been discussed or negotiated in the meeting and were asked - they were asked to then reduce that to settlement principles.

Yes, but I'm talking about a file note?---No. Apart from that, I'm not aware of any file note, any such file note.

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No, all right. Then can I take you then to page 139, which is your file note of the meeting - or your telephone call with Mr Grierson? Now, it's fairly fast. How long did the telephone conversation take?---Less than five minutes.

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Doing as best as you can refreshing your memory from this contemporaneous file note, what was said?---It was really just Mr Grierson saying that he was intending to have a chat with IBM about the process and about other business that the state had with IBM. He said that he had been disappointed with progress to date and I think he probably said to me, you know, "What can I say or not say?" I recall saying to him, "Well, you need to ensure that it's without prejudice," and actually beyond that, I can't really recall but what I do recall is that it was a very short conversation. I assume he had IBM waiting outside and that was the - it was a very narrow escape conversation.

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Can I suggested when he said "disappointed", that was a sentiment he was going to express to IBM - - -?---Yes. 1

- - - namely, that he was disappointed with IBM in terms of their lack of or lateness of responses to the state's terms?---Yes, their engagement in the process.

Did you advise Mr Grierson that she should be agreeing at that meeting with IBM representatives as to settlement principles?---No, certainly not. 10

Did you suggest that he should be agreeing to a full release of IBM to fix defects, 35 defects, by 31 October 2010?---Certainly not.

Did you suggest to him that he should negotiate an outcome beyond the state's position as identified in the most recent term sheet?---No, I didn't. Certainly it was not my understanding that the discussions were going to be of that nature. 20

You understood though that it was Mr Grierson who had been authorised by the cabinet review committee to conduct the negotiations. Yes?---That's correct.

So he certainly had authority to negotiate with IBM in the way he did, did he not?---I think that - - -

Sorry, I withdraw that. He had authority to negotiate with IBM to the extent of the parameters identified in table one?---Yes, that's correct. 30

Having not attended this meeting, your first knowledge of this meeting comes through a telephone conversation you had with Mr Brown. Is that correct?---That's right.

Mr Brown has dealt with that conversation in a supplementary statement, and Mr Grierson has also dealt with, but I only want to deal with parties to the telephone conversation at this stage between you and Mr Brown. Can I take you to it? It's in volume 3, page 150. Having been a partner for many years at Clayton Utz, Mr Charlston, what is your practice in terms of taking file notes of telephone conversations?---I generally take file notes as verbatim as I can in the course of the conversation, if necessary I'll dictate them afterwards but usually not. But particular if there's detail that needs actioning, I'll dictate them afterwards. 40

Can we take it that you write as someone speaks?---Yes. 50

And that was your usual practice as at 19 August 2010? ---That's correct.

Doing as best you can, did you take contemporaneous notes of the conversation as it happened during your telephone

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conversation with Mr Brown?---Yes, I took handwritten notes. 1

Are the contents of this file note true and correct to the best of your knowledge and belief?---I believe so.

Do they constitute an accurate record of the conversation you had with Mr Brown on 19 August 2010 at 5.38 pm?---I believe so. 10

COMMISSIONER: When were they dictated?---Mr Commissioner, I've been back to our word processing system, they were dictated by me the next morning and returned to me by our word processing operators at about 11 am.

And dictated from the handwritten notes you made during the course of the conversation?---I dictated from the handwritten notes.

Thank you. 20

MR FLANAGAN: Can I take you then to Mr Brown's supplementary statement? You've been given a copy of this, have you not, Mr Charlston?---I have, Mr Flanagan.

And you've been asked to consider Mr Brown's version of events in relation to it?---Yes.

Just excuse me for a minute. Sorry, Mr Charlston. Specifically, the starting point of Mr Brown's supplementary statement is at page 5. 30

COMMISSIONER: There's only one passage he takes issue with, isn't there?

MR FLANAGAN: Pardon?

COMMISSIONER: There's only one passage he takes issue with. 40

MR FLANAGAN: There's not, actually. I've actually counted the possibility of nine points that they might differ on. Can I take you to paragraph 5 where you say in your file note, "I query what will happen" - sorry, in your file note you say, Mr Brown saying, "I query what will happen if IBM does not perform. James said there was no security for performance and IBM has a free reign." He says that he doesn't believe this is an accurate note of what was said, and you've read what Mr Brown says about that in the following paragraph. Yes?---Yes. 50

What do you say to that?---I suspect that my question was about security for performance, and the answer that I've dictated there, which James said, "There is no security performance and IBM has free reign," what I took that to

mean, was that there is no security for its obligations. In other words, apart from being contractually obliged to do it there's no additional security for the obligation in that sense. 1

What are you referring to as additional security then?  
---Perhaps some sort of bond or retentions or something of that nature so that there is an incentive to perform.

But it was the case that if they didn't perform that payments wouldn't be made, that is, the payments that would be made to IBM required performance of the correction of the - - -?---Payment was on accepted - - - 10

All right. So that might just be a simple question of two minds differing on what was being talked about?---I think so.

Then I can take you over to page 5 of Mr Brown's statement. It's in the second paragraph where you talk about him saying that this is a political decision. First of all, Mr Charlston, you weren't in a position to determine what was a political decision and what was not?---No, I wasn't. 20

You never had any talks to Mr Grierson about what instruction he had received from the premier and Mr Schwarten in terms of a political outcome?---No.

And you certainly didn't know what was a preferable political outcome for cabinet at that time?---No, I certainly didn't. 30

What do you say then about Mr Charlston's (sic) of the accuracy of that paragraph? Sorry, the last paragraph at least.

COMMISSIONER: Mr Brown's reputation.

MR FLANAGAN: Did I say - - - 40

COMMISSIONER: You said "Charlston.

MR FLANAGAN: I see. What do you say to Mr Brown's reputation?---I'm sorry, Mr Flanagan, are you talking about the last paragraph of this item?

COMMISSIONER: Do you accept that you've got it quite wrong, or your file note is quite wrong?---No, I don't. The file note, the transcribed file note, was taken from my handwritten file notes and I certainly was not inserting into my handwritten file notes as I went some type of personal views about what was going on, I was simply writing down notes of what Mr Brown was telling me. 50

MR FLANAGAN: Thank you. Whilst you were trying to take contemporaneous file notes, can I specifically ask you

this: did Mr Brown ever express to you that he was disappointed the government had chosen not to terminate the contract?---Look, I'm sure he did, Mr Flanagan, I can't recall specifically when that was, it would have been on this day I would think. He did express the view that it was - I believe he expressed the view that it was the worst possible outcome, and I my recollection now is that what he was referring to was the decision not to terminate.

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While we're there, can I ask you these questions: it was Mr Brown's view, according to the discussion paper held with Mr Grierson on 16 August 2010, that it was unlikely that IBM would agree to the state's final position and a submission should be made to the Cabinet Review Committee to terminate. Yes?---Yes.

1

Was there any discussion that if termination occurred, further negotiation could not occur with IBM?---No.

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Right?---No. That was the expectation or the options that either there would be further negotiation or nothing would occur or litigate.

In any of your conversations with CorpTech representatives, was it identified as a real risk that if terminated, IBM would walk off the job and hinder the access of CorpTech to its subcontractors and Infor for the purposes of dealing with existing defects in the system?---I think that was probably identified as a risk, but I don't recall it being discussed as a consistent front of mind concern that the CorpTech people had. I think they were of the view that an arrangement would be made with IBM for the subcontractors.

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All right, thank you. Can I take you to the last paragraph on page 6 where he's dealing with this in terms of the political imperative:

*If IBM is removed then there would be nobody to blame for the payroll problems.*

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He entirely refutes that. Again, is your record of the conversation an accurate record?---I believe so.

Thank you. Can I take you to one particular allegation where he says:

*The politicians were extremely nervous and driven by certain facts?*

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He says that you've got that completely wrong. Again, do you refute that?---Yes.

He says:

*I believe Mr Charlston had over inflated the nature and contents of our telephone discussion on this point.*

Had you?---No.

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Is it in your nature to inflate things?---No, it certainly is not.

Is it in your nature otherwise, and as an experience dsolicitor, to take an accurate file note of what is said to you?---Yes, I believe so.

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Can I take you then to page 8? As I understand this, the context of a telephone discussion, Mr Charlston, were you so angry in terms of being shut out of the process or dealing with Blakes on one basis when a deal was happening on another basis unbeknownst to you? Were you so angry that it would affect the accuracy of your file note?---No, Mr Flanagan. In fact, Mr Brown refers to a conversation I'd had with Blakes and in fact I hadn't had any such conversation. I had a conversation with Blakes the following day, but not at this point in time. Blakes rang me the following day wanting to discuss the term sheet and the lawyer from Blakes specifically said to me that he had not then yet been briefed by IBM on the outcome of the discussions. Factually, it's not correct.

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Finally at paragraph 17 he says that when he spoke to you:

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*Mr Charlston -*

that is you -

*was clearly annoyed and angry that a rival lawyer had put one on him. I would go so far as to suggest that Mr Charlston appeared to me to be professionally embarrassed to find out that his client had settled the dispute and the lawyers for IBM knew before he did?*

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---No. And, again, that's factually incorrect because the discussion I had with the Blake's lawyer was not until the following day and at that point in time, the Blake's lawyer had not been briefed on the outcome of the discussion, or at least he told me he had not been briefed.

Were you angry at the time that you spoke to Mr Brown?  
---Certainly not.

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All right. Were you annoyed at the time you spoke to Mr Brown?---No.

That's the evidence-in-chief of Mr Charlston.

COMMISSIONER: Thank you. Mr Plunkett?

MR PLUNKETT: No questions. Thank you.

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COMMISSIONER: Mr Haddrick?

MR HADDRICK: Yes, thank you.

COMMISSIONER: Perhaps I'll come back to you later.  
Mr Ambrose?

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MR AMBROSE: No, we have no questions.

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COMMISSIONER: Mr Foley?

MR FOLEY: Yes, thank you, Mr Commissioner.

COMMISSIONER: Thank you.

MR FOLEY: In the file note reference is made by you to the conversation with Mr Brown and, in particular, there's certainly observations as to the motivation of the director-general and the relevant minister, that being Mr Schwarten. Is that right?---Which paragraph are you - - -

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Go to paragraph 6 and page 2 of your file note?---Yes. What I've recorded there is - - -

Very well. Did you ever communicate that to either the director-general or the minister?---No.

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No. You were aware, were you not, that the process required the decision to go back to the Cabinet Budget Review Committee?---Yes.

You had with respect to your further contribution made on the following morning of 20 August a marking up which appears at annexure Y to your statement. Is that correct? ---Yes, that's correct.

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In that marking up and in the email which appears prior to that, do you communicate to the state any concerns that you have with respect to the settlement principles of which you had been advised?---No, other than the points that I marked up in the principles.

Is it fair to describe them as technical rather than substantive?---My point is square - yes.

So having been retained to give advice with respect to the consultation process and then having received the proposed settlement principles and being aware that the matter was to go back before the Cabinet Budget Review Committee, you didn't offer any legal advice of a substantive nature contrary to the proposed principle?---The conversation I had with Mr Brown on that day was to the effect that a settlement had been agreed with IBM; that settlement principles - he was told to record the agreement in the settlement principles and he said that he would send his document to Mallesons and me to see if - and to mark up any comments that we had on the document. I took that to be, so far as my role was concerned, to reflect the framework within which the settlement term sheet and the negotiations that I had been involved in were reflected in this document, but not to otherwise advise on the terms of the settlement or their advisability or otherwise.

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Yes. Yes, thank you, nothing further.

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COMMISSIONER: Mr Cregan?

MR CREGAN: Just a few quick things.

We were talking before or you were speaking with Mr Flanagan before about the approach that was taken towards the negotiation with IBM and I think you said something to the effect of, "Different commercial parties approach these things differently," and that's right, isn't it? Different commercial parties will have different approaches for negotiation?---Yes.

10

Some may want lawyers involved, some may not?---Yes, yes.

And there's nothing strange in that?---No.

And you were asked by Mr Flanagan about the figure of \$12 million. That was never communicated to IBM, was it? ---It wasn't communicated in the settlement term sheet as far as I can recall, no.

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COMMISSIONER: Was it communicated any other way?---Not by me, Mr Commissioner, no.

All right.

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As to the figure itself, that wasn't based on a lawyer's quantum measurement, that was based on a figure that came out of CorpTech?---Yes. 1

So it wasn't based on quantum advice?---It wasn't based on quantum advice but Mallesons had advised on hits of damage and CorpTech had been working with that advice.

As to 20 August, that was a state-imposed deadline, wasn't it?---Yes. 10

As to the advice from - I'm jumping between topics here. As to the advice that IBM could be terminated, you're aware that IBM substantially disputed the factual foundation that would allow that to happen?---I was aware that IBM certainly disputed it, yes.

All right. And there's certainly a risk that IBM were right about that?---That the state was advised by Mallesons on their standing and the strength of their case and part of that advice was that a forensic analysis would certainly need to be done in detail before, for example, litigation was commenced but that otherwise, Mallesons gave strong advice about the state standing. 20

There were no rights - - -?---No.

And you didn't review it?---Sorry?

And you didn't review it?---No. 30

Thank you?---Well, sorry, I didn't - - -

You didn't review it essentially?---I read it but I wasn't asked advice on it, no.

Thank you, Commissioner.

THE COMMISSIONER: Thank you. Mr Kent? 40

MR KENT: Thank you, Commissioner.

Just generally, Mr Charlston, you're aware, of course, of the nature of the contract?---Yes.

Which had given rise to by the time of your involvement of dispute between the parties?---Yes.

And you already discussed with Mr Flanagan this morning the intentional value of I guess the dispute to use that globally, you discussed figures of possibly a claim of 12 million, possibly a damages claim capped at 88 million, or possibly up to - someone mentioned a hundred million at one stage. Correct?---Correct. 50

I think we see from your documents that the first settlement term sheet includes an unquantified damages claim?---That's correct. 1

And as clearly emerged later on but perhaps was always evident, there are sharp divides between the parties positions?---Yes.

Both the state and IBM were large and well-resourced litigants?---Yes. I assume so. I think the - certainly large litigants. I assume both of them were well resourced, yes. 10

The kind of people that can afford to go to court if they desire to, I suppose?---Yes. The kind of people who would not be surprising to see litigate a dispute at this stage.

This, had it resulted in litigation rather than being settled, this dispute, would you agree with me had the potential to be large and complex litigation?---Yes. 20

That carries with it ramifications including the fact that the effort on both sides from the legal team would be substantial?---Correct.

There would be a number of solicitors involved, for example, for the state?---I would imagine so.

Junior and senior counsel?---Yes, certainly. 30

In terms of attempting to get going, the scope of this, as you understood it, was large enough that advice and pleadings could take some time to obtain?---For litigation purposes, yes.

Yes. Once it did get going, there could likely be interlocutory arguments?---Yes.

Disclosure alone I think we would all probably recognize it in here that it would be fairly massive?---Yes, exactly. 40

I know I am asking you these questions about something that was not even embryonic at this stage but from your understanding, this dispute, should it be litigated, could take years to get to court?---It could take some years, yes.

The trial could run for some time, potentially?---Yes.

And there might be more time if the judgment were reserved, obviously?---Yes. 50

This is - even in the way that you and I have discussed it, potentially a very expensive process?---Yes.

Potentially millions of dollars in costs?---Yes.

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What some cynics might describe as a lawyer's picnic?---I'm not a cynic. 1

I think you have already said that there are fairly strong advices from Mallesons at least about the contractual breach point. You understood those to be based on facts that were potentially in dispute?---Yes, that's correct.

I think you might have already agreed something that everyone in here would acknowledge, litigation is uncertain?---Yes. 10

In your experience - and I should ask you, I suppose, apart from your - as I understand it largely negotiating practice, you had been involved in litigation as well? ---I'm not a litigator but I had been involved in IT disputes.

THE COMMISSIONER: So have I, Mr Kent. 20

MR KENT: I don't mean to lecture.

Such disputes, history tells us very often at the end of the day end in compromise rather than go to trial?---Yes. Others go to trial with well-known outcomes that have been reported.

Sure. Is it fair to say that as you perceived it - and you were retained to attempt to negotiate an outcome here. Correct?---Yes. 30

Very early on before any of what I had been speaking about had took place. Correct?---Yes.

You saw that as a very legitimate tactic in the circumstance, didn't you?---Tactic?

To try and negotiate a resolution quickly?---I saw it as a sensible approach to reaching - to endeavouring to reach a resolution of complex disputes, yes. 40

As you have described with Mr Flanagan, your commencement of the process was to write to Blake Dawson with the settlement sheet that we have brought today. Correct? ---Correct.

And as Mr Flanagan has also taken you through, two things followed; it took a little while to get a response. Correct?---Yes. 50

And the response was that this settlement sheet or opening offer wasn't an attempt to compromise. That's what the other side said?---Yes. That's what they said.

You rejected that. It was certainly not your view of it? ---Well, it wasn't my view that it was intended to be any

type of compromise. It was intended to put the state's requirements through settlement and with an objective of setting an agenda for these settlement negotiations.

1

Yes. And very often in a negotiation, one's first offer is something of an (indistinct) correct?---Well, it can be on occasions, yes.

In any case, whatever it was, it was a starting point for the negotiation?---Yes. It was intended to set the agenda and to put down the state's requirement.

10

The responses from the other side prompted you to complain about this to some extent in your letter of 13 August. Correct?---Yes. A response having been received from IBM, a substantive response having been received from IBM by then.

All right. Now, can I just ask you to look at a couple of bits of the correspondence. Do you have your statement there with the annexures?---Yes.

20

I'm going to ask you about annexure B which is a letter - I suspect it is in the tender bundle but it's a letter of 28 July from Mr Grierson to Mr Bloomfield at that stage at IBM. Correct?---Yes.

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Can I take you down to the fourth-last paragraph, "In order to enable the negotiations," et cetera, and there's three paragraphs set out there. Correct?---Yes. 1

This is where the time frame up to 20 August was set in the first of those paragraphs. Right?---Yes.

Or indicated at least. And then the second paragraph says this, "Commencement of a period of 10 business days in paragraph 1.8B of schedule 42," presumably of the contract, "will be the third so that the period commences on Monday, 23 August 2010." Right?---Yes. 10

I just pause there to ask you: did you have a look at the contract?---Yes, I'm sure I would have looked at the contract - - -

And that's, what, schedule 42?--- - - - for that point.

It provides for dispute resolution, presumably?---Yes. 20

I'm quite interested to ask you then if you look at annexure C, it seems to be the response to this by Mr Doak. In paragraph 3 on the first page of his letter, he says, "In relation to your point that IBM will agree to this referral to dispute resolution negotiation period on the basis of acceptance of IBM's other points in this letter," did you take that when you looked at this correspondence, and in your dealings with the matter generally, as being that was something that was going to happen?---I'm sorry, what was something - - - 30

The suggestion from paragraph 2 of Mr Grierson's, that is, "Commencement of the period of 10 business days in 1.8B of schedule 42 would commence on Monday, 23 August." Did you think that was going to happen?---Well, I thought that was a way of dealing with the notice of dispute that IBM had issued.

I might just ask you to have a look at that clause, it's in volume 1 of the previous tender bundle, so I'll have to get some assistance. Could you just have a look at that volume and go to page 163? We might look at 162 just to satisfy yourself where 1.8 starts, but that's schedule 42, paragraph or clause 1.8: dispute resolution process. The top of page 153, subparagraph (b), provides: 40

*The parties must endeavour to resolve the dispute at an operational level via face-to-face meeting between the customer's PRD or PDB, and the contractors program director within 10 business days of receipt of the notice of (indistinct) 1.8A.* 50

My question for you is: looking at those couple of bits of correspondence and the contract, were you aware of a suggestion that there had been a face-to-face meeting in

attending the window starting 23 August?---Not really. The paragraph in my letter was more a way of deferring the notice of dispute that IBM had issued, it was a mechanism of referring matters in dispute. The hope and expectation when that was written was that there would be a settlement, and that putting off the triggering of the notice of dispute until the 23rd was something that hopefully would be overcome by events. 1

Certainly, the contract contemplated a face-to-face meeting in that scenario?---Yes. 10

It's fair to say that from your perception there did seem to be some delay going on here on the IBM side. Is that as you perceived it?---That was the perception, yes.

And you were present when Mr Brown presented his discussion paper at the meeting that you told us about?---With Mr Grierson?

Yes?---Yes. 20

And you didn't differ from what he was saying about those topics, that this seemed to be a tactic, potentially at least?---That was potentially a tactic by IBM to delay until close to the deadline.

The deadline being the one set by the cabinet budget review committee?---No, the deadline being the one set in the settlement term sheet. 30

And that is the 20th?---20th, yes.

With the background that your side was also concerned that the longer it dragged on the more difficult a determination might become. Correct?---Yes, correct.

Is this because there's a concern that with delay time might be regarded as no longer being of the essence in relation to it?---No. The concern was that a notice to terminate had been issued and that if it was not acted upon within a reasonable time then the state may be taken to affirm the contract. 40

Could be an affirmation?---And no longer able to rely on those defaults.

Is this particular in circumstances where I suppose other work is going on in relation to whatever IBM was doing on the ground?---There was other work going on, yes. 50

But the state's position, which was also a point of contention, was that they were withholding payments as I understood it at the time. Correct?---It was a point of contention about whether the state was entitled to withhold payments over work that had been approved.

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One is described by IBM as "undisputed payments"?---Yes, I think that's correct. 1

But not necessarily accepted by the state as being undisputed. Correct?---I think probably accepted by the state as the work hadn't been authorised, but the state's position was that it was seeking to set off those payments against any entitlements that it might have.

Such as against the unquantified damages referred to in the first version of the settlement sheet?---More against the invoices that IBM had issued that were under the heading Business as Usual. 10

All right. Certainly, you were personally - and I suppose you were briefed - to attempt to settle this within the time frame that was given up to 20 August?---Yes.

Correct?---Correct.

And it's a fair assessment, I suppose, that as the exchange between yourself and Blake Dawson had gone there didn't seem to be any real prospect of that happening by 20 August? By the 19th, I should say?---Certainly, the longer it went on there was less prospect of a settlement being concluded. 20

Yes, nothing further, thank you.

COMMISSIONER: Yes, thank you. Mr Mumford? 30

MR MUMFORD: I have no questions, thank you.

COMMISSIONER: Mr HADDRICK?

MR HADDRICK: Thank you, Mr Commissioner. Can I first ask you some questions about the nature of the retainer agreement between your firm and the Department of Works? You told Mr Flanagan earlier in answer to one of his questions that you were the principal member of Clayton Utz who was looking after the brief on behalf of your firm? ---Yes. 40

Who else was involved in that?---There was another partner, Simon Newcomb, who initially was involved at various points along the way but only to a minor extent.

Were there other staff of your firm involved at all? ---There were other partners at different points in time, as has already been mentioned in the early stages, Mr Dunphy, Mr Perrett was involved regularly. 50

How large was the job seen to be by your firm? So are we talking about a small \$10,000 job, a \$50,000 job, a quarter of a million dollar job? What's the sort of revenue that your firm would anticipate to receive as a result of providing these services to the Department of Public Works?---I don't think I can answer that, but I don't think it was a huge - it was only a compressed scope of work - a small scope of work in a compressed period of time and I don't think we ever regarded it as a huge job in terms of fees, but an important job nevertheless since it was for the state. Clayton Utz does a lot of work for the state government.

1

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You indicated before and it's in your statement, you've obviously practised for many years, since 1977, and particularly in the field of negotiations. Surely you have some sort of feel for the quantum of this particular retainer with the state?---No. No, I don't actually.

Who was the partner who was charged with signing off on the tax invoices to the state?---I was - - -

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MR FLANAGAN: Actually, this is only going to be marginally relevant. It's only going to be relevant to the extent that Mr Charlston was in fact angry for missing out on the retainer because of Mr Grierson's conduct. That's the only marginal relevance I can see, but apart from that it really is irrelevant and I'm not interested as part of this commission in how much Clayton Utz were paid for doing this retainer.

30

COMMISSIONER: Yes. Mr Haddrick, to what point do these questions go?

MR HADDRICK: We've heard, Mr Commissioner, that the job effectively finished on 20 August 2010. We've also heard that negotiations were going very slow, on Mr Charlston's evidence, and other evidence that it was because of IBM, my words, dragging their feet. One can anticipate that Clayton Utz therefore had a reasonable expectation that their services would be engaged for a further period of time past 20 August to assist with the negotiations. It goes to what Clayton Utz could have expected to receive from the retainer agreement from the state and it's relevant to the contents of the file note of 19 August and why they perhaps are cast in the terms that they are.

40

COMMISSIONER: I think you're asking how much Clayton Utz charged or intend to charge. I don't see that's relevant. You can put to Mr Charlston that his file note was influenced by the lost expectation of the retainer.

50

Was it?---Certainly not, Mr Commissioner. I never expected to, for example, document a settlement. That was always

going to be a job for Mallesons. Once Mr Brown briefed me that a settlement had been negotiated by the director-general, that was essentially the end of our role as far as I was concerned and I did not expect us to be further involved in the matter. 1

Were you disappointed professionally because of that?---No, certainly not. We do a lot of state government work. Matters start and matters finish. There was certainly no disappointment and, indeed, I saw that as the end of the job. 10

All right. Thank you.

MR HADDRICK: Can I just take you to your statement please. Do you have a copy of that in front of you?---Yes.

Can I take you to page 7 of the statement and I'm particularly interested in the events of 19 August 2010. 20

COMMISSIONER: Sorry, which paragraph?

MR HADDRICK: Paragraph 19, Mr Commissioner.

COMMISSIONER: Thank you.

MR HADDRICK: In paragraph 19 there you record that you provided some marked up suggested changes for what is a running sheet for the meeting the director-general Mr Grierson was having with representatives of IBM. Am I to understand it correctly that at that point in time you were still of the view or knowledge that the state was not intending on effectively settling with IBM that day?---Yes. I don't think I knew at that point in time that - well, I did not know at that point in time what the agenda or content of the discussions were going to be. 30

In paragraph 20 you outline that you had a telephone call which you said to Mr Commissioner before was about five minutes in duration with - - -?---Yes. 40

- - - Mr Grierson at 11 am, presumably, with the IBM representatives outside the door. You mentioned in paragraph 20 that - and Mr Grierson said that he would indicate to IBM that he was disappointed with progress to date. Can you explain with any more detail how Mr Grierson expressed his views?---No, I don't think there was any more detail than that; that he was disappointed that IBM had not engaged in the process more actively. I mean, they're my words. They're not Mr Grierson's words. That was the effect of it. 50

Further down in that paragraph in the final sentence you say:

*I advised Mr Grierson to indicate to IBM at the outset the discussions were without prejudice and were for the purpose of better understanding IBM's (indistinct) intent in relation to the current disputes and other contracts that were on foot with the state.*

1

What did you mean by "other contracts on foot with the state"?--Well, Mr Grierson, had indicated that that was what he wanted to discuss with IBM. I don't have any more knowledge than that about it.

10

Did he indicate what other contracts he was referring to?  
---No.

What other contracts did you understand him to mean?---I didn't have an understanding about it.

So he simply said he was going to talk about other contracts with the state?---Yes.

20

Okay. Further back in your statement you say in paragraph 6 on page 2 - you say the relevant instructions to your firm were primarily provided by Mr Brown and Mr Beeston. You used the words "primarily provide". Who else were the instructions provided by?---There were meetings from time to time with Mr Grierson, as we've already discussed, with Ms MacDonald. There were meetings that Mr Backhouse attended. That's probably the scope I would think.

30

So did you consider yourself as obtaining instructions on behalf of the state from those people?---From Mr Brown primarily, yes.

But what about those other names you just mentioned?---Oh, directions and I guess instructions were expressed from time to time in all probability by those people. They were all state government people.

40

And you consider them to have the authority to give you instructions?---Yes.

When did you first speak to Mr Grierson? Did you know him prior to this process?---No. No, I didn't. I put into my statement all of my contact with Mr Grierson.

So at paragraph 13 you refer to a meeting held in his office?---That's right.

50

Was there any contact with Mr Grierson prior to that?---I think the only contact I had with Mr Grierson was the telephone call just before the meeting with IBM and this meeting in his office, so they were the only two contacts I believe I had with Mr Grierson.

So one face-to-face meeting on 16 August and one telephone call on 19 August?---Yes. 1

You said earlier in answer to, I think it was Mr Flanagan's question - he took you to annexure R of your statement and it's entitled IBM Contract Negotiations Discussion Paper and you were taken to option 1 which was to terminate the contract and you responded with the words, "The state did not have an appetite for termination." They were your words a little while ago. Mr Commissioner then probed you further in terms of what you meant by that and suggested a different word rather than appetite. He asked you whether there was any earlier - whether anyone explained why the state did not terminate either Mr Grierson or any other person and you responded with the words, "I don't recall anyone articulating to me any reason other than the risks of litigation." Is that a correct summation of your understanding?---As to why the state didn't at any stage terminate? 10

Yes?---Well, to start with, the state wanted to explore the prospects of a settlement before they exercised a right to terminate and if that were not successful then the state had a range of options, including termination, or affirming the contract. 20

You have told us before that you first became aware that the state had settled on a - or sorry, not settled on, agreed to a body of settlement principles in a telephone discussion with Mr Brown on the afternoon of 19 August 2010. How would you describe the nature of that conversation?---In what sense? 30

In the sense that were you pleased to hear that the matter had been resolved or were you disappointed that the running sheet hadn't been followed by those negotiating on behalf of the state?---I don't recall having any particular state of mind about it. I was taking instructions from Mr Brown on what the situation was. 40

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Okay. Can I just take you to some of your file notes in respect of that date, please. I will just take you to volume 3 page 139 to begin with, please?---Yes. 1

Now, you see from 139, 140, 140 is your handwritten contemporaneous note, isn't it?---Yes, that's correct.

And that's the thing you generated as part of the telephone call with Mr Grierson?---That's correct. 10

So we go back to the typed-out version of that on page 139. You were asked before about the content of that. What did you mean by "other business" on that first line after seeing IBM?---Well, that's what I - first of all, the typed-out note was only typed only on 15 May of this year - - -

Yes?--- - - - so that my usually illegible handwriting could be perhaps understood. As far as I now recall, I think the other business was Mr Grierson saying that there were other matters that the state had on with IBM and that he in addition to the status with these negotiations, he wanted to discuss other business with IBM. 20

Now, it was your usual practice to make a handwritten note of telephone conferences, wasn't it?---As much as possible, yes.

What did you mean by (indistinct) DG on the bottom of that page?---Look, I don't - I can't now interpret that. 30

Okay. I will take you over to page 144. Sorry, just before I take you to that, that records, that first one on page 139, records a telephone conference that you had at 11 am that morning with Mr Grierson, doesn't it?---On 19 August 2010, yes.

And that's the conversation that he had just prior to meeting with IBM officially?---Yes. 40

Okay. Over to page 144, please?---Yes.

Now, this is a telephone call you received from Cathy who you said before was Mr Grierson's secretary?---Yes.

At 1.44 pm. Again, you have got a handwritten note over the page at 145, don't we?---Yes, that's right.

And that's your handwritten note, obviously?---It is. 50

That records that you were advised at that stage from Mr Grierson's office that your attendance was not required?---Yes.

The final line, Margaret or Philip will be in touch re next meeting. Can you tell us what that meant or who that might be referring to?--Look, I think what it meant was that this meeting with Mr Grierson had been set up some time previously, days, perhaps a week previously and that the secretary was just saying that Margaret Berenyi, I presume, or Philip Hood I think his name was would be in touch about an adjourned meeting. 1

Okay. Over on page 146, again, we have another file note, the original being at page 147?---Yes. 10

What does this file note tell us?---Really the same thing as the director-general's secretary had told me, namely that I was not required to attend the meeting with the director-general and that was, as I understand it, that was from Mr Brown's office, a person from Mr Brown's office.

So two people called you between 1.44 and 2 pm to say, "Don't come on down"?---Yes. 20

Okay.

Then we move over to page 148 and again, the original is at page 149. That's correct, isn't it?---Yes, that's correct.

Now, can you tell us who this file note - what does this record?---This essentially recorded that Mr Brown and Ms Berenyi were on standby to see the director-general and the associate director-general, that there was no outcome yet. This was at 3.10 pm. That there had been a two-and-a-half-hour meeting and that Mr Brown's view was that Blakes were far more informed or had far more information than Clayton Utz had and essentially not to respond to Blakes until we were fully briefed. 30

So this records at 3.10 pm, Mr Brown telling you that Blakes, the lawyers for IBM, had more information in respect of the meeting held on that day than you did? ---Yes. 40

What does it mean by apologise for (lack of communication)?---I think I had been trying to contact Mr Brown earlier in the day and he hadn't been able to get back to me.

Now, we move on to page 150, the memo of 5.30 - sorry, referring to a telephone conversation at 5.30 that afternoon but prepared on 20 August 2010. I notice there is no handwritten notes. Where is the handwritten notes for that file note?---The handwritten notes were on my file but the - this was recorded - dictated by me the next morning. 50

Have you been asked for the handwritten notes from - - -? 1  
---I have been asked for my file, the file has been  
produced, yes.

And that file contains the handwritten notes for this memo?  
---It does, yes.

Now, you dictated this memo out the following morning after  
speaking to Mr Brown the afternoon before?---Yes, that's  
right. 10

And it's obvious that you handwrote it out because you have  
recorded in some detail under paragraph 4 a number of key  
principles which were worked out in the meeting the  
lunchtime before?---Yes, that's right.

This memo is written the day after - actually, the day you  
become aware that this job has been completed. True or  
false?---I'm sorry, just repeat that? 20

This memo has been written the day that you become aware  
that this job had been completed - the job, being  
Clayton Utz's job?---The telephone conversation took  
place on the Thursday - on the Thursday and I dictated the  
file note the next morning on the Friday and essentially  
the Clayton Utz role was finished on the Friday, I think.

Okay. This note isn't the contemporaneous note. The  
handwritten note is the contemporaneous note, isn't it?  
---Well, the handwritten note is the one that I took as 30  
Mr Brown was telling me what had gone on and that was at  
5.30. I don't know how long the telephone call took but I  
dictated this note the next morning and it was typed up the  
next morning.

THE COMMISSIONER: Mr Haddrick, how long will you be?

MR HADDRICK: I'll be at least another 15, 20 minutes,  
Mr Commissioner. 40

THE COMMISSIONER: All right. We will adjourn until 2.30.

THE COMMISSION ADJOURNED AT 1.02 PM

THE COMMISSION RESUMED AT 2.31 PM

1

COMMISSIONER: Mr Haddrick?

MR HADDRICK: Thank you, Mr Commissioner. I understand over the lunch break the Office of the Commission provided all parties with a copy of that file note.

10

COMMISSIONER: Yes, I heard that.

MR HADDRICK: Do you have a copy of that file note, Mr Charlston?---Yes, I do; yes.

Just put that aside for a second. If I could just go back to the typed down file note that's at page 150 of volume 3? ---Yes.

I just need to put some propositions to you. Can I get you to have a look at the second page of that, page 151. Can I put to you that in paragraph 5 where you purport to represent that Mr Brown used the expression "free rein", that is, "IBM has free rein, but that did not occur." Do you wish to respond to that?---I think that's - - -

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COMMISSIONER: What exactly are you putting, Mr Haddrick? What exactly are you putting, that the words "free rein" weren't used?

30

MR HADDRICK: That's correct?---The words "free rein" are simply what I wrote down in my file not, handwritten file not.

But when you say that is simply written down, could that be you summarising the effect of what he had to say?---I don't think so, no.

In the next paragraph, paragraph 6, where you say:

40

*James said, confidentially, that this is a political decision. The politicians are extremely nervous and driven by the fact that if IBM is removed then there would be no-one to blame for the payroll problems.*

Can I put that to you that that was not said?---That the whole thing was not said?

That is correct. As it is expressed there on that page? ---I believe it was said. That was my file note that I dictated the next morning.

50

What did you mean by putting square brackets around "outside government" close brackets?---Look, I'd have to go back to the handwritten note to see what that means. I

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dictated this, as I've said, you know, three years ago. 1

Going down further to the last paragraph or - - -

COMMISSIONER: Before you do that, have you got a copy of the handwritten note, Mr Charlston?---Yes.

Does that help you remember now what significance there is to the brackets? 10

MR HADDRICK: On the third page of the handwritten notes, Mr Charlston - sorry, the fourth page?---I think the part is on the first page, is it not?

Well, you tell us where that appears in your handwritten notes?---In the handwritten note on the first page it says, "Polit," or political decision, "Pollies extremely nervous if remove IBM and have nobody to blame." Is that what you're seeking to - - - 20

I'm asking that. Yes. Then over on the fourth page about halfway down the page you say, "JB nervous possible outcomes," three words in quotation marks. What did you mean by that?

COMMISSIONER: Where is this, Mr Haddrick?

MR HADDRICK: On the first page of the note, Mr Commissioner. 30

COMMISSIONER: Yes, I have got that.

MR HADDRICK: And it's difficult to obviously read, but down on the left-hand side there's a JB.

COMMISSIONER: Oh, yes. Thank you?---Yes.

MR HADDRICK: And open inverted commas which I read, and please correct me if I'm wrong, Mr Charlston, then it says, "Nervous" what I decipher to mean "possible" and then "outcomes" end quote?---No. What that's saying is, "Worst possible outcome." 40

Okay. Thank you. In terms of paragraph 6 of your typewritten note, the last paragraph of paragraph 6, the last sentence in paragraph 6:

*James said that the real issue is that the DG was concerned about himself and the minister. There'll be an election in 18 months and they are very concerned about anything being public -* 50

and then you put in square brackets -

*in the Health area -*

close square brackets. I suggest to you that that was not said?---That's not correct. Just let me find the reference to it in my handwritten note. 1

Certainly. You're referring us to the bottom of page 4, Mr Charlston?

MR.....: The fourth page, if I can be of assistance? ---Yes. That says, my handwritten note, "Real issue DG concerned about himself and minister, election in 18 months, query concerned about anything in public area." 10

MR HADDRICK: And just returning to your meeting with Mr Grierson - sorry, your telephone discussion with Mr Grierson at 11 am on the previous day, 19 August, you've told us before lunch - and I've taken you to your file note where you referred to Mr Grierson being disappointed to date - my words not his - disappointed to date with the process and mentioned that the state's involvement with IBM in other contracts also needed to be considered. What else was discussed on that telephone call? I'll take you back to page 139, if that refreshes your memory?---I don't know that Mr Grierson was saying to me that the state's position with other contracts needed to be considered in this context. It was just that he had other business to discuss with IBM. 20

Could you have had a discussion with Mr Grierson about the consequences of the matter not being resolved as soon as possible?---No. 30

Could you have conflated the discussions between Mr Grierson and Mr Brown?---I'm sorry?

Could you have conflated the discussions between Mr Grierson and Mr Brown? That is the discussion on the telephone at 11 am on 19 August and the discussion with Mr Brown on the afternoon of 19 August?---I doubt it. Are you asking me whether the file notes that I've made are not accurate? 40

I'm suggesting to you that in drawing your file note that you've drawn on information obtained from both discussions? ---No, that's not correct.

No further questions, Mr Commissioner.

COMMISSIONER: Thank you. Mr Flanagan?

MR FLANAGAN: Yes. May Mr Charlston be excused? 50

COMMISSIONER: Yes. Mr Charlston, thank you for your assistance. You're free to go.

WITNESS WITHDREW

MR HADDRICK: Yes. I call Mr James Brown. 1  
Mr Commissioner, before the next witness arrives, I'd like  
to tender that document for the commission please, that  
handwritten file note of Mr Charlston.

COMMISSIONER: All right. Mr Flanagan?

MR FLANAGAN: I have no objection.

COMMISSIONER: Very well. Mr Charlston's handwritten file 10  
note of 19 August 2010 will be exhibit 148.

ADMITTED AND MARKED: "EXHIBIT 148"

**BROWN, JAMES DONALDSON** affirmed:

MR FLANAGAN: Your name is James Donaldson Brown?---That  
is correct.

Mr Brown, in relation to the settlement tranche of 20  
evidence, you've provided two statements that have already  
been tendered?---That is correct.

Thank you. You were involved in settlement negotiations  
between the state of Queensland and IBM Australia Ltd which  
resulted in the supplemental deed of 22 September 2010.  
Yes?---That is correct.

Mr Brown, other CorpTech officers who were involved 30  
included Ms Berenyi?---That would be right, yes.

And Mr John Beeston?---Yes. Mr Beeston was a contractor  
not an officer of CorpTech.

Thank you. In terms of your involvement, were you involved  
in the settlement negotiations for a period of some four to  
five months?---I believe that to be correct.

All right. What was your role in the negotiations on 40  
behalf of the state of Queensland?---Okay. I acted as the  
conduit between the state and legal advisers, as well as  
IBM, along with some others.

Yes. Were you designated to fulfil that role or were you  
asked to fulfil that role?---I was asked to fulfil that  
role.

Who asked you to fulfil that role?---I believe it came out 50  
of dealings with the director-general Mr Grierson,  
Ms Natalie MacDonald and Ms Berenyi.

All right. Without being too humble about it, why were you 1  
picked to do that role?---Look, I had some experience in  
the contract and managing the contract with IBM to date. I  
also had experience in other jurisdictions of negotiating  
and managing large, complex government contracts.

Now, at the time that you came to fulfill that role  
Mallesons were already giving advice and had previously  
given advice in relation to the contract of 5 December  
2007?---Yes, I believe that spanned a number of years. 10

Their role in terms of advising on the contract and  
possible outcomes in relation to negotiations continued?  
---Yes, that's correct.

Just so we understand the negotiation process, when was  
the first time according to your recollection that you  
and other people from CorpTech met one on one with IBM  
representatives in terms of negotiating an outcome?---I  
believe, to the best of my recollection, it would have been 20  
in perhaps the June, July time frame.

In the June, July time frame, we know that Clayton Utz and  
Mr Charlston were engaged by Mr Backhouse on or about  
2 July 2010. Yes?---That would be correct.

In June, can you tell the commission what sort of  
negotiations were going on with IBM, if any?---There was a  
series of letters and exchanges between IBM and the state,  
which I think may have gone back as far as, and again my 30  
memory is hazy, but earlier in the year, it may have been  
in the late May time frame.

All right?---Sorry, April time frame, sorry. That started  
off as a show cause and a series of steps that then ensued.

We're certainly aware of all that correspondence and we're  
aware of the notice to remedy breach and the notice to show  
cause prior to termination and the notice of dispute, but  
I'm actually asking: were there any face-to-face 40  
negotiations between the state of Queensland and IBM  
representatives prior to the engagement of Clayton Utz on  
2 July 2010?---Not that I can recall.

Again, prior to the engagement of Clayton Utz on 2 July  
2010, do you have any personal knowledge of any  
face--to-face to negotiations between Mr Grierson, the  
director-general of Public Works, and IBM representatives?  
---No, I have no personal knowledge. 50

All right. Good. So can we take it that the true  
negotiations, quite apart from the formal steps taken under  
the contract for notices of dispute and whatever, that the  
formal negotiations really occurred under the purview of  
the advice from Clayton Utz?---I think that would be  
generally correct, yes.

Without going to the advices and the file notes of which speak for themselves, after the go live date of 23 March 2010 there was a deliverable to be made under the contract called "deliverable 47", which was the solution itself, by 30 April 2010. Is that correct?---My recollection is that would be correct, yes. I think that was - we may have called it "system acceptance" or - - -

1

Yes?---Yes.

10

In any event, the system was not accepted by the state of Queensland?---That's correct.

And you sought advice from Mallesons in relation to whether there was grounds for finding that IBM were in material breach of the contract and what steps the state of Queensland should take?---That's correct, yes.

And the advice came back shortly thereafter from Mallesons that there had in fact been a material breach of contract, and that the state should issue a notice of remedy for the breach?---That's right. That is correct, yes.

20

And then you wrote a file note, and you were the author of that submission to the director-general seeking permission or his approval to issue that notice to remedy breach?---That would be correct.

Thank you. Without going to the documents yet again to save some time, what was your general understanding of the nature of the material breach of the contract that the state was alleging as against IBM?---I think in general terms it was the system was not delivered to meet the business requirements of Queensland Health.

30

Was there a requirement that there be no severity 1 or severity 2 defects in relation to the solution that was being delivered for acceptance?---That would be partially correct, I believe that would have been moderated by some prior decisions to accept severity 2 errors where there was a workaround in place as agreed to by Queensland Health.

40

And there was particular agreement in relation to how those workaround would be done for severity 2 defects that were known to exist. Yes?---That's correct. Yes, that's right.

When the solution went live, were there in fact severity 2 defects that had not been previously identified that became apparent?---My recollection is that would be correct.

50

In relation to those severity 2 defects, was there a requirement under the contract for those defects to be fixed by IBM within two days?---I cannot recall the explicit time frame, but there would be an obligation on IBM to rectify them.

In any event, that was the nature of the material breach of contract that you sought advice from Mallesons and ultimately sought approval from the director-general to issue the notice - - -?---Correct.

1

- - - remedy breach. Thank you. Can I taken you, then, very briefly to the Mallesons advice of 30 April 2010, and may I ask you to take volume 1, page 88?---May I have that page number again, please?

10

88?---88? Thank you. I have that, yes, thank you.

As part of your role that had been given to you by Mr Grierson, you saw it as a sensible decision to engage outside solicitors for the purposes of continuing to give legal advice in relation to the state's position under the contract?---That's correct. It was a continuing engagement that would have benefited the state.

In terms of this advice, when you received it on or about 30 April 2010, you read it?---That would be correct. It also would have been brought to the attention of Ms Berenyi and others at CorpTech?---I believe that to be the case.

20

All right, thank you. In that opinion, you'll see at page 88 under the summary, second paragraph, "In our opinion, it is highly likely that the contractor is in material breach of contract, however further investigation is required in relation to some of the issues discussed below?---Yes, that's what the advice noted.

30

Could you just turn to page 91, then?---Yes, I'm there.

Just to verify the evidence you've previously given as to the nature of the dispute, under the opinion, is it paragraphs 1, 2 and 3 that really constitutes the nature of the dispute as between the state of Queensland and IBM as at 30 April 2010?---May I have a moment to read?

40

Yes, of course?---Yes, thank you, I've read that.

Would you agree that constitutes fairly succinctly the nature of the dispute between the state of Queensland and IBM?---At that particular time, yes.

Good. Thank you. You then received a further advice from Mallesons, dated 5 May 2010, it's in the same volume, Mr Brown, if you turn to page 93?---Yes, I'm there.

50

This is an advice that's addressed not just to you but also to Mr Boyd Backhouse. You knew him to be the executive director of legal services for the Department of Public Works?---That's correct.

Would it be fair to say that you worked closely with him in relation to the settlement negotiations with IBM?---Yes, on legal matters. **1**

On legal matters, yes, thank you. Your experience went beyond legal matters, didn't it?---It did, yes.

And it actually went to contract management?---It did.

That experience also included negotiations when there was an alleged breach of contract or negotiations for settlement upon termination of contract?---That's true, but not solely. **10**

Not solely. Yes?---Yes.

**20**

**30**

**40**

**50**

Yes, thank you. Now, in relation to this advice, if you just look at page 93, what caused you to seek this particular advice from Mallesons?---This was really to the mechanics. It's one thing to identify the material reach but what would have been the mechanics and the steps taken to then - for the state to pursue its rights under the material breach, and so that was the advice sought on Mallesons as to the procedures to follow.

1

All right. Did you also receive advice at page 94 that the breach that had been identified was a breach that was incapable of being remedied given that time was of the essence?---Where may I find that?

10

In the last three paragraphs of page 94?---Thank you. Yes, but I also noticed that there was some question over time of the essence.

Yes, thank you. Now, in relation to this opinion, the advice was to issue the notice to remedy and as we have discussed, that actually occurred. Correct?---That is correct.

20

All right. Can you turn to page 96, then, of this advice. I have referred this to a number of witnesses but the advice also identifies in the third-last paragraph on page 96 that the contract of 5 December 2007 included a cap on contractors liability for material breach. Yes?---Yes.

And you will see there that the cap that is identified by Mallesons is \$88 million?---Yes, that's their - that's their advice.

30

All right, with a comment that it seems unlikely that the damages claim will reach this cap. Yes?---Yes.

Thank you. Now, as we have discussed, the notice to remedy breach was actually approved by Mr Grierson and issued by Mallesons. Correct?---That is correct.

40

Then thereafter, the state exchanged correspondence between the state of Queensland and IBM. Yes?---Correct.

All right. Now, I just want to take you to two pieces or three pieces of correspondence, if I may, and if we can do this fairly quickly, can I take you to volume 1, page 116?---Yes, I'm there.

Thank you. It seems that in response to the notice to remedy breach, the state of Queensland received two responses. One was from Mr Bloomfield which was the formal response from IBM, and the second was from Mr Doak which was the without prejudice response from IBM. Yes?---I've only - where is the - that's the one filing, yes.

50

Yes?---Page - - -

28/5/13

BROWN, J.D. XN

116?---And page 119?

1

And then 119. Yes?---Yes, that would be correct.

All right. So Mr Brown, you're aware that there was a formal response from IBM but there was also a response that sought to negotiate a settlement with the state?---That would be correct.

Can I deal first of all with page 117 of Mr Bloomfield's response on behalf of IBM?---Yes, I'm there.

10

If you look down under the title, Specific Responses, there are significant omissions and inaccuracies in the notice, and then if you could read that paragraph, starting with the words, "This is particularly the case"?---Right. "This is particularly the case in relation to" - - -

Just to yourself?---Sorry, my apologies. Yes, thank you.

20

All right. So the period that Mr Bloomfield is referring to there is January 2009 to June 2009. You knew from your contract management, did you not, that change request CR 184 was signed off in or about July 2009?---That would be correct.

And you subsequently received advice, did you, from Mallesons that references by Mr Bloomfield to the earlier periods was strictly irrelevant to a consideration of whether there had been a material breach of contract in the failure to deliver deliverable 147?---Yes, I do recall that without referencing the material, yes.

30

Can I then take you to Mr Doak's response. Now, you read Mr Doak's response even though it was addressed to Ms Berenyi?---I would have received a copy of that as part of the contract file, yes.

Exactly, yes, thank you. What is being suggested on a without prejudice basis here by Mr Doak as at 19 April 2010, so well and truly before Clayton Utz come onboard, is that near the bottom of the page, for deliverable 47, a handover completion report but that the project acceptance for SOW 8, that is the provision of all existing contracted deliverables in accordance with the current scope of the project on or before 30 September 2010. Yes?---Yes, that would be correct.

40

With the acceptance criteria amended as follows; no severity 1 defects and that went without saying because the system wouldn't work with severity 1 defects?---Yes.

50

But all severity 2 defects which are IBM's responsibility as at 12 May 2010 as detailed in appendix A will be resolved on or before 30 September 2010 in accordance with

the release plan agreed between the parties. Yes?---That's correct. 1

So albeit it on a without prejudice basis, it's an acknowledgement by Mr Doak, was it not, that IBM were willing for an extension to 30 September 2010 to fix those defects, severity 2 defects, in appendix A, by that date? ---That would be correct, all known defects at that time, yes. 10

All right. Now, appendix A, if you then look at it, contains - and I'm very much open to correction on this but it contains either 67 or 68 defects?---Yes. I mean, I will have to take your word at that.

Well, I counted it three times; once I got 67 and the others I got 68?---Yes.

And then I got 67. So there's somewhere in between 67 and 68 defects - - -?---Yes. 20

- - - that IBM were to fix by 30 September. Yes?---Well, they were proposing to fix it.

Quite. Now, you took this proposal as a settlement offer, did you not?---Well, yes, I did.

Now, did you know of any face-to-face meetings whereby this initial settlement offer in relation to the notice to remedy breach and this settlement offer dated 19 May 2010 was discussed between Mr Doak and Mr Grierson?--- I have no direct knowledge. 30

Did you yourself conduct any face-to-face negotiations with IBM representatives in relation to this proposal?---To the best of my knowledge, no.

All right, thank you. Can I then take you to page 129 of the same volume. This is the first, it seems, of a number of option papers provided by Mallesons to you. Yes?---Yes, that would be correct. 40

And on each occasion that these option papers were delivered, they were delivered at your request. Yes? ---Correct.

This option paper is not dated but we can take it that it's an option paper that would have occurred around early June 2010 because it refers to a letter of 1 June 2010?---Yes, that would be generally correct. 50

I'm sorry, it is dated 2 June, in fine print?---Yes, it is, in the footer.

Unreadable to some?---Yes.

So in relation to this options paper, you will see there at page 130 the third dot point, it says, "IBM may threaten to down tools. IBM has no right to stop work under the contract for rectification work"?---I'm sorry, I missed your question. I apologise. 1

I'm sorry. On page 130?---Page 130, yes.

The third dot point?---The third dot point. 10

THE COMMISSIONER: Risks and Consequences.

MR FLANAGAN: Yes, Risk and Consequences?---Thank you. Risk and consequences, thank you. Yes.

Now, this is an options paper in relation to the proposal put in Mr Doak's letter of 19 May, is it not?---That would be correct.

THE COMMISSIONER: Sorry, what was the question? 20

MR FLANAGAN: This is the options paper compiled by Mallesons in relation to Mr Doak's proposal of 19 May 2010, is it not?---I believe that to be correct, yes.

Yes, all right. Option 1 was, "Accept IBM's proposal in whole or in part," and then option 2 was, "Hold IBM to the contract"?---Yes. 30

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And the option that is advised by Mallesons is an option contained in 2.2, yes, to hold IBM to the contract?---That would be correct.

1

All right. And one of the risks identified in holding IBM to the contract was that IBM may threaten to down tools, but it says, "IBM has no right to stop work under the contract for rectification work"?---That's correct. In a contractual sense, yes.

10

Quite. Then the third topic covered is terminate the contract and I'm just looking at the very early stages of this negotiation and the identification of risk. If you look at page 131, the second dot point, that was a risk identified by Mallesons. Yes?---It was, but it wasn't solely just identified by Mallesons

Yes. Mr Brown, can you assist us in this regard then. I know we're dealing with the early stage negotiations?  
---Yes, yes.

20

But as the negotiation continued, it ultimately culminated in the supplemental agreement of 22 September 2010?---Yes.

There was a sign off on that by - or an agreement to that by the Cabinet Review Committee on or about 26 August 2010. What knowledge did you have of the risk of IBM upon termination downing tools?---The only knowledge I had were basically conversations that were either relayed to me around threats made by IBM to down tools. It was not the first time. I believe I was in a meeting with IBM, Mr Doak particularly, and that would have been as early as January 2009.

30

Yes?---And I believe Ms Perrott may have been at that meeting, but I can't be absolutely sure, where a similar threat had been made.

And that was a meeting also attended by Mr Swinson?---No, I don't believe so.

40

All right. In any event - - -?---But I can also clarify, if I may - - -

Yes. Could you? Yes?---I can recall both Mr Beeston and I having more than one conversation with Mr Swinson regarding, you know, the reality or what's the legal consequence or what were the implications of IBM threatening. So that goes to part of why I said it didn't solely come from Mr Swinson. We had canvassed legal opinion on these threats before.

50

All right. You knew under the 5 December contract that even upon termination, IBM had certain responsibilities in

terms of disengagement?---Yes, that's right. There would be some residual obligations that would transcend the termination of the contract. 1

Quite apart from terminating the contract, IBM had an ongoing obligation under the warranty provisions to continue to correct defects?---Yes, although the warranty options, I believe, were somewhat limited, but there were warranty obligations. 10

All right. We're trying to assess the risk of IBM either walking off the job if the contract was terminated as part of the settlement option - - -?---Yes.

- - - or standing in the way or hindering the subcontractors, including Infor, that may have been required to complete the solution. Yes?---That's true. Yes, yes.

Can you tell us what your knowledge is of those risks and how great a risk they were?---We were sufficiently concerned that we sought additional legal advice regarding entering into direct contractual relationships with IBM's subcontractors and so we did take the threat seriously, although should IBM have effectively walked off the job, I'm sure the state would have taken action to ensure that the system or the payroll system as delivered would have been maintained and supported in that intervening period. 20

All right. We've heard a suggestion by Mr Schwarten yesterday that - - -?---Yes. 30

- - - was along these lines: that if IBM weren't maintained in the job - - - ?---Yes.

- - - that the system would have collapsed. What do you say to that?---The contract allowed for an orderly transition from IBM to CorpTech to support and I think there may have even been some contractual obligations for that transition to occur. It's one of timing. I mean, as we went further into 2010 and the ability for CorpTech to support the system group, but it was reliant on a number of deliverables from IBM, such as knowledge transfer, training of staff, access to the appropriate documentation. So I suppose Mr Schwarten's comments would have - you know, had to be taken in the context at the time of when these things may have occurred. There is no doubt that it would have been a greater risk if the contract was terminated in, say, June, July versus September, October, November. 40

Yes, all right. Thank you. In fact, we'll come to it, but one of your recommendations was if the state needed to terminate, it should terminate and it could negotiate afterwards?---That was one of the advices I did provide. That's correct. 50

Yes, all right. Could you just excuse me for a minute. Can I just take you briefly to page 126 of volume 1?---Yes, I'm on that page.

1

Yes. Do you recall seeking advice from Mallesons in relation to the open letter from Mr Bloomfield dated 19 May and the without prejudice letter from Mr Doak dated 19 May? ---Yes, I do recall seeing that advice.

The nature of the advice is that the letters would seem, prima facie, on their face to constitute an admission by IBM that they are in material breach of the contract. Yes?---Yes. That's the advice from Mr Swinson.

10

What was the purpose of seeking that advice?---Well, again, it's to get further clarity around both of the IBM letters so I could provide proper advice to other senior officers within the government.

All right, thank you. It was the case, was it not, that when you received advice from Mallesons in one form or the other, whether it be by way of a formal submission, you would communicate that advice or the substance of it, both to your chief executive Ms Berenyi and, ultimately, to Mr Grierson the director-general?---Yes, but also Mr Backhouse, who was copied in on all legal correspondence.

20

Thank you. Then can I take you to the same volume, page 180?---180?

30

This is a Crown Law advice dated 23 June 2010. Having received various advices and options from Mallesons, it was your decision, Mr Brown, was it not, to also engage Crown Law to provide, if you like, reviewing advice on the Mallesons' advice?---It wouldn't be solely my decision. It's government protocol where there's legal matters that Crown Law need to be briefed so it can also provide advice independently.

40

Who decided that Crown Law should be briefed in this regard?---I instructed Crown Law. I can't recall exactly, but it would have been part of our standard process to engage Crown Law.

All right, thank you. What was the nature of this dispute that required Crown Law to be engaged?---The dispute, I think - I think I clarified before that we were leading to potential litigation any matters of legal substance - again, it's protocol for Crown Law to be, you know, involved in reviewing the legal position and also providing advice to government separately to that of the legal parties involved. I also believe there's a protocol that requires the attorney-general to be advised of any potential litigation as well.

50

Thank you. Can we move on then on a more general level.  
When you came to engage Clayton Utz, was that your idea?  
---Yes. That idea was formed, basically, yes.

1

Yes. It was your idea. Why was Clayton Utz engaged by  
you?---The original premise was that we were heading into  
what appeared to be quite a large and complex negotiation  
and potential settlement or otherwise with IBM and I  
thought the state would be best positioned to avail  
ourselves of commercial expertise and advice to assist in  
the negotiations with IBM.

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All right. You knew Mr Charlston to have the necessary experience as a commercial negotiator?---I think I wrote in my statement that I contacted Mr Simon Newcomb initially who I had used in a commercial negotiation capacity in another jurisdiction in another time frame, and the original intent was to engage Mr Newcomb based on that experience. It would transpire then that Mr Newcomb was unavailable for personal reasons, and it was at Mr Newcomb's suggestion that Mr Charlston had the requisite expertise and skills to assist the state.

1  
10

You had experience in the course of managing the 5 December contract, and you had personal knowledge that Mr Grierson, as director-general, would meet on a regular basis with Mr Doak and others from IBM?---He did meet with IBM on specific matters and points, I can't say that it was regular, in other words, a sequencing of a regular event.

But you knew he had met with Mr Doak and negotiated various aspects of the contract. Yes?---I know that he met with Mr Doak and discussed, I don't know directly whether he negotiated aspects of the contract.

20

When I say "aspects of the contract", I'm talking about change requests?---I don't know whether - I have no direct knowledge of Mr Grierson being directly involved in the negotiation of change requests.

I'm not so much talking about negotiation of change requests, I'll probably rephrase it that if Mr Doak had a difficulty in terms of a payment not being made or in terms of scope not being defined he could come to Mr Grierson?---He would regularly contact Mr Grierson under those circumstances, yes.

30

Given your knowledge of the ability of Mr Doak to contact and deal with Mr Grierson, was there any part of you engaging Clayton Utz that sought to remove at least at the first instance this commercial negotiation occurring face-to-face between director-general and IBM representatives?---No, that's not my first thought. My first thought was to ensure that the state was adequately represented. It wasn't the proposition to replace Mr Grierson in the negotiations, or am I misunderstanding?

40

I'm not suggesting replace, what I'm suggesting is, in one sense, not to permit at least in the first instance this commercial negotiation to be conducted between IBM and Mr Grierson on a face-to-face basis without lawyers?---We hadn't got to the point of determining the negotiation protocols and principles at that point. Again, I come back to my prior statement and my best recollection was that I wanted to ensure that the state had every opportunity, had the best team it could muster to actually front up and stare IBM eye to eye across the table during the negotiations, and that was the intent.

50

Was it any part of your intention in engaging Clayton Utz for the commercial negotiation to seek to control meetings between Mr Grierson and IBM that occurred outside the way you thought the negotiations should be conducted?---No, I didn't seek to control.

1

You might not like my use of words?---Yes.

What I'm actually asking you is your motivation in engaging Clayton Utz, and I want you to tell us every part of your motivation?---Yeah. I believe that Mr Doak to be a skilled and experienced negotiator and, you know, it is my view that he is quite skilled and an expert in that area and he probably does it every day of the week where government and myself included would be lucky to undertake a negotiation of this size and scope once a twice in your career in the public sector. So my motivation was to ensure that to at least present a solid negotiation with IBM, that we brought expertise and skills onboard to ensure that we could best advantage the state during those negotiations.

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20

All right. Thank you.

COMMISSIONER: And was that concept discussed with Mr Grierson, was he told about it?---Yes, and Mr Grierson did agree to the engagement of Mr Charlston or an external commercial negotiator, and I believe there was an approval process.

For Clayton Utz?---Yes, but that was signed off as part because of the submission I put forward to engaging - and I can't recall exactly who signed off that.

30

He doesn't know?---Yes.

Just going back to the point that Mr Flanagan was raising with you. Mr Grierson agreed, did he, to the engagement of Clayton Utz, as it turned out, for the reasons you've just explained?---I believe so, yes.

40

MR FLANAGAN: Thank you. Can I take you to volume 2, page 1? This is an advice from Ms Bowen from Mallesons, it's an email advice directed to Mr Backhouse and to Mr Beeston. Did you ever receive this email?---I don't seem to have a page 1.

Page 1 of volume 2. It's an email, it has "Backhouse, Boyd"?---I have volume 2.

COMMISSIONER: Yes, the first document there after the index. It proceeds with 1-1?---1-1? All right.

50

Proceed 1-1?---Yes, I do have it. Thank you.

MR FLANAGAN: Thank you. There's a very important suggestion there in relation to issues of quantum and prospects to brief counsel. Do you see that in the third dot point? It says:

*Brief counsel either through Crown Law or through the private bar. We can recommend individuals in this case and prepare for a potential injunction or claim from IBM in response to the notice to show cause.*

---Yes.

Did you, in your role, ever contemplate a briefing either the solicitor-general or senior counsel to advise on the potential quantum of damages of the state or the state's prospects of success?---No, I did not.

Can you say why?---Because I was reliant on both - reliant on Crown Law to provide that advice.

All right. Thank you?---It's not an area I have expertise in.

Thank you. Can I then move to the actual engagement of Mr Charlston? Do you recall a briefing with Mr Charlston and Mr Beeston of 2 July 2010; that is, at the very first engagement of Mr Charlston?---I can recall, yes, we did have a brief - and I can't be precise about the date but it would around that time, yes.

In any event, Clayton Utz through Mr Charlston, provided you with a protocol and a letter of advice in relation to how one should proceed with the commercial negotiation with IBM?---That would be correct, yes.

Through that, on 8 July 2010, Mr Grierson authorised a small team of senior officers to develop the state's negotiation strategy. Is that correct?---Yes, correct.

And that involved yourself?---Yes.

Who else?---Would be Mr Beeston. It would have involved, at points, Ms Berenyi, and perhaps to a lesser extent, Ms MacDonald.

You were appointed to lead that time?---I believe so, yes.

How was it that you were appointed team leader? I'll be more direct. Did Mr Grierson appoint you team leader for the purpose of conducting the commercial negotiations with IBM?---I'm misunderstanding the question because I want to make it clear I didn't conduct, I participated in the negotiations. Look, I can't recall a direct conversation with Mr Grierson but it very well may have been Mr Grierson

acting through Ms MacDonald, where it was suggested that I lead, or even Ms Berenyi may have suggested to Mr Grierson that I lead the team.

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Yes, all right. Now, subsequent to that, things elevated to the stage of the state issuing a notice to show cause prior to termination of IBM?---That is correct and that was based on further advice received from Mallesons.

Yes. Again, you were the author of a submission to the director-general to issue the notice to show cause?---That would be correct.

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And the show cause issued?---Yes, that's correct. 1

All right. Now, at or about the end of June 2010, the auditor-general tendered his report in relation to the governance and other issues in relation to the Queensland Health project. Yes?---Yes, report number 7 to parliament, 2007.

Correct. In relation to that, can you tell us what effect, if any, the auditor-general's report had in terms of this negotiation process?---I recall that in one of the correspondence received from IBM, it was referenced to the extent where IBM used it as a defence against the show cause, I believe. 10

Can I take you to volume 2 page 98?---98. Yes, I have it.

Just excuse me for a minute. Did you ever receive advice in relation to legal effect of the auditor-general's report from Mr Backhouse?---I very well may have but I can't recall specifically. 20

All right. Do you recall advice to this effect that the auditor-general's report constituted the opinion of the auditor-general and would not be admissible in a court or law in relation to any litigation?---I can't recall that specifically but generally if I had received it, I would have noted that, yes.

Thank you. I can show you at volume 2 page 192 then? ---192, thank you. 30

If you look at the third full paragraph - - -?---Yes.

THE COMMISSIONER: Whereabouts?---Yes, I do recall that now, thank you.

MR FLANAGAN: Good, thank you.

THE COMMISSIONER: Mr Flanagan, whereabouts? I missed it. 40

MR FLANAGAN: It starts with, "However, I would like to make one point of clarification."

THE COMMISSIONER: Yes, thank you.

MR FLANAGAN: Then he says, "In my opinion, these reports will not be receivable in evidence" - - -?---Yes. Yes.

THE COMMISSIONER: Thank you. 50

MR FLANAGAN: No authorities are quoted in support of the proposition but there are authorities that support the proposition.

THE COMMISSIONER: Yes, I think I have read them. 1

MR FLANAGAN: Yes.

Now, was there any evidence ever presented to you that if the state of Queensland terminated IBM's services in or about negotiation period 2 August and 20 August, that IBM would hinder access by the state of Queensland to their subcontractors?---I believe that to be correct and I think the origin of that advice may have been a concern as I have previously expressed about fallback positions for the state in accessing IBM contractors directly, so that would be general. 10

My question is a little bit different?---Right.

My question was - - -?---Sorry.

My question was, were you ever presented with evidence; that is, evidence from CorpTech persons working at the (indistinct) that would suggest that IBM would hinder access to subcontractors that were needed to provide the solution?---Sorry, I misunderstood your question. No concrete evidence but I do recall having conversations about the topic. 20

All right. Mr Brown, did you ever see that risk as so great that the state would be unable to reserve its rights?---If you're asking the question that - sorry, I perhaps should - I don't understand your question, I'm sorry. 30

The risk in terms of terminating IBM's services: was that assessed as so great or so difficult to overcome that the state could not take steps to reserve its rights?---No, I do not believe that to be true. I thought - my advice was received and provided - was that in terminating the contract, the state would retain a range of rights.

All right, thank you. Can I take you to page 149 then of volume 2?---Thank you. Yes, I am there. 40

Thank you. This was advice that you sought from Mallesons, specifically in relation to the state of Queensland's rights upon termination of IBM. Yes?---That would be correct.

Including the disengagement rights that the state had and the relevant schedule of the 5 December contract?---Mm'hm. 50

To also identify the potential restraints, including the tort of intentional interference with contractual relations? ---Correct.

Yes. The summary, you will see at paragraph 4.4 at page 155, was the advice that you received. Yes?---Yes, that's correct. 1

Good. You also sought comment of review by the Crown solicitor in relation to the Mallesons advice?---Mm'hm.

If you turn to page 194 - - -?---Was that 194, please?

194?---Thank you. 10

I think this is the a passage that has been referred to before. It's at 196 under item C?---I'm sorry, I didn't hear the page number.

196?---Thank you.

Under item C and it deals with non-solicitation?---Yes.

In terms of the advice provided to you, one reads the Mallesons conclusion in paragraph 4.4 with that reservation expressed by the Crown solicitor there. Yes?---I believe so, yes. 20

All right, thank you. Now, what was the purpose of you seeking the advice from both Mallesons and the Crown solicitor in relation to this issue?---Well, again, it was seeking - as part of the protocol, to seek a further opinion from Crown Law. 30

Was this with a view to seeking what would be the state's rights if IBM's services were terminated?---In part, yes.

All right, thank you. Now, you became aware that KPMG did a risk assessment, dated 21 July 2010?---Yes, that is correct.

That was commissioned by the Department of Premier and Cabinet. Yes?---I believe so. 40

Did you read the document?---Yes, I did.

In that document, which is repeated in a number of cabinet submissions, it is suggested that it would be prudent to ensure that IBM remained engaged for any transition to CorpTech. Yes?---Yes, that would be correct.

Did you ever read that warning or that suggestion for prudence from KPMG to say that the state should otherwise seek to reserve its rights to sue?---May I have the question put to me again, please, I'm sorry. 50

Yes. Did you ever view that warning by KPMG as suggesting the state should do all it could to reserve its rights to sue?---Yes, I would have read that; yes.

Yes, thank you. Can I take you then to page 222?---Mm'hm. 1

A simple question; are you the author of this document? It identifies you as the contacting briefing officer at page 225?---Yes, that would be correct.

And then for the submissions made to the cabinet review committee, were you the person who authored those documents or were they done by another person through the cabinet process?---They would be largely authored by myself. 10

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The decision to annex the relevant Mallesons opinions and Crown Law opinions was a decision made by you?---Yes. 1

On 22 July, then, the submission goes to the cabinet review committee whereby Mr Grierson is authorised to conduct the negotiations on behalf of the state of Queensland. Yes?  
---Correct.

But parameters are set in table 1. Yes?---Yes. 10

And you were the author of table one, were you not?---I was the author but not the sole contributor of that table.

But that had been a table that had been thought of in terms of the commercial negotiations that were to take place in terms of the state seeking damages from IBM. Yes?---Yes.

And in seeking as a preferred position not to release IBM from further claims for damages. Yes?---Correct. 20

If that couldn't be achieved through negotiation, the other option was a partial release whereby if the solution failed in the future for reasons not yet then identified, that the state would have recourse to IBM in terms of damages. Yes?  
---Correct.

And they were the only parameters by which Mr Grierson was authorised to negotiate. Yes?---They were the parameters authorised by CBRC. 30

You know the supplemental deed, though, of 22 September, and indeed you know from the settlement principles that arrived that resulted from the meeting between Mr Doak and Mr Grierson on 19 August provided a full release to IBM if IBM were to complete 35 defects by 31 October 2010. Yes?  
---That is correct.

Is it your view having participated in authoring the submissions to cabinet, that negotiation or those settlement principles went beyond the parameters identified for releases?---Yes. 40

Thank you. I should say to the extent it went beyond those parameters on 26 August?---Sorry, yes.

26 August, cabinet review committee ultimately authorises the entering into the supplemental deed on the basis of those principles, does it not?---Correct. So that was at that point. 50

At that point, yes?---Yes.

But at the time those principles were agreed between IBM and Mr Grierson, those principles went beyond the parameters that had been authorised by cabinet at that stage?---I believe so, yes.

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Thereafter, we have Clayton Utz onboard from 2 July and you identified the negotiation period as being between 2 August and 20 August. Yes?---I believe so, yes. 1

All right. Having received the advice from Clayton Utz as to how the process should process, it was to be lawyer to lawyer to start with. Yes?---Initially, yes.

With the exchange of term sheets?---Yes. 10

And you were closely engaged in terms of the term sheets and the terms of those sheets?---Yes, I was, as were others.

All right. And there was a draft term sheet that initially had \$12 million for the liquidated damages being sought. Yes?---That would be correct, I believe.

Do you know how those damages were assessed at \$12 million at that stage?---I believe it was a calculation based on what it would cost to replace IBM and transition cost, so there was some degree of science behind it that then came up with a number of around \$12 million. 20

IBM took some time through their solicitors to respond to the first term sheet sent to Blakes on or about 4 August 2010. Yes?---Correct.

And response was received on 13 August 2010?---Yes. 30

Did you have concerns in terms of the delay by IBM in responding to the first draft of the term sheet?---Yes.

What was that concern?---Well, the concern was that I believed that IBM were using time as a negotiation tactic, in other words they were trying to elongate the negotiation process.

Did you know the date, or the approximate date, that one would need to terminate this contract?---Yes, and that was advice received from Mallesons. 40

Were most people working to a date of 23 August 2010?---I believe that to be the date, yes.

After this term sheet was received through a process within CorpTech and within the state government, a term sheet was again arrived at by the Queensland government for the purposes of sending to IBM. Yes?---That's correct. 50

I won't take you to the documents, but do you recall emphasising to Mr Charlston that you wanted Mr Charlston to convey to Blakes that this term sheet constituted a considerable movement by the state of Queensland in terms of compromising and constituted its final solution to the negotiation?---I believe that to be correct, yes.

Leading up to that, you also provided a discussion paper for Mr Grierson, didn't you, in terms of options?---Yes. 1

Again, we don't need to go to it, but you recall don't you, Mr Brown, that discussion paper contained an evaluation of the likelihood of IBM accepting the Queensland government's last term sheet. Yes?---I believe so.

First of all, you were the author of that discussion paper, weren't you?---Yes. 10

Your view was that it was unlikely that IBM would accept it. Yes?---Yes.

Having reached that view, your suggestion was, "If they don't accept it the state of Queensland should terminate." Yes?---Correct.

You were engaged by CorpTech throughout this entire negotiation process, you were the person who authored the cabinet view committee's submissions. When you advised that termination was an option, did you view the risk of such termination as being such as to outweigh any consideration of terminating, and the risks that we discussed, such as, access to subcontractors and the risk identified by Mr Schwarten as a catastrophic collapse of the payroll?---I was of the view that the risk was manageable, and that was based upon a series of advices provided by Mallesons in the form of legal. But also time had come to aid the state in that CorpTech was better prepared, although not fully prepared, I must state, they were better prepared to support the system at that point than they were in an earlier time. 20 30

To your own knowledge, the Health stabilisation project had transitioned in July 2010 to the Health improvement project. Yes?---That would be correct.

The first payroll was run on 23 March 2010. Yes?---Yes, that's right. 40

There had been subsequent fortnightly pay runs thereafter. Yes?---That is correct.

In that regard, defects that were being identified were being corrected by CorpTech and by IBM?---I believe that generally to be correct, yes. I think both IBM and CorpTech were - yes, that's correct.

To that extent CorpTech, through people such as Jane Stewart, who you knew, was establishing a relationship; that is, a working relationship, with the subcontractors engaged by IBM and indeed a working relationship with Infour. Yes?---That would be correct, yes. 50

Can we have your assessment, Mr Brown, of what was this extraordinary risk that's been identified by others who are informed entirely by you, it would seem, and your annexures as to terminating IBM at or around 23 August 2010?---As I previously stated, it was my view that while there was a degree of risk it was an acceptable risk to terminate the contract.

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Back to your discussion paper that you authored, it's a discussion paper dated about 16 August. You meet with Mr Grierson and others. We talked about the proposal to terminated if IBM don't accept the most recent version of the term sheets. It was decided at that meeting, it seems, in part of the discussion paper that Mr Grierson would then meet with IBM. Yes?---I believe so, yes.

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With Mr Charlston from Clayton Utz present?---That was the original intent, I believe.

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What was the intent of Mr Grierson meeting with IBM?---It is my belief that it was an attempt to bring the negotiations to a conclusion or to a satisfactory outcome for the state.

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Was there any part of the discussion paper or any part of your meeting with Mr Grierson on the 16th that foresaw Mr Grierson agreeing new settlement principles with Mr Doak and the other IBM representative?---Not that I can recall.

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Do you know why Mr Charlston became uninvited from that meeting?---No. That's a question best put to Mr Grierson.

Mr Charlston receives on 19 August 2010 a telephone call from a person called Cathy. Do you know a Cathy at CorpTech?

COMMISSIONER: It's Mr Grierson's secretary.

MR FLANAGAN: Yes?---So, no, no - yes, I was going to say the only Cathy I know, as I understand, was Mr Grierson's secretary. Yes.

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Yes, thank you.

COMMISSIONER: She wasn't CorpTech?---CorpTech, no.

MR FLANAGAN: Sorry. I'm sorry. Yes?---She works at Public Works.

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Yes, sorry, Mr Commissioner. Thank you?---Yes. She was the director-general's - - -

I'm getting my - - -?---- - - secretary and Department of Housing and Public Works.

Do you have any knowledge of Mr Grierson's secretary ringing Mr Charlston to say, "We don't require you for this meeting"?---Not that I recall.

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Did you ever have any conversation with Mr Grierson, Ms Berenyi or anyone else that suggested to you that Mr Charlston was no longer required?---Yes, I do recall and it was felt that Mr Charlston's services were no longer required and Mr - yes, yes.

COMMISSIONER: You're trying - - -

MR FLANAGAN: Yes. I'm saying required for this meeting, that is, to be present at the meeting?---I do recall - and I believe it was Mr Grierson's view - that he wanted to conduct the meeting with IBM on his own, I believe.

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Did he say why?---Not that I can recall.

COMMISSIONER: Who told you that Mr Charlston hadn't been invited to the meeting?---I believe it was in the meeting we had where Ms Berenyi, Ms MacDonald - and we had some discussions about how Mr Grierson was going to meet with IBM. I suggested, I believe, in that meeting that Mr Grierson could avail himself of Mr Charlston's services in that meeting and Mr Grierson indicated that he'd prefer to conduct the meeting without Mr Charlston.

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How long was that before Mr Grierson met with the IBM people?---I can't recall specifically, Mr Chesterman, but it was either the day before or on the day.

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Thank you?---Yes.

MR FLANAGAN: Thank you, Mr Commissioner. Just excuse me for a minute.

Can I take you to volume 3, page 112 then please, Mr Brown? ---May I have the page number again please.

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112?---Thank you.

This is an email from Mr Killey of IBM to other IBM representatives, so it's not a document that you would have seen before?---Right.

But it does record Mr Killey recounting a conversation he has with Mr Grierson on that day. Yes? So this is after the discussion paper of the 16th where it was agreed that Mr Grierson would meet with IBM. Yes?---Mm'hm.

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With Mr Charlston present. Yes?---Well, that was the proposition. Yes.

All right. This is a note, "To capture key points from a telephone call at 3 pm from Mal Grierson." So this telephone call on 17 August 2010:

*Sorry for the brevity. After initial friendly pleasant exchange of greetings, Mal Grierson got to the point and his tone changed to a more forceful tone. He said, "Where is Bill Doak? Is he in the country and still engaged?"*

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And there's a response;

*He stated that IBM's response was unacceptable and not conducive to reaching a settlement, eg, we acknowledge there are some 180 defects but are only prepared to fix 24 and this is a disgrace. He said if Lucas got hold of this, the lawyers would be into it and they'd go legal.*

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Yes?---That's what it says, yes.

My question is if you read the rest of it, there's also a reference there to Anna?---Yes, I've read it. 1

Did you know that Mr Grierson had a conversation with Mr Killey from IBM on 17 August 2010?---I can't be specific. There were regular telephone exchanges between Mr Grierson and IBM, so the answer is probably yes and by way of further explanation, Mr Doak had been appointed to another position within IBM overseas and there was a transition period and so that's where Mr Doak and Mr Killey were both interacting with Mr Grierson. 10

All right. If you then turn to page 114?---Yes.

These are emails that you've read before. These are the emails where I think it's Mr Boyd Backhouse who drafted the response for Mr Grierson to Mr Killey because Mr Killey was suggesting in his email, which is the second email on the page of page 114 that:

*The state imposed a specific process for resolution through legal representatives.* 20

That's a reference, is it not, to Clayton Utz' protocols? ---Yes, yes.

"As per your letter of 30 July," which was a letter that Mr Grierson authorised to be sent?---Yes.

"With which IBM is currently complying." The request for this meeting seems to be an expedient change from the state's settlement process. That is, IBM were suggesting: well, having received the call from Mr Grierson that they will now be able to negotiate face to face with Mr Grierson and not according to the protocol. Yes?---Yes. 30

That was brought to your attention, was it not?---It was.

That caused you some anxiety, did it not?---Well, it caused us to provide advice back to the director-general that we needed to respond in the most strong terms to IBM that the process hadn't changed. 40

Quite. You caused Mr Backhouse to give legal advice to Mr Grierson as to how to respond to Mr Killey's email. Yes?---That would be correct.

You checked the wording of Mr Grierson's careful email back to IBM?---I believe I reviewed it. Yes. 50

Yes. You reviewed it?---Yes.

And it made clear that he was simply expressing his disappointment in IBM's response to date, but was not departing from the protocol. Yes?---That's correct.

Mr Grierson - he agreed to this email going out, did he not?---That would be correct. 1

So as at the date of this email, which is 18 August 2010, Mr Grierson is aware that he is not in these commercial negotiations to be departing from the protocols carefully established by Clayton Utz?---That would be my understanding, yes.

All right, thank you. It's not just your understanding. 10  
It was a fact, was it not?---Yes. Yes. Correct.

Yes. Thereafter the next thing that seems to happen is that you still know he's going to meet with IBM on the 19th, don't you?---Yes.

Just take us quickly through the events of the 19th according to your own recollection then?---I mean, I think it was the day before where we were talking regarding about, you know, him having representation from Clayton Utz, Jeremy Charlston, indicated, you know: 20

*I spoke to Jeremy Charlston on that morning and he'd said, effectively, "What do I do? and I said, "Well, look, in the absence of any information from the director-general, it's business as usual. You're to proceed and engaged with Blakes."*

I believe I got a phone call mid-afternoon from Mr Charlston where he had indicated that he'd received a call from Blakes indicating that the state had - my words - done a deal with IBM and that he should seek further clarification from the client, being myself, as to what was going on. I attempted to contact the director-general, but he was tied up in some meetings, and I got to see - I believe later that afternoon or evening, I was advised of the outcomes of the negotiations that Mr Grierson had had with IBM. 30

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Can we just take you through that stage by stage? If you go to volume 3 page 133, now, this is an email that you send to Ms McDonald, yes, the associate director-general? ---Yes. 1

It's an email that you send on the morning, 10.17 am, on 19 August 2007?---Yes.

Which is the day that everything seems to happen. All right?---Yes. 10

You know that the director-general and Ms McDonald are going to meet with IBM. Yes?---Yes, that's right, yes.

At this stage, you probably know or do you know whether Mr Charlston is still intended to attend this meeting?---No, I do know that he is not attending that meeting.

All right. So by this stage, you know that Mr Charlston is not attending this meeting?---Yes. 20

You therefore take steps through this email to try to keep the process in accordance with the established protocols, don't you?---Yes, that's correct.

That was for the purpose of this email. Yes?---Yes.

And you encourage Ms McDonald with Mr Grierson to be ringing Mr Charlston to get advice in relation to how to conduct themselves in the state's interest in relation to these negotiations?---That would be correct. 30

You also warned them that it is strongly - this is in the third paragraph, "It is strongly advised that no additional commentary on the contract or process be discussed as this may compromise the state's legal and negotiating position, particularly in relation to preservation of state's legal rights as a result of IBM's material breaches. Yes?---That is correct. 40

Now, those words and the words, Mr Brown, spoken by a person who suspects that something is going to happen that will compromise the state's position, are they not?---I wouldn't characterize it by saying I'm forecasting what is going to happen. It's providing advice to the director-general to ensure those things don't happen.

Yes, but you feared that they were going to happen?---Well, it was a potential outcome and I wanted to reinforce with the director-general - well, it was a potential outcome and I wanted to reinforce with the director-general my views. 50

Your fears that you had identified earlier and the reason why you engaged Clayton Utz as commercial negotiators, the reason you set up a protocol, the reason that you sought to

have Mr Charlston present when the director-general met with IBM was because you feared that if he had a face-to-face meeting with Mr Doak, he would be out-negotiated. Yes?---That was my concern, yes.

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Yes. That was also your belief, was it not?---Yes.

And that belief was based on the fact that you had seen and witnessed Mr Doak out-manoeuvre and out-negotiate Mr Grierson in the course of the management of the contract of 5 December?---Not only Mr Grierson but - yes.

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All right, thank you. Indeed with Mr Doak's experience, he was a very skilled program director, was he not?---He was a formidable negotiator, yes, in my opinion.

Yes. So the meeting takes place. If we go to then page 150 - - -?---150.

- - - of the same volume, volume 3, can I just start with this, putting aside the various and fairly minor disputes that you have with Mr Charlston as to the accuracy? ---Mm'hm.

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It would seem that the meeting between Mr Grierson and IBM representatives with Ms McDonald present took around two-and-a-half hours. Yes?---That was - yes, I think that was generally correct.

All right. After that meeting you ultimately went to see Ms McDonald and Mr Grierson with Ms Berenyi?---I believe that to be correct, yes.

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Did Mr Grierson tell you on that occasion what was discussed in this two-and-a-half hour meeting?---In summary form, yes, basically the outcomes of the meeting and what had been agreed.

As we go through this file note, did he also inform you of other things such as what IBM had suggested to him in terms of CorpTech's ability to fix the defects?---Yes, I can recall that, yes.

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We will come to that. Do you also recall IBM having told Mr Grierson or Mr Grierson having told you that IBM would sue the state of Queensland if they terminated?---That's correct, yes.

Now, do you have any independent recollection now as you sit there of what other things Mr Grierson told you that you didn't convey to Mr Charlston; that is, I just want to know the conversation you had with Mr Grierson, putting this file note aside?---Yes. I probably expressed - disappointment is perhaps the wrong word but disappointment that the state didn't terminate the contract because I

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thought that - you know, that was the state's best option from my perspective. I believe Mr Grierson also indicated that he had consulted with Mr Ken Smith around the matter and that they were in agreeance that the cause of action outlined by him was the way to progress.

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One thing that you told Mr Charlston was that the DG spoke to Ken Smith following the meeting with IBM, they have determined that the state has no interest in termination of the contract with IBM. The state wants IBM to finish the contract?---I think that to be generally correct, yes.

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Did Mr Grierson express to you why the state had no appetite - why he and Mr Smith had no appetite to terminate the contract?---No, he didn't.

Did he tell you why the state thought it necessary for IBM to finish the contract?---No, he didn't.

Had you gleaned from him in previous conversations with Mr Grierson was so firmly of the view that IBM needed to finish the contract - sorry, I withdraw that question. Was Mr Grierson in his previous conversations with you firmly of the view that IBM should finish the contract?---I think the previous conversations it was - should continue with the contract and again, it goes to the few conversations I did have with Mr Grierson around this with others present. It was generally along the lines that the state scope is ill-defined and therefore, you know, the state's position is very weak and so it was generally around that type of conversation around why it was - you know, as conveyed to me why he thought it was necessary to continue with the contract rather than terminate the contract with IBM.

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But you knew through change request 184 in July 2009, a lot of those scope disputes had been resolved?---Contractually yes, but they were continually raised by IBM on an ongoing basis, so there was always - to use my terms, "noise" around the scope of the solution to be delivered.

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Can you recall anything else about what Mr Grierson told you had occurred in that two-and-a-half-hour meeting? ---There was probably a range of other topics we canvassed but nothing specific really that comes to mind at this point.

Thank you. Now, in terms of the file note with Mr Charlston, can we just work out what Mr Grierson had told you that you were conveying to Mr Charlston?---Yes.

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So if we start with the fact of - they instructed him on the outcome of the meeting and what he is to do as a result, and as a result of the meeting, you were to settle or draft settlement principles. Yes?---That was correct, yes.

Now, those settlement principles were quite different, were they not, to the term sheets?---That's correct. 1

And they were certainly different to the term sheet that had constituted the final state's position. Yes?---Yes.

All right. Relevantly, they were different in terms of the complete abandonment of liquidated damages and the complete (indistinct) of releases, even partial releases?---That's correct. 10

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Thank you. And indeed you spoke to Ken Smith, Premier's, following the meeting with IBM, that you confirmed that. Yes?---I believe I was advised of that, yes. 1

So that's something Mr Grierson told you?---I believe so, yes.

COMMISSIONER: Do we take it from that - sorry. Do we take it from that Mr Grierson hadn't spoken to Mr Smith before he settled with IBM?---I don't know, Mr Chesterman. It wasn't raised in the meeting I had with Mr Grierson. 10

Well, did you - - -?---I have no direct knowledge.

Did Mr Grierson say to you that he had spoken to Smith before he met the IBM people?---No, he didn't. On this particular topic?

Yes?---Yes. 20

MR FLANAGAN: And did you have any knowledge of Mr Grierson speaking to Mr Smith prior to this meeting?---Yes, I believe - I'm aware that Mr Grierson kept Mr Smith informed of progress as to, you know, and there would have been several meetings leading up to the 19th or conversations that I'm sure Mr Grierson would have kept Mr Smith appraised of progress.

All right. Thank you?---But I have no direct knowledge. 30

Then they have determined, that is, Mr Smith and Mr Grierson, that the state has no interest in termination of the contract with IBM, the state wants IBM to finish the contract. Mr Grierson informed you of that on the occasion?---That's how it was related to me, as I understand it.

Thank you. That there is not enough confidence in CorpTech to support the system, Mr Grierson said that to you?---Mr Grierson said that to me in the context of that was an IBM statement, yes, as opposed to a statement by Mr Smith and Mr Grierson. 40

And then IBM emphasises this view to the DG?---Most definitely, yes.

Thank you. Then IBM told the DG that IBM would sue the state. You've already agree with Mr Grierson telling you that?---Yes, correct. 50

Those threats were taken seriously by the DG, so did Mr Grierson say to you, "I take seriously the threats of IBM that they will sue the state"?---I can't recall him saying those words, but the way he conveyed it in a conversation I took that to be, you know, the meaning of it rather than his direct saying.

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BROWN. J.D. XN

There is no dispute between you and Mr Charlston in relation to they key principles for settlement. Yes?---No.

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You indeed did draft the key principles as dictated to you by Mr Grierson and Ms MacDonald?---I did but not solely.

One of your pieces of advice in your email to Ms MacDonald was, "Take a file note of what's said." Yes?---I believe I would have said that, yes.

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Did you ever receive a file note from either Mr Grierson or Ms MacDonald in relation to the meeting between them and IBM on 19 August?---No, I cannot recall.

Was Ms MacDonald reading from notes when she dictated or told you what the key principles were?---I believe so, yes.

So we can go down, then, to paragraph 5. Mr Brown, I might now enter into the territory of the differences between you and Mr Charlston, if I may. You said, "I queried what would happen if IBM does not perform, that is, Mr Charlston queried of you what would happen if IBM did not perform. Jane said there is no security for performance and IBM has a free reign." You dispute that you said those words to Mr Charlston?---I dispute I say those exact words, and I believe in my statement I've qualified what - - -

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Could you just quickly tell us how we should understand that notation, because you're the person speaking, so what did you mean?---It was in the context given that - sorry, the state had decided not to terminate the contract with IBM, that the state's negotiation position from then on would be severely weakened and impacted, that was the context of the statement.

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But it was the case that IBM would be paid all monies that had been retained, apart from a particular sum, if they performed by fixing 35 defects by 31 October 2010. Yes? ---That is correct. It was part of the, yes, arrangement.

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Beyond them doing that, there was no other security in terms of them performing that contract?---No, that had been waived, yes.

"Jane said confidentially that this is a political decision." Can I just stop you there. Had you ever spoke to Mr Schwarten directly about why the state wanted to settle with IBM?---No.

Did you ever speak directly with Mr Grierson as to why the state wanted to settle with IBM?---I had several conversations, and again as I have indicated previously the concerns as expressed by Mr Grierson report to the 4th.

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When you word "confidentially" there, and let's assume the word used was "confidentially", are you conveying something

that Mr Grierson had told you?---You're asking to assume something which I disagree. I dispute I used the term "confidentially".

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All right. Let's just assume for the moment that you did use the word "confidentially". My question is more specific: did Mr Grierson ever convey to you any political imperatives as to why the state government would not terminate the services of IBM?---No.

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Did Mr Grierson ever conveyed to any political imperatives that he saw or had been communicated to him in relation to why the state would not terminate the services of IBM? ---No.

Or any political imperatives as to why the state was seeking to settle with IBM?---No.

All right. Thank you. If you were to convey to Mr Charlston words to this effect, and I know you dispute that you did, they would simply be your own view or assumption as to what the political motivation?---Yes, but you predicated it if - - -

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Quite. I understand that?--- - - - and I dispute that entirely.

You see, it's a strange thing for a experienced solicitor such as Mr Charlston to write of political decisions when he's simply recording a phone conversation with you contemporaneously?---But equally, it's a strange thing for a senior public servant to enter into conversations of political decisions.

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It's an embarrassing thing. That's the difference, isn't it? It's an embarrassing thing for a senior public servant to have that recorded as being said by you. Correct?---If it is said, yes, but equally, you know, senior public servants don't entertain those kinds of conversations.

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Quite. I'll put it to you, Mr Brown, directly. Those words were actually said by you and the reason that you deny them now is because of the embarrassment they caused? ---No, I dispute that.

All right. Thank you. While we're on this, Mr Charlston is not the sort of person to show anger but he's certainly not the sort of person to let anger cloud is ability to take an accurate file note, is he? You dealt with him? ---I've dealt with him and I believe Mr Charlston to be professional and ethical, yes.

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Thank you. I want to ask you about this, "James said his personal view is that this is worst possible outcome, IBM played hard ball and got what it wanted. You did say those words to Mr Charlston, didn't you?---Perhaps not those

exact words. It's in the context, again, back around the right to terminate the contract was waived and in my perspective, you know, the state missed an opportunity to seek damages from IBM.

1

What did you feel of the full release of IBM?---I wasn't happy about it.

Was there any reason why the contract couldn't have been terminated?---In my opinion, no, and again I'm not a legal expert, but in my view the state had an opportunity to terminate the contract and it chose not to.

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Why did you think it was the worst possible outcome? ---Again, I don't think I used those terms, but again the outcome was that we had an opportunity that was very well laid out leaving quite a constructed path to lead to a point where the state could make a decision. We could have terminated the contract, we would have entered into negotiations with IBM probably to settle and we would have reserved - excuse me, may I have some water, please? If I might just pause for a moment. And the potential was there to seek damages from IBM. I stress potential because that's a future event, but I think we would have been on a stronger footing to deal with IBM if the contract had been terminated.

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Was it your view that yet again Mr Doak had out-maneuvred or out-negotiated Mr Grierson?---The answer is yes. 1

Yes. It's then said that:

*James said the real issue is that the DG was concerned about himself and the minister. There will be an election in 18 months and they are very concerned about anything being public in the Health area.* 10

Is that something that Mr Grierson had conveyed to you at any stage?---No.

I appreciate you deny that you said it to Mr Charlston, but - - -?---Thank you; as I do deny that quite strongly.

Yes, quite. But is that something that Mr Grierson had ever expressed to you?---No. 20

All right. You see, both Mr Swarten and Mr Grierson say in their relevant statements that they had already discussed retirement from both politics and from being DG of public works prior to this event. Did you have any knowledge of that?---No; and I haven't read their statements either.

Thank you. It's true that you instructed Mr Charlston not to reply to Blakes at all?---Yes, that would be correct. That's following - yes. No; that's correct. 30

Apart from seeking from Clayton Utz and Mallesons to give input in relation to the settlement principles that has arisen from the meeting with Mr Doak and Mr Grierson, you didn't require the service of Clayton Utz beyond 20 August - - -?---That is correct, yes.

Thank you. Just excuse me for a minute please. Thank you, Mr Commissioner. That's the evidence-in-chief of Mr Brown. 40

COMMISSIONER: Yes, thank you. Mr Plunkett?

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

COMMISSIONER: Mr Ambrose?

MR AMBROSE: We have no questions.

COMMISSIONER: Mr Foley? 50

MR FOLEY: Yes, thank you.

Mr Brown, I appear for Mr Schwarten. You mentioned in answer to a question from Mr Flanagan that Mr Schwarten had never said anything to you to indicate a political imperative with regard to the decision-making concerning the payroll contract?---That is correct.

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Had you had regular dealings with Mr Schwarten?---No.

Had you had any dealings with Mr Schwarten?---The answer is yes, but not on this topic.

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But it was not a regular event for you to be interacting with the minister. Is that correct?---That is correct.

You've given evidence as to what you have and haven't said and I won't go through that with you again. Let me turn to the authorship of the documents leading up to the Cabinet Budget Review Committee decisions of July and August 2010. Your evidence is, as I understand it, that you were heavily involved in authorising these documents?---That is correct.

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As a senior public servant, you have a duty to fully and fairly inform your director-general, minister and the Cabinet Budget Review Committee of all the relevant issues, facts and advice necessary for the making of a decision? ---That is correct.

Did you discharge that duty?---I believe I did.

Are you satisfied that in the preparation of those documents you put before your minister and the relevant Cabinet Budget Review Committee the relevant facts and advice necessary for that body to make its decision?---I believe so. Yes.

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In the course of preparing the Cabinet submission of 22 July 2010, I note that there are some 14 attachments which include various legal advice from Crown Law, from Mallesons and the KPMG risk assessment. Do you recall that?---Yes, I do.

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They were there in connection with your preparation of the document for consideration by the director-general and the minister?---Correct.

You were satisfied then that they fully and accurately reflected the pros and cons of taking the course of action that government actually took?---I believe so, yes.

So that we've your personal view might be, you adhered to your professional public service duty to put the relevant pros and cons before the responsible minister and the relevant Cabinet Budget Review Committee?---That's right. I am not the decision-maker of matters such as this.

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And, importantly, whatever private views you may or may not hold in regard to it, you believe that you were diligent. Do you still believe that you were diligent in the preparation of the material that informed those Cabinet Budget Review Committee decisions?---Yes, and also the advice leading up to the creation of those documents; yes. 1

Very good. You were asked a number of questions by Mr Flanagan with respect to the contracts and in regard to one of them, one answer you said, "It's not an area I have expertise in," and to another question you answered, "I'm not a legal expert." Do you recall that?---Yes. 10

You have, though, significant experience since 1971 of working in information technology?---I do.

You say in your first statement that your roles over the last 10 to 15 years have tended to be in management roles more than technical ones. Is that correct?---That is correct. 20

You say at paragraph 4 of that first statement that you do not hold any formal tertiary qualifications. Is that correct?---No, I don't.

All right, thank you. The statement is correct, you don't hold tertiary qualifications. Is that correct?---That's correct, yes. I don't hold tertiary qualifications.

Yes, thank you. And needless to say you don't have any formal legal training?---No, I don't. 30

Thank you. Yes. Nothing further. Thank you.

COMMISSIONER: Yes, thank you. Mr Cregan?

MR CREGAN: Mr Brown, this is a fairly long project with a complicated history by the time it gets to post go live? ---Yes. Yes, it is. 40

In particular about scope?---Scope was one of the key complications, but there were others. Yes.

But there were ongoing complications about scope, both in the latter half of 2009 after CR 184 and into 2010?---Yes, but I would argue that with CR 184, the matter of scope, while still a topic, diminished significantly.

But there were still - - -?---There were still, yes. 50

That's one of the identified difficulties, isn't it, in agreeing defects - disputes about scope?---Yes, that's right.

As to the notice of breach and the notice to show cause, you're aware, aren't you, that IBM disputed the factual foundation to those notices?---That's right, yes. 1

And they disputed the liability for the breaches?---They did.

And rejected globally and said it had delivered the scope system?---That's their claim. We also - one of the reasons for seeking legal advice was to obtain a perspective other than that of IBM's. 10

As to the negotiation period, the time scale up to 20 August, that was a time scale imposed by the CBRC on the government?---I think you're correct. I can't recall whether we're operating under the contract or whether the contract framework for negotiation and arbitration influenced that time frame as well, but generally I think you're right. Yes. 20

Yes, thank you, Mr Commissioner. That's all. 20

COMMISSIONER: Thank you. Mr Kent?

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MR KENT: Thank you, commissioner.

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Mr Brown, can I just ask you to have a look at volume 1 of the tender bundle, please, at page 91?---Yes. Was that page 191?

Page 91?---91? Thank you. Yes, I'm there.

I think you were directed to this document earlier on by Mr Flanagan, so unless you need to I won't change you the front page of it so that you can identify it, but you'll see that it's the opinion from Mallesons on 30 April. Correct?---Mm'hm.

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You were taken previously to the matters set out under the heading of Opinion and various things about material breach. Can I just ask you to look at, essentially, the last paragraph on that page?---Is that the one that starts, "The agreed scope"?

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No, the one starting above that, "Further investigation"? ---Yes. Yes, I've read it.

It sets out - and there's a number of dot points:

*A number of issues that may well have arisen on the project that will impact the conclusion expressed above.*

There's dot points set out there and there's a number that continue on over the page?---Mm'hm.

30

As I think Mr Cregan has put to you, it's correct, I suppose, that during all of this negotiation period you were aware that there were significant factual disputes between IBM and the state?---That's true, but that wasn't the basis for the issuing of the breach notice. It was around IBM's ability to rectify a suitable period of time.

My question is of much larger scope, but really from that point on up to the end of the settlement negotiations, whatever confidence was being expressed, you're aware that there were two potential sides to the - - -?---That's right. Yes, exactly.

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All right. Can I just take you then in the same volume to page 129? I think you may have looked at this - so this one, if you could just identify that's the options paper dated 2 June from Mallesons Stephen Jaques?---Yes.

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And go over to 131?---It's on there.

As I think you may have already identified it with Mr Flanagan, there was an identification there of a key

risk in that it might be necessary to bring in a third party to rectify the defects, although the cost of that may be recoverable?---Yes.

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That might be another way of saying it, but that was perhaps the (indistinct) the risk that for one reason or another, IBM might not continue to be available if the contract is terminated?---That's true. Yes, correct.

But that's a risk that was considered and you've told us what you thought of that risk as it went on. Correct? ---Correct.

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All right. You've been asked quite a few questions about the meeting of 19 August where the settlement principles emerged from. I'm just not sure - perhaps Mr Flanagan can correct me, but I'm not sure whether the settlement principles document itself is in the tender bundle.

MR FLANAGAN: It is.

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COMMISSIONER: I think it is. I think I have seen it.

MR KENT: It's annexed to Mr Charlston's statement. Is that the only place?

MR FLANAGAN: 26 August.

MR KENT: Yes.

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MR MUMFORD: Volume 3, page 178.

MR KENT: Thanks. Did you hear that?---Volume - sorry?

Volume 3, page 178?---All right. Okay. Volume 3, page 178.

MR MUMFORD: At 191?---I'm on page 178 which is a copy of Cabinet Budget Review Committee decision.

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It's page 191.

MR KENT: Yes, it's okay. Just bear with me for one moment. If Mr Charlston's statement is an exhibit, can I ask if the witness can see it please together with its attachments?

Fortunately, because the pages are not numbered, I'm going to take you to a document that's very close to the back of that bundle?---This bundle here?

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Yes, yes?---Right.

The very last thing at the end of it should be annexure Z which takes up about two or three pages. I'm going to ask

you to go back before the to something called Proposed Settlement Principles?---Would that be in annexure Y, would it?

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Logic dictates it is?---All right. I've got an email that says, "Attached is my mark up of the proposed settlement principles."

That's right.

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COMMISSIONER: Mr Kent, what I think I might do is to adjourn now and let you and Mr Brown find the document overnight and resume efficiently in the morning.

MR KENT: Thank you.

COMMISSIONER: We'll adjourn until 10 o'clock tomorrow.

THE COMMISSION ADJOURNED AT 4.27 PM UNTIL WEDNESDAY, 29 MAY 2013

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