

**In the matter of the *Commissions of Inquiry Order (No 2) 2012*
The Queensland Health Payroll System Commission of Inquiry**

Submissions on behalf of IBM Australia Ltd

SETTLEMENT ISSUES

24 JUNE 2013

Preliminary

1. These submissions concern the “Issues List for Settlement Submissions” provided by the Commission on 4 June 2012.
2. Those issues principally direct attention to internal State government decision making leading up the execution of the Supplemental Agreement between IBM and the State on 22 September 2010. They concern whether, on the information and advice available to the State at the time, it behaved reasonably and properly.
3. The issues are not directed to resolving ultimate factual or legal questions concerning IBM, including whether:
 - (a) IBM was in fact in breach of the Contract in the post go-live period;
 - (b) IBM would in fact have “walked off” the job had the State moved to terminate the Agreement;
 - (c) the software supplied by IBM was, in fact, at risk of “collapse”;
 - (d) any of the other factual matters or legal conclusions in the advice received by the State was correct.

(Other Issues)

4. Resolution of the Other Issues would require extensive evidence which was not sought or given.
5. The Commission sought only one statement from an IBM witness, on the limited topic of the interactions between IBM and Mr Grierson.¹ The IBM witness who provided that statement was not called to give oral evidence.
6. Instead the focus of the evidence during the settlement hearings, consistent with the issues now identified by the Commission, was concerned with the perceptions of officers of the State, and the effect that the advice and information with which they were provided at the time should have had upon them.

¹ Ex 146 (Statement of Kevin Killey).

7. In these circumstances:
- (a) There is no occasion for any findings adverse to IBM to be made.
 - (b) Such findings are unnecessary for the resolution of the questions with which the Commission has indicated it is concerned. It is open to the Commission to reach conclusions about the propriety (or otherwise) of the State's conduct on the basis of the advice the State received and the beliefs held by the State's officers without making findings about the Other Issues.
 - (c) We invite the Commission, for the sake of clarity, to make clear in its final report that it is not making findings about the Other Issues (or like issues).
 - (d) IBM does not seek to comment on the propriety or otherwise of government policy or decision-making and these submissions do not address those aspects of the issues identified by the Commission.
 - (e) There are only a few points which need to be addressed, which are set out below.

Issue 3: Was there any evidence to support the suggestion that IBM would hinder the State or refuse to honour its obligations?

8. The risk perceived by some State officers that IBM would not honour its obligations, cease providing services or improperly hinder the State in contracting with sub-contractors, does not find credible support in conduct by or statements from IBM.
9. The only time the issue of IBM's possible response to a dispute was the focus of any serious comment was long before the go-live date, in January 2009, at a meeting at the offices of the State's external lawyers. The meeting was dealt with in oral evidence by Mr. Doak.² The context was a threat by the State to issue a breach notice to IBM. Mr Doak identified the opportunity that might present to re-set the project.
10. On the other hand, when the State issued a formal notice to remedy breach to IBM on 12 May 2010,³ IBM did not stop working or fail to honour ongoing obligations. It

² T24-115 to T24-117.

³ Settlement Tender Bundle, Vol 1, p 108.

remained committed to the project. It did so throughout, and continuously.

11. Mr Grierson recalled having a “subtle” impression in 2010 that IBM might walk away if the Contract were terminated,⁴ based on a comment said to have been made by Mr Doak that IBM would be like to be able to re-deploy its programming staff to other projects. Mr. Grierson also referred to a question from Mr Doak about whether the dispute could be sorted out or if the parties were “going to war?”⁵ These interactions were not put to Mr Doak for his response.
12. In respect of suggestions that IBM would hinder the State in access to its subcontractors, Mr Lucas recalled that IBM were “cranky” with the State about it directly contacting sub-contractors while the Contract was still on foot.⁶
13. None of the above bears out a threat by IBM to walk away or otherwise improperly hinder the State. IBM’s behaviour in fact suggests (and demonstrates) a desire to assist its customer as much as practicable.

Issue 8: What was the impact of these 35 defects on the Interim Solution (including the nature of such impact and the number of staff affected)?

14. The evidence on this topic was not extensive. We make two points.
15. *First*, as we have observed in previous submissions, caution must be used in drawing any conclusion from the use of the word “defect” in relation to this project. It became a label used to identify (at least) any way in which the software did not meet the ultimate wishes and desires of Queensland Health. It is not a term that necessarily indicates an error by IBM in coding software to meet agreed (contractual) requirements. No conclusion about IBM’s performance should be made on the basis of the use of this label.
16. *Secondly*, the evidence received by the Commission did not extend to identifying whether the 35 “defects” were in fact a result of errors in coding against agreed specifications, a result of underspecification by Queensland Health, or a result of something else. Neither did the evidence extend to quantifying the seriousness and

⁴ Exhibit 149(a) (Statement of Grierson), paragraph 44.

⁵ Exhibit 149(a) (Statement of Grierson), paragraph 67.

⁶ T35-21 (Lucas).

impact of the 35 defects – beyond that they had been identified by Queensland Health as requiring priority.

17. Accordingly, there is no evidential basis to support a finding that the existence of the 35 “defects” represented a breach by IBM of any obligation or reflected adversely on the quality of the software it had developed.

Issue 9: Was there any (or any adequate) evidence to support the perception that the Interim Solution was at risk of collapsing if the Contract were terminated?

18. No technical evidence on this topic was given during the Settlement Hearings.
19. The list of issues which the State refers to in its submissions,⁷ drawn from the statement of Mr Reid, are not matters which on their face:
 - (a) disclosed deficiencies in IBM’s performance under the Contract;
 - (b) were (necessarily) the immediate responsibility of IBM to address.
20. In reality, as we have set out in previous submissions, the system comprising the “Interim Solution” was a combination of software and business processes. This system as a whole was, it is open to say, in a fragile state. That fragile state, and any risk of collapse, was as a result of a range of factors and not because of the software.
21. To the extent there was substance to the general concern about the fragility of the system as a whole, nevertheless there is no sufficient evidence to conclude that the software itself was at any real risk of “collapse”. Indeed, Ms Stewart saw no issue in full responsibility to maintain and upgrade the software devolving to CorpTech.⁸ The software did not “collapse” and continues in use today.

Counsel for IBM Australia Ltd

24 June 2013

⁷ Submissions of the State, paragraph 109.

⁸ T29-104 lines 30-45 (Stewart).