QUEENSLAND HEALTH PAYROLL SYSTEM COMMISSION OF INQUIRY

(*Commissions of Inquiry Act*)

SUBMISSIONS OF THE FORMER HEALTH MINISTER

Introduction

1. Paul Thomas Lucas has assisted the Commission by voluntarily attending an interview with Senior Counsel Assisting the Commission, providing a lengthy and detailed statement, identifying additional relevant documents and appearing before the Commission of Inquiry to give evidence and be examined by Senior Counsel Assisting and Counsel for other interested persons.

2. There are a range of issues identified for comment in the list of issues provided by Counsel Assisting the Commission on 5 June 2013. The majority of those issues are not directly relevant to Mr Lucas. This submission is confined to the matters that directly concern Mr Lucas.

Position of Mr Lucas and his limited involvement

3. Mr Lucas was commissioned as the Minister for Health on 26 March 2009 and served in that office until 21 February 2011.

4. The department for which Mr Lucas was the responsible Minister was known as Queensland Health (**QH**). When Mr Lucas became Minister for Health, QH was the internal customer of another department of the State, namely, the Department of Public Works (**DPW**). The State of Queensland, through the latter department, had entered into a contract of 5 December 2007 (**IBM Contract**) with IBM Australia Limited (**IBM**). By the IBM Contract, the State had appointed IBM as the prime contractor for the Shared Services Solutions Program for the State.

5. The systems and services to be procured under the IBM Contract included a payroll system to replace QH's then operating payroll system known as LATTICE.

6. DPW was responsible for managing the IBM Contract, as amended from time, and all Statements of Work entered into under the IBM Contract.

7. The software replacement for LATTICE to be provided under the IBM Contract was an SAP payroll system and a Workbrain rostering system. Mr Lucas was not involved in or consulted about a decision to commence full operation of these replacement systems in March 2010 or at all. Shortly after they commenced full operation, it was apparent that those systems were suffering significant difficulties. Those difficulties placed State in dispute with IBM.

8. As Deputy Premier from 13 September 2007 until 16 September 2011, Mr Lucas served as a member of the Cabinet Budget Review Committee (**CBRC**).

9. Mr Lucas's involvement, in relation to settlement of the dispute with IBM, was:

   (a) in July 2010, he was a member of CBRC which authorised the Director-General of DPW to negotiate with IBM with a view to reaching a mutually acceptable settlement;

   (b) in August 2010, Mr Lucas was a member of CBRC which decided to settle with IBM on the terms to be set out in a written supplemental agreement (**supplemental agreement**), and to authorise him and Mr Schwarten, the Minister for Public Works and Information and Communication Technology, to agree on the terms of the supplemental agreement;

   (c) in September 2010, Mr Lucas, as Minister for Health, approved the terms of the supplemental agreement for forwarding to CBRC; and

(d) in June 2011, he was a member of CBRC, which approved the final terms of the supplemental agreement.

The terms of the supplemental agreement

10. The supplemental agreement, as its name suggests, was supplemental to the IBM Contract. It varied the terms and conditions of the IBM Contract. It replaced the "Deliverables", pursuant to Statement of Work 8, with a "body of work" comprising:

(a) the replication of the SAP and Workbrain code and configuration items;

(b) the Concurrent Employment solution, which related to approximately 1,600 employees who were employed in a full time capacity across two or more part-time positions, concurrently;

(c) rectification of defects identified in the spreadsheets referred to in Item 1 of Schedule 1 of the supplemental agreement;

(d) rectification of such defects or items as were contained in variations by agreement of the parties; and

(e) rectification of any new "severity level 1" or "severity level 2" defects that arose within the period to 31 October 2010.

11. Clause 3.3 of the supplemental agreement set out a range of other conditions aimed at ensuring that the body of work was able to be conducted.

12. The supplemental agreement recorded the following compromises with respect to the payments due to or claimed by IBM.

(a) IBM gave up its claim to be paid $2.035 million (GST inclusive) for project acceptance work, which amount had been due and payable on 5 August 2010.

(b) IBM agreed to accept 50% of the $1,581,494 (GST inclusive) for retention work, which had been due to be paid on 31 August 2010.

(c) The State agreed to pay IBM the $1.87 million (GST inclusive) for SAP support stack work, which amount had been due and payable on 8 August 2010.

(d) IBM gave up its claim for damages for alleged breach of the Contract by the State.

13. IBM released and discharged the State from any and all claims. That release was conditioned only upon the release in IBM's favour coming into effect. The nature of the State's release of IBM is considered below.

14. By clause 6, the LATTICE Statements of Work (Statements of Work 5, 7, 8, 8a and 12) terminated from 31 October 2010, without either party having any liability to the other 'in respect of such termination'. Other Statements of Work under the IBM Contract continued according to their terms.

The CBRC decision to negotiate

15. The CBRC decision to authorise negotiations with IBM was undoubtedly correct:

(a) as a model litigant, the State should always seek to resolve disputes before recourse to the courts;

(b) there were uncertainties about the true legal position of the State in the dispute, which could not be resolved without further extensive investigation, so that it would not have been appropriate for the State to adopt a "shoot first and ask questions later" approach to the dispute with IBM; and

(c) such negotiations are properly conducted by senior officers of the relevant department, with appropriate professional assistance from legal and technical advisers.

The CBRC decisions to enter into the supplemental agreement

16. The subsequent decisions to authorise the entry into the supplemental agreement were the subject of questions directed to Mr Lucas and a number of the issues posed by the Counsel Assisting the Commission.

17. In July, August and September 2010, the undoubted but not limitless, resources of the State might have been applied to litigate the dispute with IBM. By then the State had given its notice, alleging IBM to have breached the IBM Contract, and IBM had responded with its own notice, contending that the State was in breach.

18. The appeal of litigation when a significant dispute arises is understandable. However, the State, and those charged with its stewardship, must have a different perspective: that of a party with interests and responsibilities wider than the conduct of the particular dispute.

Considerations of the CBRC

19. It is wrong to speak of the CBRC having a primary consideration in resolving matters between IBM and the State. The matter was complex, as the CBRC submissions demonstrated. Each of the following matters bore on the CBRC decisions to reach a negotiated agreement with IBM.

20. ***First***, the CBRC is a committee of the cabinet. It operates at the most senior level of the executive government. The cabinet handbook refers to the vigorous processes required before a matter comes before the CBRC. Those processes are aimed at ensuring that submissions to CBRC are refined through consultation

across all relevant departments including the Treasury. The members of the CBRC do not have a management function but a governance function.

21. In discharging that governance function, the CBRC receives and acts on advice. It has not been suggested by any questioner of Mr Lucas that the CBRC should have disregarded the legal advice put before it on each occasion. On its face that advice was extensive and detailed. It was provided by an external firm and reviewed by the State's internal legal advisers. Both sources were reputable and experienced in the relevant specialist fields. The advice was consistent. It did not call for, expressly or by necessary inference, any further advice before the specific recommendations put to the CBRC were considered.

22. ***Second***, as the legal advice provided to the CBRC made clear, the outcome of any litigation with IBM could not have been forecast with any reasonable certainty in the absence of months of further investigation, consideration and research. It is frankly an extremely heroic assumption to imagine that, without those months of further work, advice about the State's position in the dispute from the Solicitor General or a Senior Counsel could have improved the circumstances in which decisions were made by the CBRC. The legal advice also noted that the State had already arguably lost the right to terminate the IBM Contract based upon the notice it had given in June 2010. Further delay while investigations were undertaken, would likely have confirmed that outcome.

23. ***Third***, although the legal advice to the CBRC was that the State had a reasonable claim against IBM, it could not be said that the State's position was impregnable or that IBM could not succeed in any defence. An assessment of the State's prospects in the dispute could not be made on the assumption that the departmental officers who dealt with IBM acted with the same level of commercial and contractual training, knowledge or experience as the IBM representatives with whom they dealt. The

State's public service officers are charged with administering the various units of public administration in accordance with public sector policies and procedures that have evolved over 150 years. These policies and procedures do not accord with private sector commercial practice.

24. IBM's position[1] was that:

> *"there are no issues preventing the effective, stable and repeatable operation and support of the payroll system for scope which IBM is responsible.*
>
> *IBM maintains that the State has a working payroll system which has been delivered by IBM in accordance with the Contract. In fact, IBM has completed 11 payruns, including 3 payruns which were completed in accordance with the Acceptance Criteria set out in CR208. ...*
>
> *Any issues experienced by the State related to the pay run process, is the State's responsibility. IBM is aware of two significant issues. First, the significant increase in the transactional and data volumes which WorkBrain is required to process, than what was originally estimated by the State. As at the June pay runs the increase is approximately six times greater than what was originally estimated by the State. Second, the number of users is far higher than what was originally estimated by the State. These issues, as with other factors, which may be impacting the pay run process, are not IBM's responsibility."*

25. It had been the experience of Mr Lucas that litigation between the State and commercial entities could lead to unexpectedly poor results for the State when the actions of public servants are examined in a commercial contractual framework; a framework in which they were not experienced and of which they were not mindful at the relevant times. The Auditor General had identified flaws in the State's management of the IBM Contract. These flaws could be further investigated and

[1] See annexure Q to the Affidavit of Mr Charleston and particularly see the document entitled Settlement Terms Sheet and IBM's 'Position & Reasons' dated 13 August 2010 (page 3 of 9).

used by IBM in any litigation as a basis for denying any liability for alleged defects or as a basis for contribution by the State. In his oral evidence Mr Lucas mentioned the Moreton Bay shark cages litigation. The TrakHealth litigation is another relevant example. Some relevant clippings are attached.

26. As the advice to the CBRC noted, if the State pursued and failed in litigation, it would likely be ordered to pay IBM the sums due under the IBM Contract and any damages for breach or repudiation of contract; it would bear all its own legal costs and be ordered to pay the assessed costs of IBM.

27. ***Fourth***, the legal, IT consulting and departmental advice to the CBRC identified the risk of further disruption to the QH payroll payments if the State sued IBM. Successful negotiations with IBM could (and did) eliminate that risk. IBM had taken the formal position that the State was in breach of the IBM Contract. IBM could have accepted any termination (or continued non-payment of sums due) as a repudiation by the State and considered itself released from further performance of the IBM Contract. Questions put to Mr Lucas proceeded on the assumption that this could not occur. There was, at the relevant time, no evidentiary basis for that assumption. If the State terminated the IBM Contract (or IBM accepted the State's failure to pay as a repudiation) further assistance was not likely.

28. IBM had put the State on notice that it would defend its contractual relationships with its subcontractors. Advice from Crown Law appended to the 26 August 2010 CBRC submission pointed out that there would likely be restraints in place for individual personnel and for subcontractors and that the State could be exposed to liability for inducing breach of contract or interference in contractual relations should it continue to seek to 'poach' IBM staff and subcontractors.

29. The removal of the risk that IBM would "walk away" from the project and prevent or dissuade its contractors from assisting DPW (CorpTech) to transition to the

management of the project was a highly relevant consideration for the CBRC. A significant number of employees had been seriously affected by the payroll problems since March 2010. Avoiding any further disruption and resolving existing difficulties as efficiently as possible were valuable outcomes of the settlement for the State.

30. It would be quite inappropriate to attempt to evaluate the settlement on strictly commercial terms, as if the State were simply a business. A view that the dispute with IBM was the same as any contractual dispute between commercial actors is quite wrong. The adverse effects of the payroll disruption on the personal situations of health workers and their families should not be excluded or discounted. The risk of further harm to indisputably innocent individuals could not be reduced by commencing litigation – in fact it could only be exacerbated. As Mr Lucas said in evidence:

"I'll tell you one lot of people who weren't at fault and they were our staff and they were the ones who were paramount in relation to considering whose best interests that was because even if we took action and even if we were partly successful, and there is no guarantee of that, what would that have meant three years down the track when they'd been in default on their mortgage, as many have been, because the payroll system didn't operate correctly."[2]

31. It was suggested that this was 'emotive' language. With respect, the issue of working people not receiving pay in the amount and on the day expected increases the likelihood of default on mortgages, disconnection of utilities for failure to pay bills on time, and difficulty in meeting the costs of basic items such as food and clothing. It also causes significant distress and anxiety to employees and their families.

[2] T35-19, I18-25.

32. The problems with the QH payroll were not largely resolved by the time of the negotiations with IBM. On 20 September 2010, it was estimated that about 50 staff would not be paid that Thursday.[3] One employee commented: 'Yes it does seem like the problems have decreased, but they are still there and the stress does not go away'. 'It has caused distress to my family and I haven't had the guts to get my tax done because I know it isn't correct'. The Queensland Nurses Union state secretary Gay Hawksworth said the union had heard from nurses every day who had not received the correct pays – some for six months. The article reported "68 people unpaid last week while in the previous two pay cycles 97 and 130 employees respectively did not receive their pays'. As at 5 May 2010 there had been 158 'nil pays' that is 158 staff received no pay[4]. The extent of serious underpayments might be gauged by the 2,470 QH employees who had requested access to 'interim cash payments'[5].

33. ***Fifth***, litigation with IBM was unlikely to be concluded cheaply or speedily. IBM is a very significant international corporation, well-advised and well-resourced, ranked by Fortune Magazine in 2012 as the second largest US firm by number of employees, the fourth largest by market capitalisation, the ninth most profitable, and the ninetieth largest by revenue. In litigation about its performance of the IBM Contract, it may reasonably be assumed that IBM would defend its performance and reputation.

34. The litigation would have been costly in monetary terms for the State. Even if the State succeeded and obtained an award of costs in its favour, the State would likely be some millions of dollars out of pocket in respect of its own actual costs. It would

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[3] Caldwell, Anna, 20 September 2010, 'Queensland Health payroll debacle still not resolved after six months', www.couriermail.com.au, accessed 24 June 2013.
[4] Estimates brief number 31.8, 'Payroll – incorrect payments', John Cairns Deputy Director General Human Resource Services.
[5] Estimates brief number 31.11 John Cairns, Deputy Director General Human Resource Services Estimates Committee 2011.

also have been costly in terms of the time of State public servants who would have to be involved in the preparation of the State's case, giving statements, identifying and producing documents and generally assisting with the prosecution of the State's claim.

35. It was likely many of the public servants who would be witnesses for or otherwise assist the State in the litigation would also be involved in addressing the ongoing problems with the QH payroll system. The delay and disruption consequent upon taking such persons "off-line" or "off task" to assist in a legal case can readily be appreciated. The less tangible effects of the stress of such a dual role on key individuals were also a relevant matter.

36. ***Sixth***, the supplemental agreement provided a range of other benefits for the State that could not have been obtained through litigation of the dispute. These included extended support by IBM for pay runs at no additional cost to the State, IBM's participation in progress review meetings in the transition to CorpTech taking over technical support for the QH payroll system from 31 October 2010, and commitments that IBM's personnel would remain available to further assist CorpTech after that date.

37. ***Seventh***, IBM had foreshadowed a claim against the State. Further legal, administrative a personnel costs would be incurred in defending the State against such a claim.

38. ***Finally***, although a mutual release of some kind was always the most likely outcome of any negotiated settlement, the release negotiated in favour of IBM was limited and conditional. It was limited to IBM's obligations, acts and omissions prior to 1 September 2010. It was conditional upon all severity level 1 defects being rectified, and there being no material breaches of the supplemental agreement that had not been remedied by 31 October 2010. The release of the State by IBM was

conditional upon the State's release of IBM coming into effect, but otherwise not limited or conditional.

Soundness of the CBRC decisions

39. In the circumstances, the CBRC decisions to negotiate and agree on the terms of the supplemental agreement were reasonable. The negotiated resolution of the dispute with IBM was concluded within a few months; it gave the State certainty as to the outcome; it provided an incentive for IBM to cooperate and resolve level 1 issues quickly; and it did not distract the individuals actually seeking to remedy the problems with the QH payroll system from their principal tasks.

40. Prior to the agreement, there had been substantial differences between the parties as to whether there were any issues preventing the effective, stable and repeatable operation and support of the payroll system; and IBM and the State had not been *ad idem* as to the defects to be remedied.[6] There had also been a substantial difference as between the parties in respect of the monies owed by the State to IBM.[7] By entering into the supplemental agreement, the State obtained certainty as to the work to be done, including the rectification of defects, the sums to be paid to IBM and the certainty of no further claims by IBM for its work on this aspect of the project.

Whether the CBRC decisions were political

41. There does not appear to be any utility in considering whether the CBRC decisions were "political" in any particular sense. They were decisions of executive government, made in accordance with recommendations and advice provided by the departments of the State to the cabinet committee.

[6] See annexure Q to the Affidavit of Mr Charleston and particularly see the document entitled Settlement Terms Sheet and IBM's 'Position & Reasons' dated 13 August 2010 (page 2 of 9).

42. A decision contrary to departmental advice might more easily be identified as having the potential to be "political" in the sense of being driven by considerations peculiar to the decision-makers. Decisions, such as those with which the Commission is concerned, made in accordance with advice are only political in the sense that they are decisions of executive government.

43. In questions put to Mr Lucas, the Commissioner suggested that a decision might be "political" in the sense that it was one that sought public approval or appreciation. As Mr Lucas frankly stated in his evidence, the political damage flowing from the QH payroll problems had already been done by the time the CBRC came to consider the first recommendations in 2010. That damage could not be undone. In fact, as Mr Lucas said, it would have been more politically astute to sue IBM and so blame it for all the QH payroll woes.

44. In the circumstances, Mr Lucas' evidence, that the CBRC decisions were not taken because they represented the most politically or publicly acceptable outcome, ought to be accepted. Rather they were decisions of executive government made in accordance with detailed recommendations and on advice provided by persons with relevant knowledge and expertise. Other persons might have taken different views. That matters not, save that it may be reasonably inferred that a decision contrary to the recommendations and advice put before the CBRC would likely have been a "political" decision, in the somewhat pejorative sense used in questions before the Commission.

24 June 2013

[7] Statement of Charlson, annexure Q, Item 10 of the settlement terms document of 13 August 2010, p 7 of 9

- Cloud Computing

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Government

State seeking e-health damages

- by: *Sean Parnell*
- From: *The Australian*
- April 22, 2008 12:00AM

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THE Queensland Government has raised the stakes in its legal row with developer TrakHealth and is seeking almost $100 million in compensation for a failed e-health contract.

When Queensland Health scrapped a $30 million hospital software contract with TrakHealth three years ago, the company took Supreme Court action to recoup $18 million in losses and unspecified damages.

TrakHealth, which was to supply a patient administration system and a clinical information system, accused the government of compromising the project and damaging its reputation.

"Queensland Health's behaviour was unreasonable and unconscionable," a TrakHealth spokesman argued at the time, as the company sought work elsewhere.

In its defence, Queensland Health involved US-based InterSystems, which now owns TrakHealth, and database pioneer Terry Ragon, filing reams of documents in the Brisbane Supreme Court to demand $21.5 million in compensation.

Queensland Health argued that TrakHealth misrepresented itself and its product, MedTrak, ahead of an order being placed in 2003, while Mr Ragon, the founder of US-based InterSystems, failed to intervene to limit Queensland Health's losses.

Earlier this month, Queensland Health amended its defence and counterclaim to seek $98.2 million in compensation to cover the increased cost of delivering such software in the current market.

Queensland Health estimates it would cost $132 million to have a similar system installed now, not to mention the cost of keeping other systems going in the meantime, well beyond the $33.81 million involved in the original deal.

"To put Queensland Health in the position in which it would have been had the plaintiff performed its obligations under the contract, it would be necessary to procure from a different software supplier a product equivalent to that which the plaintiff contracted to deliver," court documents state.

A spokesman for TrakHealth, InterSystems and Mr Ragon declined to comment.

It is understood they have until today to file documents in the Supreme Court to respond to Queensland Health's amended defence and counterclaim.

A Queensland Health spokesman said e-health remained pivotal to the future of sustainable healthcare and the department had committed to a massive information and communications technology strategy.

"This strategy aims to create a consolidated holistic view of patient care by enabling ICT investment over the next four to seven years," the spokesman said.

"It will ensure Queensland is moving towards supporting the electronic collection, transmission, safe storage and access of patient and clinical information that supports the improvement of patient care."

Queensland Health's priorities in the strategy are discharge summaries, results reporting, order entries, electronic clinical notes, statewide scheduling and comprehensive medication management.

The department, which plans to introduce new technology systems and capability "where necessary", has engaged alliance partners EDS (for enterprise architecture) and PricewaterhouseCoopers (for change and program management) to assist with this stage of the strategy.

In the Australian market, TrakHealth is most active in Victoria, but it also has contracts in Asia, New Zealand and Britain.

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Qld Health buries TrakHealth suit

Summary: *Queensland Health has settled its long-running lawsuit with e-health vendor TrakHealth and its parent InterSystems.*

By Renai LeMay | April 14, 2009 -- 00:44 GMT (10:44 AEST)

in brief Queensland Health has settled its long-running lawsuit with e-health vendor TrakHealth and its parent InterSystems.

TrakHealth dragged Queensland Health into the state's Supreme Court in December 2005 after the department terminated a contract with the vendor for the implementation of the department's Clinical Information System project and related software. The e-health vendor claimed it was owed damages.

However, Queensland filed a counter-claim against the e-health vendor as well as InterSystems and its CEO Terry Ragon.

"The parties have now agreed [to] a settlement which resolves all matters in issue between them, including all claims and counter-claims in the proceedings, to their mutual satisfaction," a statement issued by TrakHealth this morning said without providing further details.

Topics: Health, Government, Government AU