

QUEENSLAND HEALTH PAYROLL SYSTEM COMMISSION OF
INQUIRY

Before the Honourable Richard Chesterman AORFD QC

SUBMISSIONS ON BEHALF OF

THE HONOURABLE ROBERT EVAN SCHWARTEN

1. These submissions should be read together with the signed witness Statement of the Honourable Robert Swarten dated 20 May 2013¹ and the Supplemental Statement², both of which were tendered during Mr Swarten's appearance before the Commission on 27 May 2013.

2. Mr Swarten's service as a Cabinet Minister in various Queensland government departments is set out in paragraph 4 of his witness Statement³.

Cabinet Government

3. The *Constitution of Queensland 2001* provides that "*there must be a Cabinet consisting of the Premier and a number of other ministers*". Section 42 further provides that "*The Cabinet is collectively responsible to the Parliament*".

¹ Exhibit 138a.

² Exhibit 138b.

³ Exhibit 138a, paragraph 4.

SUBMISSIONS
Filed on behalf of the
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Minister

4. During all relevant times, Mr Swarten held appointment as a Minister of the State in accordance with Section 43 of the *Constitution of Queensland* 2001.
5. Section 51 of the *Constitution of Queensland* 2001 provides that “*the Executive Government of the State of Queensland (the State) has all the powers, and the legal capacity, of an individual*”. Section 53 of the *Constitution of Queensland* 2001 provides that “*the State may carry out commercial activities*”.
6. During the period relevant to the Commission’s inquiry into “*settlement*”, Mr Swarten served as Minister for Public Works and Minister for Information and Communication Technology.
7. At all times Mr Swarten discharged his duties as Minister in good faith, with integrity and diligence. He acted on the advice of his Department and in accordance with proper Cabinet procedures, including the rigorous processes of the Cabinet Budget Review Committee.

Cabinet Budget Review Committee

8. Cabinet Budget Review Committee procedures require careful consultation and scrutiny by senior public servants in the preparation of submissions leading to decision making.
9. In evidence, before the Commission of Inquiry, is the record of the Cabinet Budget Review Committee decision of 22 July 2010⁴, to which is attached the Policy Submission signed by the Honourable Robert Swarten MP⁵. That submission includes a detailed, careful setting out of the options facing government, namely:
 - negotiating a settlement with IBM⁶;

⁴ Decision no. 3019.

⁵ Submission No. 3962.

⁶ Paragraphs 44 to 56 and Table 1.

- terminating the contract with IBM⁷;
 - suspending the contract⁸; and
 - continuing with the contract on the current terms⁹.
10. The consultation addendum to this CBRC Submission indicates that consultation had occurred with senior officers of the Department of Premier and Cabinet, Queensland Health and Queensland Treasury.
11. Attached to the Cabinet Submission are 14 attachments including Crown Law Advice, 3 sets of Advice from the law firm Mallesons Stephen Jaques and a KPMG Risk Assessment.
12. The Cabinet Budget Review Committee submission signed by Mr Swarten on 21 July 2010 is a comprehensive document based on a careful and disciplined approach.
13. The Cabinet Budget Review Committee decision of 26 August 2010¹⁰ also reflects a careful and disciplined approach. That decision was based on a policy submission¹¹ signed by the Honourable Robert Swarten on 23 August 2010 on the advice of his Department. This Submission set out the options for government, namely:
- continuing the contract under supplemental terms and conditions¹²; and
 - termination of the contract for default¹³.

That Submission also attaches two legal advices from Mallesons Stephen Jaques and two Crown Law advices.

⁷ Paragraphs 57 to 70.

⁸ Paragraphs 71 to 77.

⁹ Paragraphs 78 to 88.

¹⁰ Decision No. 3040.

¹¹ Submission No. 3979.

¹² Paragraphs 16 to 25.

¹³ Paragraphs 26 to 32.

14. Throughout this difficult process, the Honourable Robert Swarten discharged his duties as a Minister with care and diligence. His actions as a Minister throughout were based on the advice of his Department which had taken steps to obtain legal advice and a risk assessment.

Commission's Duty of Procedural Fairness

15. It is well established that a Commission of Inquiry such as the present one has a duty of procedural fairness. In *Keating v Morris & Ors; Leck v Morris & Ors* [2005] QSC 243, Moynihan J of the Queensland Supreme Court observed at paragraph 36:

“[36] It is of ‘fundamental importance’ that parties and the general public have full confidence in the fairness of decisions and impartiality of the decision makers to whom the rules of procedural fairness applies.”

16. In *Carruthers v Connolly* [1998] 1 Qd R 339 at 371, Thomas J of the Queensland Supreme Court also discussed the importance of procedural fairness in the conduct of a Commission of an Inquiry.
17. This submission will now deal with the issues raised by the Commission regarding the “*settlement*” phase.

Issue 1 - Was it provident for the State of Queensland (“the State”) to enter into the Supplemental Deed dated 22 September 2010?

18. Yes, it was provident for the State of Queensland to enter into the Supplemental Deed dated 22 September 2010 having regard to the evidence at the time, the due governmental processes followed and the possible detrimental alternatives. The execution of the Supplemental Deed provided the least detrimental outcome for the State in all the circumstances.

Issue 2 - Before doing so, ought the State to have obtained an Opinion from either the Solicitor-General or Senior Counsel?

19. It was suggested by the Commission during the course of the hearings that the State ought to have obtained an opinion on prospects and quantum provided by Solicitor-General or Senior Counsel. It is far from clear whether this was necessary or desirable in the circumstances confronting the State and having regard to the legal opinions already obtained.
20. In particular, Crown Law had been asked to advise comprehensively by Mr James Brown, as noted in the Crown Law advice of 23 June 2010 on the way forward for the State:

“I understand that you have requested Crown Law to advise on the situation presently existing between the State and IBM and the courses of action open to the State to bring the matter to a satisfactory conclusion.”

21. An experienced and able Assistant Crown Solicitor gave written advice on two occasions¹⁴. At no stage did Crown Law advise the government of the State that it was necessary or desirable to obtain an opinion from either the Solicitor-General or Senior Counsel. Crown Law officers were not challenged on this advice; indeed no Crown Law officer was even called before the Inquiry to give evidence or be questioned.
22. Similarly the State received legal advice from Mallesons Stephens Jaques and from Clayton Utz. Both firms have experience and expertise in commercial contracts. Mallesons was not called to give evidence on the point. A solicitor from Clayton Utz, Mr Jeremy Charlston was called and questioned at length about a file note on the 19 August 2010 but it was never suggested to Mr Charlston by the Commission or Counsel assisting that Clayton Utz had been derelict in their duty in failing to advise the State to obtain an opinion from either the Solicitor-General or Senior Counsel.

¹⁴ 23 June 2010 and 20 July 2010.

23. An exhibit tendered before the Commission (Exhibit 157) indicates that \$500,000.00 was allocated for the cost of retaining Clayton Utz to assist in contract settlement issues. This was done at the request of Mr James Brown, Executive Director of CorpTech, to assist in the negotiation process. It was not suggested in the course of the hearing by Counsel assisting the Commission that it was necessary or desirable for such an opinion to have been obtained in order to facilitate effective negotiation. This proposition was never put to Mr Charlston.
24. It appears to be suggested by the Commission that senior public servants, or perhaps even Ministers of the Crown, should of their own motion have sought an opinion from either the Solicitor-General or Senior Counsel, despite the fact Crown Law did not so advise. This is a novel suggestion.

Issue 3 - Was there any (or any adequate) evidence that there existed a real risk that if the State terminated the 5 December 2007 Contract with IBM ("the Contract"), that IBM would:

- a) **not honour its post-termination obligations under the Contract;**
 - b) **immediately cease providing services under the Contract (including remedying Severity 2 defects);**
 - c) **hinder the State seeking to contract with existing IBM sub-contractors including Infor and Presence of IT?**
25. This is a somewhat puzzling question for there was abundant evidence in the documents and in the oral testimony of such a real risk.
26. Crown Law advice dated 20 July 2010 at paragraph 4.3(d) and 4.4 pointed to "*the risk of a claim of inducing breach of contract by IBM's subcontractors*".

"For completeness, I note that even if the State does terminate the Payroll Contract, the risk of a claim of inducing breach of contract by IBM's subcontractors remains present in the State's dealings with those subcontractors. While (as noted in paragraph 4.3(b)) it is unlikely that the subcontractors have agreed not to engage directly with the State in their

subcontractor agreements, the subcontractors' contracts with IBM will not necessarily terminate on termination of the Payroll Contract and IBM may continue to have rights under those contracts to require subcontractors to engage in work as directed by IBM. The State might be seen as interfering with the relationship between IBM and a subcontractor if it seeks to directly engage a subcontractor to do work that would detract from the subcontractor's capacity to carry out its obligations to IBM."

27. This Advice was attached to both Cabinet Budget Review Committee submissions by Minister Schwarten¹⁵ leading to the relevant CBRC decisions.
28. Mr Mal Grierson, Director of Public Works, a highly experienced and able public servant, gave oral evidence of such a risk¹⁶ IBM in response to the Notice to Show Cause had set out its own review of its legal position and the actions available to it¹⁷, asserting that *"the State will be at risk of repudiating the Contract in the event it terminates the Contract"*.
29. Furthermore, Question 3 as currently framed fails to have proper regard to the need for goodwill above and beyond IBM's mere formal compliance with its post-termination obligations under the contract. Former Premier Bligh identified in her evidence the importance of that goodwill¹⁸.

Issue 4 - In settling with IBM, did the State give too much emphasis to the following:

- a) **the criticisms in the Auditor-General's Report tabled 29 June 2010 of the conduct of the State and difficulties with the changing project scope as outlined in that Report;**
- b) **an assertion that IBM would sue the State if it terminated the Contract;**

¹⁵ Dated 22 July 2010 and 26 August 2010.

¹⁶ Transcript of Day 34, 29 May 2013 at pages 31, 42, 76, 77, 62, 10, 22 and 41.

¹⁷ Letter of Blake Dawson dated 6 July 2010 which was Attachment 7 to the CBRC submission of 22 July 2010.

¹⁸ Transcript of Day 32, 27 May 2013 at pages 31 and 37.

- c) **that CorpTech's involvement in remedying defects and in carrying out enhancements to the Interim Solution, might void the warranties contained in the Contract; and**
 - d) **the risks of litigation.**
30. The Auditor-General is an officer of the Parliament. He is not subject to direction from any person. Indeed this is specifically provided for in the *Auditor-General Act 2009* at Section 8.
31. In accordance with the doctrine of representative and responsible government, the government of the day is accountable to the Parliament and, through the Parliament, to the people of Queensland. In the circumstances it is incumbent upon the State to have due regard to the report of the Auditor-General as an officer of the Parliament. Section 42 of the *Constitution of Queensland 2001* expressly provides that "*the Cabinet is collectively responsible to the Parliament*".
32. As to the risks of litigation with litigation with IBM there is clear evidence of such risks not only from the two Crown Law advices, and that of Mallesons Stephen Jaques but also from the Risk Assessment undertaken by KPMG and attached to Minister's Schwarten's submissions to the Cabinet Budget Review Committee¹⁹.

Questions 5 to 9 – concerning the assessment of risk associated with the option of terminating the contract with IBM.

- 1 Question 5 is posed in the abstract and does not have regard to the critical evidence of many staff members not being paid or being paid incorrectly during the period in question. In particular, the question fails to have regard to the evidence of hardship to such employees, including default on mortgages²⁰, loss of credit

¹⁹ Submission Nos 3962 and 3979.

²⁰ Oral evidence of former Minister Lucas on 30 May 2013 at pages 8, 19, 23 and 28.

rating²¹ and the risk of suicide²². The premise of the question also fails to have regard to the careful setting out of considerations in former minister Swarten's submissions to the budget review committee. These submissions set out the relevant considerations for considerations by the Government, including all relevant pros and cons.

- 2 The assessment of risks and disadvantages appears at paragraphs 62 to 67 of the Cabinet Budget Review Committee submission of 21 July 2010. This information was furnished to Minister Swarten by his Department. The departmental advice to Government was that "*a very real scenario is that IBM may walk out immediately it receives the Notice of Termination*"²³.
- 3 Reference is made also to a possible claim by IBM for wrongful termination²⁴.
- 4 A number of practical difficulties in pursuing action against IBM were identified including poor or inadequate project record keeping, and the effect of changing project personnel on the management of the project from the State perspective²⁵.
- 5 Reference was also made to the Auditor-General's Report to Parliament No. 7 for 2010 which provided significant detail on shortcomings in the State's governance and management of the project.
- 6 A preliminary cost estimate for the State pursuing the litigation was between \$3,000,000.00 (excluding GST) to \$7,000,000.00 (excluding GST)²⁶.

Questions 10 and 11 – Concerning Mr Reid

- 7 These are matters for Mr Reid. Former Minister Swarten signed the Supplemental Deed based on the written recommendation of his Director-General, Mr M Grierson, and the Director-General of Health, Mr Reid. There was nothing

²¹ Ibid, page 15 and 23.

²² Oral evidence of former Minister Swarten on 27 May 2013 at page 68.

²³ CBRC Submission of 21 July 2010, paragraph 62.

²⁴ Ibid, paragraphs 63 and 64.

²⁵ Ibid, paragraph 65.

²⁶ Ibid, paragraph 66.

before Mr Schwarten to suggest that Mr Reid was not carrying out his duty in a proper fashion.

Questions 12 to 14 concern Mr Grierson's negotiations with IBM on 19 August 2010 and the negotiating protocols established by Clayton Utz

- 8 A spring can rise no higher than its source. The source of authority to enter into negotiations was the CBRC Decision of 23 July 2010 at Decision 4: *"to authorise the Director-General, Department of Public Works, to act as the State's delegate in progressing the preferred option"*.
- 9 That is exactly what Mr Grierson did. Mr Grierson's department had decided to retain Clayton Utz to assist in negotiation and develop protocols. Those negotiations had produced little progress.
- 10 Question 14 is a hypothetical question. One might equally speculate that a much worse outcome may have been achieved for the State had Mr Grierson not acted as he did.
- 11 In the Supplemental Witness Statement of the Honourable Robert Schwarten tendered in evidence on 27 May 2013²⁷, Mr Schwarten observed at paragraph 13:

"13. I had confidence at all material times and continue to have confidence in the experience and expertise of Director General Grierson to conduct those negotiations and to seek to arrive at a settlement."

- 12 The Honourable Robert Schwarten adheres to that view.

Question 15 - Did Mr Grierson negotiate with IBM on 19 August 2010 within the parameters set by the Cabinet Budget Review Committee Decision of 22 July 2010?

- 13 Yes.

Question 16 - If the answer to Issue 15 above is "no", in what respects and to what extent did Mr Grierson depart from those parameters?

- 14 In view of the answer to Question 15, this question does not arise.

²⁷ Exhibit 138b.



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