QUEENSLAND HEALTH PAYROLL COMMISSION OF INQUIRY

SUBMISSIONS OF ACCENTURE AUSTRALIA LTD

1. Accenture Australia Ltd (**"Accenture"**) sought leave in early March 2013 to appear as a party with an interest in this inquiry.[1] Although it had been unsuccessful in its bid to provide the payroll system that is now under inquiry, and so had no role in the problems that ensued, Accenture was concerned that others involved in the inquiry would seek to deflect responsibility or confuse the issues by casting aspersions toward Accenture and its personnel, however groundless. In that context, Accenture argued that it should be given leave to appear because of (among other things) the risk of adverse submissions or comment by other parties to the inquiry, including through written submissions.[2]

2. Various indications were given by counsel assisting the Commissioner that only parties at risk of adverse findings or comment by the Commissioner would be granted leave to appear as interested parties[3]. Accenture was not granted leave to appear as a party with an interest in the inquiry and so is not a party against whom the Commissioner has indicated an intention to make adverse findings.[4]

3. Having been granted no right to cross–examine witnesses or otherwise participate in the evidentiary hearings, Accenture has unfairly been subjected publically to serious but unfounded criticism by a witness before the inquiry, and by counsel assisting the inquiry in paragraph 39 of their submissions to the Commissioner dated 26 April 2013 (the

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[1] Letters dated 5 March 2013 and 7 March 2013 from DLA Piper to the Commissioner's Office.

[2] Letter dated 7 March 2013 from DLA Piper to the Commissioner's Office.

[3] Discussion of 6 March 2013 between Rachel Walsh of DLA Piper and Official Solicitor to the Commission.

[4] Letter dated 7 March 2013 from the Commissioner's Office to DLA Piper and discussion of 11 March 2013 between Rachel Walsh of DLA Piper and Senior Counsel assisting the Commissioner.

Submissions). Those submissions have been published on the Commission's publically available website, despite Accenture's (and Mr Porter's) objections.[5]

4. It is important to put into a proper legal and factual context the evidence and submissions relating to pages 3 and 4 of Exhibit 32, being, respectively, an email from Mr Bloomfield to Mr Suprenant of IBM dated 3 August 2007 and an undated draft signed off "Simon", found in Mr Bloomfield's "draft box" on IBM's email system (the **email**).

5. Paragraph 39 of the Submissions recites (inaccurately and out of context) comments made by Barbara Perrott and Gerard Bradley about the email, asserting that Ms Perrott stated that the email suggested a level of collusion between SAP and Accenture and that it "evidences an attempt by Accenture to deprive the procurement process from the competitive environment for which Corp Tech was hoping".

6. Firstly, Ms Perrott did not make the competitive environment comment; Mr Bradley did. Very importantly, Mr Bradley's comment was directed towards SAP's behaviour, not Accenture's.

7. Secondly, it is also important to note that neither Ms Perrott nor Mr Bradley had seen the email until shortly before giving their evidence, and neither had any first-hand knowledge of how it came into being or for what purpose. Each relied on clearly stated assumptions about the email when giving their evidence. Those assumptions were not supported by the evidence and were largely contradicted by the evidence.

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[5] These objections were raised by Rachel Walsh of DLA Piper in discussions with the Official Solicitor to the Commission on 6 May 2013 and with Junior Counsel assisting the Commission on 24 May 2013, and were raised in a letter from Bartley Cohen to the Commission dated 9 May 2013. It is also worth noting that the first version of the Suhmissions published on the Commission's website contained an assertion that Accenture had made improper use of confidential information it had received. This was utterly without foundation and contrary to evidence and the comment was subsequently removed.

8. Finally, the record is clear, and the Submissions correctly concede, that (a) there is no suggestion that Mr Pedler acted in any way on Mr Porter's email and (b) no evidence of actual collusion between SAP and Accenture was put before the Commission.

9. The way these fragments of evidence are presented in the Submissions, as if they are well established facts, ignores the highly ambiguous nature of the evidence about the origin, recipient and intent of the email, and the legal framework in place at the time that regulated Accenture's, Mr Porter's and SAP's behaviour. Also, the Submissions tease out a passing reference to possible "collusion" without any connection to its proper legal meaning or recognition that the email does not breach any applicable legal requirement.

10. Accordingly, the Commissioner should positively reject the conjecture.

11. For the reasons set out below, Accenture submits that the Commissioner should find that:

    11.1 The evidence about the source, recipient and intent of the email is highly ambiguous and that Mr Porter did not clearly send it to Mr Pedler.

    11.2 Mr Pedler did not respond to the email and did not make the suggested inquiries of Ms Perrott or share the requested information with Mr Porter.

    11.3 No law, code, policy, guideline, or term of the actual procurement process in place at the time in question would, in any event, have prevented Mr Porter from sending the email to Mr Pedler and there is no legal basis for the conjecture about collusion.

    11.4 Ms Perrott's conjecture that Accenture may have colluded with SAP was based on assumptions about the email and how it was subsequently treated that were not supported by the evidence and were contradicted by the evidence.

    11.5 There was no competent evidence that collusion by Accenture occurred.

11.6 Neither Ms Perrott nor Mr Bradley accused Accenture of depriving "the procurement process from the competitive environment for which Corp Tech was hoping", because the concern (expressed by Mr Bradley, not Ms Perrott) was directed at SAP and **not** Accenture.

11.7 Any inference that Mr Bradley in any way sought to criticise Accenture should also be rejected because his evidence was also based on assumptions about the email and how it was subsequently treated that were not supported by the evidence and were contradicted by the evidence.

Ambiguous evidence

12. Mr Porter seems to agree that he sent the email, although he vacillates on the point. He is even less sure of who he sent it to.[6] His evidence must be seen in the context that he was asked to assume that he sent the email to Mr Pedler.[7]

13. Mr Pedler does not recall receiving the email[8] or any request along the same lines,[9] nor does he recall forwarding it to anybody else.[10] As Mr Pedler's cross–examination proceeded, he became increasingly doubtful about the likelihood that he had been the recipient of the email.[11]

14. There is nothing on the face of the email to suggest that, if it was sent by Mr Porter, he necessarily sent it to a competitor involved in the procurement process under investigation.

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[6] T 16-37:50 to T16-38:5; T15-122:1-4.

[7] T16-13:31.

[8] T15–76:2.

[9] T15-120:4-8.

[10] T15–76:28.

[11] T15–80:53–56 and T15–117:32–45.

Unfounded conjecture about "collusion"

15. Ms Perrott had been told by Senior Counsel assisting the Commissioner that the email was from Mr Porter "to another person, probably Mr Pedler of SAP ..."[12] and was told to "assume for the present purposes it's Mr Pedler from SAP".[13] This was a mere assertion and was not supported by evidence. Indeed, Mr Pedler had by then expressed strong reservations about whether he had received the email, and had consistently given evidence that he did not recall receiving it.[14] Mr Porter's evidence about the email was uncertain and ambiguous. Ms Perrott's evidence must therefore be discounted insofar as it relies on the unsafe assertion put to her by counsel.

16. In response to examination by Senior Counsel assisting the Commissioner, Ms Perrott stated that:

> ...[I]f it was Mr Pedler [who received the email], there is also, I read into that as well, collusion between SAP and Accenture.[15]

17. Ms Perrott was therefore clearly predicating her off-the-cuff conjecture about collusion on Mr Pedler being the recipient of the email. This was contrary to Mr Pedler's evidence that he strongly doubted having received the email. It must also be noted that Ms Perrott had only recently seen the email for the first time.[16]

18. On being asked by Senior Counsel assisting the Commissioner to explain her "collusion" conjecture, Ms Perrott stated:

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[12] T16–102:18–20.

[13] T16–102:47–48.

[14] See footnotes 8 to 10 above.

[15] T16-107:10-12.

[16] T16-102:23.

> Well, the fact that Mr Porter asked another supplier to sound me out and they obviously then would have – the next step is they shared the information, that I guess I view as a serious issue as well.[17]

19. Ms Perrott therefore also clearly predicated her collusion conjecture on an assumption that Mr Pedler shared information with Mr Porter. There is no evidence of this. Mr Pedler gave evidence that he does not recall responding to the email[18] and doesn't believe he acted on the email.[19]

20. In explaining her conjecture, Ms Perrott did not reveal an understanding of the true legal meaning of "collusion", nor did she explain that she meant it in the legal sense.

21. Ms Perrott's conjecture about collusion must therefore be seen in the context that:

    21.1 She had previously been asked to assume that the email originated from Mr Porter and was sent to Mr Pedler, despite Mr Pedler's strong reservations about having received it and despite the ambiguous nature of all the other evidence in this regard.

    21.2 She was not informed of Mr Pedler's strong doubt that he was the recipient of the email and that he had denied acting on the email.

    21.3 She assumed incorrectly, and contrary to the evidence, that SAP shared with Accenture the information requested in the email.

    21.4 It was never established that she had any understanding of what the word collusion means in a legal sense.

22. None of Ms Perrott's assumptions is supported by evidence and to a large degree there is evidence to the contrary. Her use of the term "collusion" must therefore be rejected as unsound, as must any reference to it in the Submissions.

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[17] T16–107:13–17.

"Competitive environment" comment

23. Although paragraph 39 of the Submissions attributes the "competitive environment" comment to Ms Perrott, the transcript cited at footnote 45 of the Submissions establishes that Mr Bradley made the comment. Very importantly, he made the comment in respect of the impact of SAP giving the email to IBM without the knowledge of Accenture. Contrary to the assertion in the Submissions, Mr Bradley did **not** level the allegation against Accenture.

24. Immediately before giving the evidence, Mr Bradley was told by Senior Counsel for IBM that the email was "an Accenture email"[20] and "that it was freely released ... to SAP".[21] Mr Bradley was not told of the ambiguous nature of the evidence about the email, nor that Mr Pedler had expressed strong reservations about having received the email and had denied passing it on to IBM. The assumption he was asked to make was not supported by evidence and was in parts directly contradicted by the evidence.

25. The relevant cross-examination by Senior Counsel for IBM is transcribed as follows:

> Let me approach it slightly differently. Putting aside the suggestion of any collusion between Accenture and SAP just for the moment, and I'll come back to that, if Accenture has confidential information and it wants to give it away to SAP you can [sic] stop them, that's got nothing to do with you?---No, correct, yes.
>
> And if SAP then getting wants [sic] to give it to IBM, that's got nothing to do with you? Putting aside some suggestion of collusion, what's to be done with that information?---I think SAP giving it to IBM without the knowledge of Accenture was, I would think, a concern.
>
> Concern to Accenture, you might think?---Certainly, yes, but also a concern as to whether it impacts the competitive process from our perspective.[22]

26. Importantly, and contrary to the Submissions, Mr Bradley did **not** give evidence that the sending of an email of this nature from Mr Porter to Mr Pedler "evidences an attempt by

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[18] T15-76:11.

[19] T15-93:32-42.

[20] T17–104:18.

[21] T17–104:19–20.

[22] T17-104. See also T17-87:33-41.

Accenture to deprive the procurement process from the competitive environment for which Corp Tech was hoping". He was in fact concerned that SAP's action in passing it on to IBM would have reduced competition.

27. Therefore, the assertion in the Submissions that Mr Bradley alleged that Accenture had deprived "the process from the competitive environment for which Corp Tech was hoping" must be rejected as wrong and the Commissioner should note that in his Findings.

28. Furthermore, any inference that might be drawn that Mr Bradley was in any way critical of Accenture should be also rejected as wrong because (as with Ms Perrott) he was asked to make assumptions about the email that were not supported by the evidence and were in part directly contradicted by the evidence.

Evidentiary standard to be applied to allegations

29. The allegations lack a proper evidentiary basis. In accordance with *Briginshaw v Briginshaw*[23]:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ....

30. As stated by Justice Moynihan in *Keating v Maurice & Ors*[24]:

> The application of that [*Briginshaw*] principle means that the gravity of the issue necessarily is reflected in the weight of the proof required to establish the facts found in the conclusion.

31. On the basis of the *Briginshaw* test, it is clear that reasonable satisfaction should not be produced by:

> [I]nexact proofs, indefinite testimony, or indirect inferences.[25]

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[23] (1938) 60 CLR 336, at 362.

[24] [2005] QSC 243.

32. The Submissions and Ms Perrott raise a serious and inherently unlikely allegation against Accenture and its employee, from which grave consequences flow. In doing so, both rely on inexact proofs, indefinite testimony and indirect references. They have also put the allegations in a very public forum.

33. On the proper application of the civil standard and in the interests of fairness, the Commissioner should therefore positively reject:

33.1 Ms Perrott's conjecture regarding the appearance of "collusion"; and

33.2 The erroneous criticisms directed at Accenture in paragraph 39 of the Submissions (including that Accenture potentially deprived the procurement process of a competitive environment).

Legal framework in 2007

34. Even if the Commissioner was satisfied that Mr Porter sent the email to Mr Pedler, there is no legal basis for criticising Mr Porter (or Accenture) for doing so.

35. Not only is there "no evidence of actual collusion before the Commission" (as the Submissions concede), there was no legal basis for establishing that collusion occurred. In particular:

35.1 There was no code, policy[26] or guideline which applied to IT procurement by the Queensland Government during the relevant period that prohibited communication between tenderers.

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[25] *AG v HTR* [2007] QSC 19.

[26] At paragraph 33 of their submissions dated 26 April 2013, counsel for the government in this inquiry make reference to the State procurement policy requiring "ethical, honest, fair behaviour". However, the policy cited rests on guidelines which apply to officers of the government, not bidders, and that do not address the issue of communication between bidders.

35.2 If Mr Porter sent the email, his conduct in sending it, and indeed the content of the email itself, did not breach any rules or conditions of the request for proposal process then in place.

35.3 There was no legislative prohibition (whether under the *Trade Practices Act 1974* or otherwise) on Mr Porter's conduct or communication of this nature between tenderers.

Conclusion

36. Ms Perrott's conjecture about collusion was based on unsound assumptions that lacked supporting evidence and were largely contradicted by evidence. It was unfair in those circumstances for the Submissions, published on a public website, to tease out a criticism of Accenture or its former employee based on that unreliable conjecture.

37. Mr Bradley also clearly did not accuse Accenture of anti-competitive behaviour, but expressed a concern that Accenture had in fact been the victim of such behaviour by another. It was unfair for the Submissions, again in a public forum, to erroneously assert that the comment was directed to Accenture' behaviour.

38. There is, in any event, no legal basis for either criticism.

39. In the interests of fairness, the Commissioner should positively reject the allegations and clear Accenture and its former employee of any suggestion of wrong-doing in this matter.

Dated: 7 June 2013

DLA Piper

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DLA Piper Australia
Solicitors for Accenture Australia Ltd