

QUEENSLAND HEALTH PAYROLL COMMISSION OF INQUIRY

RESPONSE TO SUBMISSIONS OF IBM

1 These submissions are made on behalf of Simon Porter and address the Submissions filed by IBM.

2 It is disappointing to Mr Porter and a cause of much aggravation that certain matters are now raised by IBM that call into question his character and integrity in circumstances where they are raised:

- (a) For the first time;
- (b) In the public arena and
- (c) After the conclusion of the hearings.

3 Mr Porter denies the allegations raised by IBM.

4 The matters raised by IBM in their submissions, at least insofar as they relate to Mr Porter and by extension to Accenture, appear simply to serve to distract the Commission from the substantive matters that are the subject of the Inquiry.

5 They are also matters that we submit are not relevant to the Inquiry. The Commissioner himself touched on this issue during Mr Porter's cross examination by Mr Doyle SC for IBM¹. In the context of the Inquiry's Terms of Reference it follows that the issues raised by IBM against Mr Porter are simply irrelevant, ought to be excluded from further consideration and should in fact be removed from the public record.

6 The conduct of Mr Porter that is called into question by IBM concerns the email that is contained at exhibit 32. The only material relevant to Mr Porter is the first two pages of this exhibit. While

¹ T16-54:34-40

these submissions refer to the email as the "Exhibit 32 Email" such a reference is to the first two pages only.

7 The IBM submissions perpetuate what we say is a fundamental mischaracterisation and misunderstanding of the Exhibit 32 Email. Conclusions have been reached and submissions made on the basis that the Exhibit 32 Email was sent by Mr Porter to Mr Pedler of SAP and that it was from there that the email came into the possession of IBM through Mr Bloomfield.

8 There is no evidence on record to support the IBM submissions.

9 The IBM submissions fail to account for the lack of evidence concerning the origin of the Exhibit 32 Email and the email chain that resulted in it ultimately being found in Mr Bloomfield's draft box. Critically there is no evidence before the Commission to make a finding that the Exhibit 32 Email was sent to Mr Pedler of SAP or, in fact, who the email was actually sent to.

10 Mr Porter accepts that he was the likely author of the Exhibit 32 Email².

11 Mr Porter's evidence was that he could not recall who he sent the email to. At its highest his evidence is that "the most logical person" that the email would have been sent to was Mr Pedler³. Such evidence is hardly definitive on its own and in the absence of any further evidence cannot support the serious allegations that have been made.

12 Despite being tested on this point on a number of occasions, particularly under cross-examination by senior counsel for IBM, Mr Pedler gave evidence that he could not recall receiving the Exhibit 32 Email⁴ nor ever forwarding such an email to anybody else⁵.

13 Mr Pedler, whose evidence appears not to have been impugned, gave evidence that:

² T16-11: 52

³ T16-12: 3-4

⁴ T15-76: 2

⁵ T15-76: 28

- (a) He had no specific recollection of receiving the email⁶;
- (b) Such an email would not have sat terribly well with him had he received it at the relevant time⁷;
- (c) It was unlikely he would have sent on to anybody else the email because it "contained confidential information"⁸;
- (d) He did not believe he ever sent the email on to Mr Bloomfield⁹; and
- (e) He never sent it to Mr Terry Burns¹⁰.

14 Mr Pedler's comments at paragraph 37 of the statement are reflective of his own position in relation to the Exhibit 32 Email. He expressed concern that information in that email would have been provided to IBM because it contained information about pricing strategy and a strategy to adopt a "not to exceed price".

15 The only sensible conclusion that can be reached in light of this evidence is that Mr Pedler did not receive the Exhibit 32 Email from Mr Porter.

16 IBM, through Mr Bloomfield, could not shed any light on how Mr Bloomfield received the Exhibit 32 Email. This, in the circumstances, is quite curious, but nevertheless, Mr Porter accepts the evidence of Mr Bloomfield in this regard.

17 It is therefore somewhat ironic that in circumstances where IBM cannot identify the source of its receipt of the email, it can make what amount to quite serious allegations against Mr Porter, on what must be an assumption that he sent the email to Mr Pedler of SAP. It is, on Mr Porter's submission, quite inappropriate for IBM to do this.

⁶ Pedler Statement paragraph 31

⁷ Pedler Statement paragraph 31

⁸ Pedler Statement paragraph 33

⁹ Pedler Statement paragraph 35

¹⁰ Pedler Statement paragraph 34

- 18 This is particularly so in circumstances where IBM purport to excuse Mr Bloomfield of any wrongdoing in relation to the email, yet are "suggestive of improper conduct [of Mr Porter] which may have been in breach of law"¹¹.
- 19 It is unnecessary in those circumstances for IBM to then disparage the conduct of Mr Porter to justify the conduct of Mr Bloomfield. Further, the matters raised at paragraphs 182 to 185 of IBM's submissions were also unnecessary. Again these paragraphs merely go to disparage the conduct of Mr Porter to simply justify the conduct of IBM.
- 20 The matters raised in these paragraphs are quite serious and should, with respect, be withdrawn. The attempt by IBM to purport to resile from any impact that they may have on Mr Porter in a footnote is quite scandalous in the circumstances.

TPA Allegation

- 21 IBM raise an allegation that Mr Porter and Accenture engaged in conduct that was in breach of section 45 of the *Trade Practices Act* ("TPA"). No corresponding allegation is raised against SAP and/or Mr Pedler which, in the circumstances, is quite confusing. Nevertheless, Mr Porter denies that he engaged in conduct that would constitute a breach of section 45 TPA.
- 22 For there to be a breach of section 45 TPA, the following elements must be considered:
- (a) That there was a "contract, arrangement or understanding" in place at the time between Accenture and SAP; and
 - (b) That such arrangement had the purpose or effect of "substantially lessening competition" in the market.

¹¹ IBM submissions paragraph 166

- 23 There was no evidence led at the Inquiry that would support either of these two elements. In fact, the necessary analysis, particularly in relation to the second element, was not touched on at all.
- 24 In relation to the first element of section 45 of the TPA, the Exhibit 32 Email does not evidence any arrangement as is required by section 45.
- 25 There was no evidence of conduct of SAP that is suggestive of any arrangement between Accenture and SAP. In fact, SAP did not approach their response to the RFP in the same way as did Accenture. This means that if the email disclosed material that should not have been given to SAP then it was irrelevant because SAP (as well as IBM) approached the bid differently. Neither IBM nor SAP submitted bids that were directly comparable to Accenture. The facts are that:
- (a) The bids were approached from different perspectives;
 - (b) There was disagreement as to the relevance of the \$100 million floor price; and
 - (c) The Accenture and SAP bids were different.
- 26 Mr Pedler did not share Mr Porter's concerns in the email about the "ridiculously cheap price"¹² and he went on further to assert that SAP was not influenced by the Exhibit 32 Email in its response to the RFP¹³.
- 27 It follows therefore that the evidence highlights that there was no arrangement between Accenture and SAP that would constitute a breach of section 45 of the TPA or otherwise. Further there was no evidence that Mr Pedler in fact proceeded to make the enquiries as were suggested in the Exhibit 32 Email.

¹² T15-93:10

¹³ T15-119:20-39 and T15-121:3-28

28 In relation to the second element of a section 45 TPA matter, there was no evidence before the Commissioner that dealt with the necessary legal and economic analysis that is required to give consideration to the lessening of competition in the market. Further, any evidence of witnesses as to their concerns about the impact that the Exhibit 32 Email would have on the tender process ought to be dismissed:

- (a) Because such evidence was merely the opinion of lay witnesses;
- (b) The conclusions reached were always premised on an assumption that the Exhibit 32 Email was sent by Mr Porter to Mr Pedler – which for the reasons outlined in these submissions is false; and
- (c) There was no evidence from any expert as to the impact that such an email could have had on the relevant “market” for the purposes of section 45.

29 Again, for these reasons, the Commissioner ought dismiss any suggestion of a TPA breach by Mr Porter and Accenture.

Fraud Allegation

30 There is no legal or factual basis for an allegation that Mr Porter engaged in conduct of a criminal or fraudulent nature. Such an allegation is a serious one. The allegations are raised without there being a proper factual or legal basis to support them. Such allegations ought not be made lightly and certainly not made without proper foundation. The manner in which these allegations have now been raised against Mr Porter are of some considerable concern to him.

31 In circumstances where the necessary factual or legal basis for such an allegation has not been made then it is proper for the Commissioner to make a positive finding that Mr Porter did not engage in such conduct as alleged by IBM.

32 Further, there is no basis asserted as to how IBM maintains that section 408C of the Queensland Criminal Code applies. An attempt by IBM to resile from the implications of such a serious allegation in a footnote is, as discussed before, simply scandalous.

33 At no time did the conduct of Mr Porter fall within the requirements of section 408C in that he did not:

- (a) "Gain any benefit or advantage, pecuniary or otherwise, for any person" in sending the email;
- (b) "Cause any detriment, pecuniary or otherwise, to any person" in sending the email;
- (c) Induce Mr Pedler or anyone to do anything that he was lawfully entitled to abstain from doing; and
- (d) Do anything that would fall within the scope of section 408C.

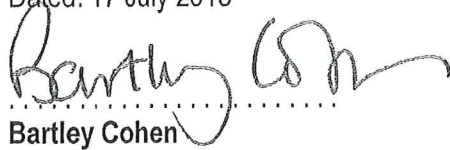
Conclusion

34 It follows from these submissions that Mr Porter remains aggrieved as to the conduct of IBM in raising the matters in the manner that it has done so.

35 Each of the allegations raised by IBM against Mr Porter are either misconceived or are made without any legal or factual basis. The Commissioner ought therefore dismiss these matters and should make positive findings as follows:

- (a) To dismiss IBM's allegations against Mr Porter and Accenture; and
- (b) That there was no evidence to suggest that Mr Porter or Accenture engaged in conduct that was in breach of any law, was dishonest or of a criminal nature.

Dated: 17 July 2013

A handwritten signature in dark ink, appearing to read 'Bartley Cohen', written over a horizontal dotted line.

Bartley Cohen
Solicitors for Simon Porter