

Expert Report

For:
Queensland Health Payroll System Commission of Inquiry

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1. BACKGROUND AND INSTRUCTIONS

- 1.1 I have been engaged by the Queensland Health Payroll System Commission of Inquiry (**Commission**) to assist with the Commission's inquiry (**Inquiry**) to examine the contractual arrangements between the State of Queensland and IBM Australia Limited (**IBM**) dated 5 December 2007 (**Contract**).
- 1.2 I have been asked to prepare a Report addressing the following issues:
- (a) Advise whether the contractual arrangements between the State of Queensland and IBM were adequate, and in particular whether the scope of work was sufficiently identified and defined in the Contract?
 - (b) Was the Contract typical for large IT design and implementation programs? Is it usual for such a Contract to move from Statements of Scope to Statements of Work?
 - (c) Were there known risks in proceeding in such a way with such a large procurement Contract? How could the Contract have been structured to reduce the risk which eventuated, that time and cost expanded hugely?
 - (d) Advise on the appropriateness of subsequent variations to the Contract, and change requests subsequent to the execution of the Contract. There were 47. Is the number unusual? Would tighter specification have made so many unlikely?
 - (e) Given the structure and contents of the Contract, advise on how the State of Queensland should have managed the Contract.
 - (f) Advise on whether and how the State of Queensland could have terminated the Contract having regard to the terms of the Contract, identifying any clear points at which the State had an opportunity to cease acquiring any further services from IBM.
 - (g) Any other comment or observation you wish to make which may be relevant to our Terms of Reference which occur to you from your perusal of the material.
- 1.3 I attach at Annexure 1 copies of the letters of instructions provided to me by the Commission dated 21 February 2013 and 15 March 2013 (**Letters of Instructions**).

2. EXPERT WITNESS REQUIREMENTS

- 2.1 This Report is prepared in compliance with Rules 428 of the Uniform Civil Procedure Rules 1999 (Qld) (with necessary modifications due to the fact that the evidence is to be used in the Commission not a Court). A copy of Rule 428 is attached at Annexure 2.
- 2.2 Details of my qualifications and experience are attached at Annexure 3.

3. MATERIAL AND INFORMATION RELIED ON TO PREPARE THIS REPORT

- 3.1 In preparing this Report, I have relied on and considered the following materials and information provided to me by the Queensland Health Payroll Commission of Inquiry:
- (a) Letter of instructions dated 21 February 2013 from Queensland Health Payroll System Commission of Inquiry;
 - (b) Letter of instructions dated 15 March 2013 from Queensland Health Payroll System Commission of Inquiry; and
 - (c) Brief to Expert (IT) Volumes 1 to 3 (**Brief**), including supplemental materials provided by the Commission for inclusion in the Brief.

- 3.2 In preparing this Report I have been assisted by lawyers in the firm of HWL Ebsworth Lawyers. Notwithstanding this assistance, the opinions in this Report are my own and I take full responsibility for them.
- 3.3 I have also relied on the Government Information Technology Contract (GITC) version 5.01 obtained from the Queensland Government website:
[http://www.gitc.qld.gov.au/\(ei3swpnetc3m2nncl1i4o5us\)/freedom.aspx?pid=684](http://www.gitc.qld.gov.au/(ei3swpnetc3m2nncl1i4o5us)/freedom.aspx?pid=684) accessed on Wednesday 6 March 2013.

4. MATERIAL FACTS ON WHICH THIS REPORT IS BASED

- 4.1 All material facts on which this Report is based are set out in the Brief.

5. ASSUMPTIONS AND QUALIFICATIONS

- 5.1 I have assumed that all the contents of the Brief are true, reliable and complete copies of original documents.
- 5.2 I have not reviewed:
- (a) the Customer Contract for Shared Service Solutions Program HR Business Solution Software and Services between the State of Queensland and IBM dated 30 November 2005, or any Interim Statement of Work under that agreement, the existence of which I am only aware of because they are referred to in the SSSP Customer Contract (as defined below); or
 - (b) the Supplemental Agreement between the State of Queensland and IBM Australia Limited dated 22 September 2010 (**Supplemental Agreement**).

6. SUMMARY OF PRINCIPAL CONCLUSIONS

- 6.1 ***Advise whether the contractual arrangements between the State of Queensland and IBM were adequate, and in particular whether the scope of work was sufficiently identified and defined in the Contract?***

- (a) The lack of detail in the Contract as to the required features and characteristics of the proposed Lattice Replacement system, and certain of the assumptions of IBM as to the system recorded in the Contract, resulted in a high level of uncertainty about important elements of the Lattice Replacement project at the time the parties embarked on the project.
- (b) The risks inherent in such uncertainty were prudently addressed by the parties agreeing in the Contract to commence the project with a requirements gathering exercise that was intended to produce a scope and fixed price for the Lattice Replacement system.
- (c) Overall, the contractual arrangements for the Lattice Replacement project were adequate, but the terms of the Contract did not deal adequately with the requirement of timely performance of the project.

- 6.2 ***Was the Contract typical for large IT design and implementation programs? Is it usual for such a Contract to move from Statements of Scope to Statements of Work?***

- (a) The Contract was fairly typical of public sector IT project contracts, but it lacked an emphasis on the Customer's required outcomes that is increasingly found in contemporary private sector IT project contracts.
- (b) The approach adopted by the parties, of commencing with an initial scoping and pricing exercise that leads to a fixed scope and price, was not unusual and was prudent in this case.

- (c) The incorporation into the Contract of "high level objectives and guiding principles" was also not unusual, but led to some uncertainty as to the rights and obligations of the parties under the Contract.
- 6.3 ***Were there known risks in proceeding in such a way with such a large procurement Contract? How could the Contract have been structured to reduce the risk which eventuated, that time and cost expanded hugely?***
- (a) There were known risks, and certain structural features of the Contract may have contributed to their materialisation.
- (b) The structural features which may have contributed were:
- (i) the failure to include in the Contract, at the time it was entered into, sufficient detail as to the scope of the new system to be implemented by IBM; and
- (ii) the uncertain status of timeframes in the Contract.
- 6.4 ***Advise on the appropriateness of subsequent variations to the Contract, and change requests subsequent to the execution of the Contract. There were 47. Is the number unusual? Would tighter specification have made so many unlikely?***
- (a) There was a large number of Change Requests resulting from a "missed Business Requirement" or an "incorrectly identified" business requirement.
- (b) I am not able to provide an opinion on whether these were appropriate.
- 6.5 ***Given the structure and contents of the Contract, advise on how the State of Queensland should have managed the Contract.***
- (a) To manage the risks identified in this Report required diligent attention by the State of Queensland to the governance and contract management of the project.
- (b) Delays and price increases in the course of the Lattice Replacement project indicate that the level of governance and contract management exercised by the State of Queensland may have been inadequate.
- 6.6 ***Advise on whether and how the State of Queensland could have terminated the Contract having regard to the terms of the Contract, identifying any clear points at which the State had an opportunity to cease acquiring any further services from IBM.***
- (a) The State of Queensland was entitled to terminate the Contract for convenience, upon the payment of a relatively generous compensation package to IBM.
- (b) While it is not possible, without undertaking a factual investigation, to identify clear points at which the State would have been entitled to terminate the Contract for material breach by IBM, the Contract would have been difficult to terminate for material breach, and significantly more difficult than it could have been had the termination regime been drafted in a form more typical of private sector IT contracts.
- 6.7 ***Any other comment or observation you wish to make which may be relevant to our Terms of Reference which occur to you from your perusal of the material.***

Please refer to section 16 below.

7. THE BACKGROUND TO THE CONTRACTUAL ARRANGEMENTS

- 7.1 The context in which IBM was engaged under the SSSP Customer Contract (as defined in paragraph 9.1 below) is provided by the *Invitation to Offer No: 435 / 000334 For a Prime Contractor for the Shared Services Solutions Program for the Queensland Government (ITO)*.

7.2 The ITO was an invitation seeking:

"offers for the supply of certain professional services relating to the Shared Service Solutions Program of work" (ITO, Part A, paragraph 1.1).

7.3 According to the ITO, the Queensland Government's "Shared Services Initiative" (**SSI**) was to involve:

"agencies and SSPs [Shared Service Providers] implementing redesigned business processes to maximise the benefits achieved from... new systems... standardisation of end-to-end processes and associated practices, implemented in advance of, or in parallel with, future system changes" (ITO, Part C, paragraph 1.2).

7.4 The ITO states that:

"On 16 August 2007, the Shared Service CEO Governing Board [**SS Board**] agreed to a range of improvements to the SSS Program to implement standard finance and human resource business solutions across Queensland Government Departments" (ITO, Part C, paragraph 1.6.2).

7.5 The ITO goes on to state that one of those planned improvements was:

"significantly accelerating the implementation timeline and reducing costs by engaging a Prime Contractor to manage defined work packages on a fixed-price basis" (ITO, Part C, paragraph 1.6.2).

7.6 The timetable for the process initiated under the ITO included:

- (a) the ITO being released to the market on 12 September 2007 (ITO, Part A, para 4.1);
- (b) an interim response in the form of respondents' nominated reference sites, to be received on 17 September 2007;
- (c) a full response to the ITO, to be received by 1 October 2007; and
- (d) following the evaluation of all responses, the award of the Customer Contract by 31 October 2007.

7.7 It is apparent from the information in the ITO extracted in paragraphs 7.1 to 7.6 above that:

- (a) the SSI was a relatively large and complex programme of work, in that it involved:
 - (i) the implementation of new systems across multiple Queensland Government Departments; and
 - (ii) associated operating process changes;
- (b) it was believed by stakeholders (namely, the SS Board) that the SSI required a significant acceleration of its timeframe while achieving a reduction of costs;
- (c) the ITO that initiated the process for the selection and engagement of a Prime Contractor was prepared and released to the market in a relatively short time period after these needs were articulated by the SS Board – that is, under 4 weeks;
- (d) responses from the market on this were sought in a relatively short time period – that is, under 3 weeks from the release of the ITO, for a full response; and
- (e) the Prime Contractor was to be selected in a relatively short time period – that is, in one calendar month.

- 7.8 The SSSP Customer Contract was entered into on 5 December 2007 – that is, in under 6 weeks from the selection of IBM as the Prime Contractor.
- 7.9 I have been asked to focus on the contractual arrangements applicable to the work that was to be performed by IBM relating to the replacement of the then-existing payroll system in the Queensland Department of Health, known as the "Lattice system".
- 7.10 The ITO provided that:
- "The highest priority activity is the replacement of the legacy HR systems that utilise the Lattice Human Resource Information System (Lattice) and The Solution Series Software (TSS)" (ITO, Part D, para 4.1.1).
- 7.11 In this Report, I refer to the work to be performed by IBM in replacing the Lattice system at Queensland Health as the **Lattice Replacement**.

8. SYSTEMS INTEGRATION CONTRACTS

- 8.1 A project involving the implementation of an information technology system, whether or not to replace an existing system, is typically called a "systems integration" project.
- 8.2 In such a project, the new "system" to be delivered by the entity tasked with its delivery (**Supplier**) will comprise computer software, which might be a combination of:
- (a) commercial, "off-the-shelf" products;
 - (b) modified or configured versions of such products; and
 - (c) computer programs specially developed for the entity procuring the new system (**Customer**).
- 8.3 The project might also involve the Supplier in:
- (a) delivering computer hardware, or installing computer software on computer hardware separately procured by the Customer;
 - (b) implementing communications connectivity between elements of the system, or between the system and its external environment; and
 - (c) providing services to assist the Customer to adapt its business processes to the system.
- 8.4 When embarking upon a systems integration project, a Customer is faced with various technical and commercial risks, the level of which is determined by many factors, including the scale and complexity of the project, which can vary substantially from one project to another.
- 8.5 Among the more substantial of these are the risks that:
- (a) the system delivered to the Customer will not meet the Customer's requirements (**Scope Risk**);
 - (b) the system will not be delivered within the Customer's required timeframes (**Delay Risk**); and
 - (c) the price for the system will be more than the Customer intended to pay (**Price Risk**).
- 8.6 From the perspective of a Customer, an effective contract to govern a systems integration project will, at a minimum, address each of these risks.

- 8.7 To address the Customer's Scope Risk, a systems integration contract will usually:
- (a) describe the features, functions and performance attributes of the system, either in the form of a statement of the Customer's "business requirements", in the form of technical specifications and design documents, or in a combination of such forms;
 - (b) confer on the Customer rights to verify that the system as delivered to it possesses those features, functions and performance attributes, such rights typically embodied in a set of provisions dealing with "acceptance testing"; and
 - (c) oblige the Supplier to ensure that the system it delivers to the Customer possesses those features, functions and performance attributes, or to give warranties to that effect.
- 8.8 To address the Customer's Delay Risk, a systems integration contract will usually include:
- (a) a timetable for the stages of the project, with key dates or "milestones" that the Supplier and sometimes the Customer is required to meet; and
 - (b) incentives for the Supplier to comply with the timetable, and disincentives for the Supplier to be late, such as financial incentives and disincentives.
- 8.9 To address the Customer's Price Risk, a systems integration contract might make provision for:
- (a) a fixed price for the system;
 - (b) a capped "time and materials" price for the system; or
 - (c) a combination of these and other pricing methods,
- according to which the Supplier will be remunerated for the completion of work at different stages of the project, or for the delivery of discrete elements of the system.
- 8.10 In general, a systems integration contract will be more effective to address a Customer's Scope Risk, Delay Risk and Price Risk, the more the contract:
- (a) accurately and comprehensively describes the features, functions and performance attributes of the system to be delivered by the Supplier;
 - (b) includes a clear timetable with mandatory milestones to be met by the Supplier, and strong financial disincentives for delay by the Supplier; and
 - (c) gives the Customer certainty as to the total price payable for the system over the life of the project, or at least certainty as to the method by which that price will ultimately be determined.

9. OVERVIEW OF THE CONTRACTUAL ARRANGEMENTS

- 9.1 The contractual arrangements between the State of Queensland and IBM relating to the Lattice Replacement are evidenced by the following documents:
- (a) Deed of Agreement between the State of Queensland acting through the Department of Public Works (referred to in the Deed of Agreement as the "Contract Authority") and IBM Australia Limited: GITC Number Q-11, dated 28 July 2005 (**Deed of Agreement**);
 - (b) GITC Version 5 Agreement Number Q-11: Customer Contract between IBM Australia Limited and State of Queensland for the appointment of a prime contractor for the

Shared Services Solution Program for the Queensland Government, dated 5 December 2007 (**SSSP Customer Contract**);

- (c) documents recording variations to the SSSP Customer Contract agreed by the parties to the SSSP Customer Contract (**Change Requests**); and
- (d) the Supplemental Agreement.

DEED OF AGREEMENT

- 9.2 The Deed of Agreement establishes an arrangement between the Contract Authority and IBM for the supply by IBM of "Information Communication Technology ("ICT") Products and/or Services to Customers" (Recital A of the Deed of Agreement).
- 9.3 The Deed of Agreement has a number of parts. The Deed of Agreement, inclusive of those parts, is referred to in its own terms as the "Agreement". In this Report, **Agreement** refers to the Deed of Agreement inclusive of its parts.
- 9.4 The parts of the Agreement are:
- (a) Part 1: Contract Authority Provisions (**Part 1**);
 - (b) Part 2: Customer Contract Provisions (including General Order Schedule C1 incorporating Schedule C2) (**Part 2**);
 - (c) Part 3: Customer Contract Modules (**Part 3**); and
 - (d) Part 4: Customer Contract Schedules (**Part 4**).

Part 1 of the Agreement

- 9.5 Part 1 of the Agreement deals with, among other things, the contractual framework and mechanics of the procurement of "Products" and "Services" by "Customers" from IBM. A key provision of Part 1 is clause 2.7. In simplified terms, clause 2.7 provides that:
- (a) a Customer requiring Products or Services negotiates with IBM and endeavours to reach agreement in relation to the terms and conditions of a "Customer Contract";
 - (b) when the Customer and IBM sign a "General Order", or the terms and conditions of the Customer Contract are otherwise agreed, a Customer Contract comes into force; and
 - (c) the terms and conditions of the Customer Contract so formed include:
 - (i) "Additional Provisions";
 - (ii) the Customer Contract Provisions, being Part 2 and any applicable Customer Contract Schedules;
 - (iii) the "General Order" and any document which the General Order expressly incorporates; and
 - (iv) the applicable "Module" and the applicable "Module Order".
- 9.6 Any Additional Provisions:
- (a) which do not derogate from the terms of the Agreement or the terms of the Customer Contract, are to be included in the "General Order", in Schedule A2 of Part 1, or in both places (Part 1, clauses 2.7.3 and 2.7.4); and

- (b) Which do derogate from the terms of the Agreement or the terms of the Customer Contract, are to be approved by the Contract Authority (Part 1, clauses 2.7.5 to 2.7.11 inclusive).

Part 2 of the Agreement

- 9.7 Part 2 of the Agreement deals with what might be referred to as the transactional terms of a particular procurement of Products and Services by a Customer from IBM, and related rights and obligations. For example, Part 2 includes provisions relating to:
- (a) how the price of a "Deliverable" is to be determined (clause 3 of Part 2);
 - (b) obligations of the parties to the Customer Contract to co-operate with each other (clause 4 of Part 2);
 - (c) confidentiality obligations of the parties (clause 5.4 of Part 2);
 - (d) intellectual property rights of the parties (clause 6 of Part 2); and
 - (e) limitations of the liabilities of the parties (clause 7 of Part 2).
- 9.8 Part 2 also provides, in Schedule C1, a template for any General Order to be adopted by a Customer and IBM for inclusion in a Customer Contract. That template is in the form of a table consisting of numerous fields, each field containing:
- (a) details of specific matters to be agreed by the parties to the Customer Contract (for example, in field C1.19, whether time is to be of the essence in respect of IBM's obligations); and
 - (b) instructions to the parties as to how their agreement on those details is to be reflected in the General Order (for example, in field C1.19, instructions to specify that time is of the essence, if that is what the parties have agreed).

Part 3 of the Agreement

- 9.9 Part 3 of the Agreement consists of 14 Modules and associated template Module Orders.
- 9.10 Each Module in Part 3:
- (a) relates to a different type of potential ICT transaction between a Customer and IBM; for example, Module 8 relates to the procurement by a Customer from IBM of ICT Contracting Services; and
 - (b) contains what might be referred to as the technical terms applicable to that type of ICT transaction; for example, clause 6.2 of Module 8 obliges IBM to perform the ICT contracting services at the times and in the manner set out in the Project Payment and Implementation Plan.
- 9.11 Each Module Order consists of numerous fields in which the parties are to record their agreement as to details of specific matters relating to the ICT transaction the subject of the relevant Module; for example, in Module Order MO8, details of the site at which the ICT contracting services are to be performed.

Part 4 of the Agreement

- 9.12 Part 4 of the Agreement comprises template schedules for Customer Contracts, with instructions addressed to the parties as to how these should be filled in.

SSSP CUSTOMER CONTRACT

- 9.13 The SSSP Customer Contract expressly purports to be a "Customer Contract" formed under the Agreement. The Customer which is a party to the SSSP Customer Contract is identified in Schedule 1 of the SSSP Customer Contract as the State of Queensland "comprised of departments, as defined within the meaning of the Financial Administration and Audit Act 1977", excluding any government owned corporation (Schedule 1 of the SSSP Customer Contract).
- 9.14 The SSSP Customer Contract takes the form of a set of physical documents, separate from (but incorporating certain provisions of) the Agreement.
- 9.15 The SSSP Customer Contract consists of:
- (a) the incorporated provisions of the Agreement, namely, the Customer Contract Provisions, being Part 2 and applicable Customer Contract Schedules;
 - (b) General Terms, being clauses 1 to 9 inclusive, which are expressed to be "Additional Provisions";
 - (c) implicitly (as to which, see paragraph 9.20 below), Module 8 relating to ICT Contracting Services;
 - (d) Schedule 1: General Order and Schedule 2: Module Order MO8 which has been filled in to include details of the ITC Contracting Services;
 - (e) other Schedules;
 - (f) Statements of Work or SOWs; and
 - (g) Statements of Scope or SOSs.
- 9.16 It is a term of the Agreement that upon the formation of the SSSP Customer Contract, IBM was obliged:
- "[to] supply the Products and/or Services in accordance with the terms and conditions of this Agreement and the Customer Contract" (Part 1 of the Agreement, clause 2.2.1).
- 9.17 One of the curiosities of the GITC v 5.0 is that in the Customer Contract, one does not find an express obligation of the Contractor to supply the Products and/or Services. This might be a defect of form rather than substance, for the standard Recital for Customer Contracts set on in Part 2 of the Agreement records the parties' agreement to enter into the Customer Contract "for the supply by the Contractor of Information and Communications Technology ("ICT") Products and/or Services..." (Part 2 of the Agreement, Recital A).
- 9.18 As defined in the Customer Contract and, in turn, in the SSSP Customer Contract:
- (a) "Product" means "the information communication technology product to be supplied by the Contractor to the Customer under the Customer Contract"; and
 - (b) "Service" means "the information communication technology service to be supplied by the Contractor to the Customer under the Customer Contract" (Part 2 of the Agreement, clause 1.1).
- 9.19 More specific meanings are given to the terms "Product" and "Service" in the SSSP Customer Contract. Schedule 1 of the SSSP Customer Contract identifies:
- (a) that the term "Product" is "not applicable", going on to note that "some of the Products that are used under this Customer Contract are licensed under Customer Contract GITC Number Q-11 dated 28 July 2005"; and

- (b) that the "Services" to be provided under the SSSP Customer Contract are "ICT Contracting Services".
- 9.20 A second curiosity of the GIRC v 5.0 is that no provision is made, either in the General Order or elsewhere in the terms of the Customer Contract, for the parties to identify expressly the Module or Modules in Part 3 of the Agreement that the parties have selected to apply in any particular Customer Contract. Again, this might be a defect of form rather than substance, for each Customer Contract is to include a Module Order, the number of which sign-posts the Module which the parties have selected.
- 9.21 In the case of the SSSP Customer Contract, Schedule 2 is Module Order MO8, which tells us that, consistent with the definition of "Services" in Schedule 1, the parties had chosen Module 8, entitled "ICT Contracting Services", to apply.
- 9.22 Adopting the respective template forms for a General Order and a Module Order MO8 provided in the Agreement, Schedules 1 and 2 of the SSSP Customer Contract contain details of the "Services" and the "Deliverables" to be supplied by IBM. Those details refer to SOWs which, according to Schedule 1, "are contained in the DVD attached to this Customer Contract" (Schedule 1: General Order, section C1.14).
- 9.23 In addition, Schedule 1 of the SSSP Customer Contract provides that:
- "In accordance with Schedule 17, each SOS may become a SOW" (Schedule 1: General Order, section C1.14)

10. ADEQUACY OF THE CONTRACTUAL ARRANGEMENTS

Advise whether the contractual arrangements between the State of Queensland and IBM were adequate, and in particular whether the scope of work was sufficiently identified and defined in the Contract.

SCOPE RISK

- 10.1 The term "scope" has at least two applications in the SSSP Customer Contract. First, the term is used to refer to the range of services which IBM was to provide under the SSSP Customer Contract. An example of this use of the term is:
- "The scope of the Lattice Replacement works stream is to design, configure & build, test, and implement the interim Lattice Replacement solution for Queensland Health" (SOW 8, June 2008, section 1.3).

In this Report, I refer to "scope" in this first sense of the word as **Service Scope**.

- 10.2 The second relevant use of the term "scope" is to refer to the attributes of the work product to be delivered by IBM under the SSSP Customer Contract, in particular, the features and characteristics of the Lattice Replacement system which was to be delivered by IBM. An example of this use of the term is:
- "the Project Manager will... Agree with Queensland Health the minimum scope required for the interim solution" ((SOW 8, June 2008, section 6.1.2).

In this Report, I refer to "scope" in this second sense of the word as **Solution Scope**.

- 10.3 There is an obvious relationship between the Service Scope and the Solution Scope: the greater the number and complexity of the features and characteristics that were to be incorporated into the Lattice Replacement system, the greater would be the range of services to be provided by IBM.

- 10.4 To the extent that the Service Scope of the Lattice Replacement was set out in the SSSP Customer Contract at the time of execution of the SSSP Customer Contract, it was to be found in:
- (a) clause 5.3, which referred to Schedule 46, of the SSSP Customer Contract;
 - (b) SOW 7: Lattice Replacement Interim Solution Scoping and Planning (**SOW 7**); and
 - (c) SOS 1: Lattice Replacement Design, Implement, and Deploy (**SOS 1**).
- 10.5 Shortly after entering into the SSSP Customer Contract, the parties supplemented the Service Scope of the Lattice Replacement by adding the following SOWs:
- (a) SOW 8A: Lattice Replacement Design, Implementation and Deploy – from 2nd January 2008 to 18 January 2008 (**SOW 8A**); and
 - (b) SOW 8: Lattice Replacement Design, Implement and Deploy (**SOW 8 – January 2008**), which was agreed by the parties and became part of the SSSP Customer Contract by a change request (**CR**) dated 18 January 2008 numbered CR0005.
- 10.6 Subsequently, by means of CR000060 dated 28 June 2008, SOW 8 was varied by the parties in the form of SOW 8: Lattice Replacement Design, Implement and Deploy, version 1.2 (**SOW 8 – June 2008**).

Solution Scope of the Lattice Replacement

- 10.7 By any measure, the extent to which the Solution Scope of the Lattice Replacement was set out in the SSSP Customer Contract at the time the parties entered into that contract was very limited.
- 10.8 SOS 1 states that:
- "The Scope of the Lattice Replacement works stream is to design, configure & build, test, and implement the interim Lattice Replacement solution for Queensland Health" (SOS1, page 4).
- 10.9 SOS 1 provides the following by way of a description of the features and characteristics which that solution is to have:
- (a) the Lattice Replacement solution is to be "based on the SSS DOH solution" (page 4);
 - (b) that Department of Housing solution "will provide a well understood and manageable baseline to build the [Lattice Replacement] solution upon" (page 6);
 - (c) the Lattice Replacement solution will cater for the "current EBA, to be effective in August 2008" (page 4);
 - (d) it will address "the functionality gaps that currently affect Queensland Health's organisational capabilities";
 - (e) it will allow "retrospective payments to be generated";
 - (f) its "design and approach... could be adapted as required to support the remaining Lattice Agencies if required" (page 5);
 - (g) the design of the solution "has ensured there will be single rollout of functionality to users";

- (h) it will comprise "solution components that will be used by both the interim and final Shared Services Solution", of which 11 are listed (page 5);
- (i) it will utilise "high levels of core Customer solution functionality", 10 examples of which are provided (such as "Rostering", "Awards Interpretation" and "Leave") (pages 6 and 7);
- (j) it will deliver "a number of fundamental benefits to Customer and Queensland Health", which are then listed in SOS 1 (pages 7 and 8);
- (k) it will "only provide the minimum functionality required to satisfy the basic functions of paying and managing [Queensland Health's] human resources" (page 8);
- (l) it will include "the use of an external awards engine, Workbrain, to interpret payments against the relevant awards for All Agencies", inclusive of the "Time and Attendance module for Workbrain... and the Leave Module for Workbrain" (page 10); and
- (m) within the solution:
 - (i) "Reports will be based on the Agency specific requirements" to be gathered by IBM (page 10);
 - (ii) "Forms likewise will be a sub-set of the Queensland Health Agency specific scope" (page 11);
 - (iii) "Interfaces will be based on the use of an SAP Service Bus, based on SAP XI technology" (page 11);
 - (iv) "Data conversion will be simplified" (page 11);
 - (v) "Enhancements will be minimised" (page 11); and
 - (vi) "Workflow... will be designed and built to adhere to the SSS standards" (page 11).

10.10 It does not appear that the parties intended such broad and general descriptions of the features and characteristics of the proposed Lattice Replacement system to serve as a statement of the Solution Scope for the purpose of enabling IBM to proceed with the Lattice Replacement work, given that the above text had, according to SOS 1, "been extracted from the Contractor ITO in relation to the Lattice Implementation for Queensland Health" (page 4).

10.11 However, the important point is that apart from those broad and general descriptions, and Schedule 46 of the SSSP Customer Contract (which I consider in paragraph 10.17 below), there was no statement of the Lattice Replacement Solution Scope in the SSSP Customer Contract at all when the parties entered that contract.

10.12 Further, assumptions set out in SOS 1 suggest that IBM's understanding of the required Solution Scope of the Lattice Replacement may have been minimal at the time of entry into the SSSP Customer Contract. Given IBM's expressed intent in SOS 1 to use the DOH solution as the basis of the Lattice Replacement system, it is problematic for such assumptions to include that:

"the existing DOH SAP HR/Payroll solution includes the functionality expected to deliver the minimum Queensland Health requirement" (page 24).

10.13 In other words, IBM's approach to the Lattice Replacement was based on an assumption as to the suitability of the DOH system, which nothing in the SSSP Customer Contract indicates had been checked or validated.

- 10.14 IBM proposed that the minimum scope of the Lattice Replacement system would be determined after the parties had entered into the SSSP Customer Contract, the extracts from its response to the ITO in SOS 1 including the statement that:

"An early activity of the wider SSS program team, in conjunction with the SDA, is to determine the Agency specific scope for Queensland Health and we [IBM] propose that this process is also used to identify the minimum scope for the Lattice replacement initiative" (SOS 1, page 8).

- 10.15 Another express assumption of IBM set out in SOS 1 was that:

"[the] Workbrain awards interpretation required to deliver the interim solution are built, tested and available by the dates required" (page 24).

- 10.16 I have been instructed that "Workbrain" is a software product.

- 10.17 According to clause 5.3 of the SSSP Customer Contract:

- (a) IBM was to conduct a "Workbrain Scalability Assessment as part of SOW5", and Schedule 46, consisting of various slides bearing the IBM logo referring to "Workbrain", represented IBM's "current plan" for that assessment;
- (b) on or before 4 April 2008, the parties were to meet and review the results to date of that assessment,

"and if the Parties agree that there are unacceptable risks of proceeding with or failure of [IBM's] proposed design, the Parties will decide if changes can be made to reduce risk and improve performance (e.g., to the design, to the hardware, to interfaces, tuning, etc) or decide not to proceed with the Contractor's proposed solution.

If the Parties agree that there are unacceptable risks of proceeding with or failure of the Contractor's proposed design, the Parties will also agree on a contingency plan."

- 10.18 The reality that no adequate Solution Scope existed at the time the parties entered into the SSSP Customer Contract provides the context for SOW 7 which, as its title indicates, describes services to be provided by IBM in the nature of scoping and planning activities related to the Lattice Replacement. Such work was to be completed by IBM "by December 2007" (SOW 7, para 8).

- 10.19 In a significant system design and implementation project, the design of the system to be implemented usually passes through different stages, each stage resulting in design documents or "artefacts" of increasing detail and technical complexity, each design document or artefact agreed or "signed-off" by the parties. It is not uncommon for the parties to enter into a contract for the project with only a general, "high level" design for the system in place, often in the form of a statement of the Customer's business requirements.

- 10.20 When the design of the proposed system can only be expressed by the parties, at the time they enter into the contract, with such a lack of detail as is to be found in the SSSP Customer Contract, it is good practice to structure the contract with two sequential stages. The first stage involves the Supplier in developing a satisfactorily detailed and comprehensive Solution Scope and, usually, a fixed price to build and implement a system that conforms to the Solution Scope. If the Customer finds the Solution Scope and fixed price to be acceptable, the second stage commences, in which the Supplier proceeds to build and implement the system for the agreed fixed price.

- 10.21 This appears to be the approach that the parties to the SSSP Customer Contract in fact intended to adopt. As part of the services to be performed under SOW 7, IBM was:

- (a) to conduct a series of activities and provide a number of specified deliverables, including:
 - (i) a definition of "the recommended scope";
 - (ii) a "fixed price for Design, Build and Implementation"; and
 - (iii) a "plan for Design, Build, Implementation & Support" (SOW 7, para 2.1.1); and
- (b) to define such things as "required business processes... required business critical functionality... geographies and businesses that will be affected... required integration to other systems... transaction and master data to be migrated... custom reports and forms that will require to be developed... organisational change management activities" (SOW 7, para 2.1.1).

10.22 However, it is notable that in SOW 7, the descriptions of such scoping and planning activities adopt the adjectives "recommended" (as in "the recommended scope") and "required" (as in "required business critical functionality"). The use of these adjectives begs the questions: "recommended by whom?" and "required by whom?".

10.23 The answer to the questions posed immediately above appears to be supplied in the following passage (and similar passages) in SOW 7:

"D. Scope Requirements

In determining the scope for the interim solution, the Contractor in conjunction with the SDA will determine the critical Agency requirements for Queensland Health for interim solution. The Agency-specific requirements will be kept to an absolute minimum for the Lattice Replacement interim solution enough to satisfy the basic functions of paying, rostering and managing their human resources" (SOW 7, para 2.1.1, page 4).

10.24 I understand that the Solution Design Authority or SDA was to be staffed by personnel of both the Customer and IBM. According to Schedule 22A of the SSSP Customer Contract, the SDA was to be:

"primarily responsible for defining and maintaining solution scope, architecture and design for the Program and under each Statement of Work (including any changes to any of the foregoing)" (para. 3.2(a)).

10.25 Accordingly, the parties agreed there would be two criteria used to determine if a particular system feature, function or performance attribute (**Scope Element**) would be within the scope of the Lattice Replacement:

- (a) first, that Scope Element would have to be agreed by IBM "in conjunction with the SDA"; and
- (b) second, that Scope Element would have to be "critical" or "the absolute minimum to satisfy the basic functions of paying, rostering and managing their human resources" (see paragraph 10.22 above).

10.26 This approach represents a potential weakness in the contractual arrangements between the State of Queensland and IBM. If IBM and the SDA failed to reach a consensus as to whether a particular Scope Element should be included in the scope of the Lattice Replacement, there would be the potential for "grid-lock" that would stall the completion of the activities assigned to IBM under the SSSP Customer Contract.

10.27 It would have been preferable for:

- (a) the State of Queensland to have had a casting vote in the SDA or for the preferences of the SDA to prevail in any case of failure of the State of Queensland and IBM to agree on Scope Elements; or
- (b) in the SSSP Customer Contract, the parties to incorporate or refer to a documented minimum Solution Scope for the Lattice Replacement against which any particular Scope Element could be assessed for inclusion in the scope of the Lattice Replacement. As discussed above, such a documented minimum Solution Scope was absent from the SSSP Customer Contract at the time the parties entered into that contract.

10.28 The principal work product which resulted from IBM's requirements gathering activities under SOW 7 appears to have been the document entitled "QHIC Project Scope Definition – Version 0.12". My comments regarding the adequacy of this document as a Solution Scope as a basis for IBM to proceed with the development and implementation of the Lattice Replacement system are set out in section 13 below.

10.29 In summary, on the issue of the adequacy of the contractual arrangements with respect to Scope Risk, I have reached the following conclusions:

- (a) While it was not an unusual approach for the parties to enter into a contract without a detailed Solution Scope in place, the inclusion in the SSSP Customer Contract of the assumption as to the suitability of the DOH system as a basis for the Lattice Replacement System, and the fact that a broad assessment of Workbrain would be required, made this an unusually risky example of that approach;
- (b) It was prudent of the parties to seek to address the risks inherent in this approach to adopt a two-stage structure under which an initial scoping exercise would be conducted by IBM; and
- (c) The utility of that structure in reducing risks relating to the Solution Scope was undermined by requirement of consensus between the SDA and IBM, and the lack of any detail as to the Solution Scope against which questions of scope could be assessed.

TIMEFRAMES

10.30 The Customer Contract Provisions of the Agreement incorporated into the SSSP Customer Contract required the parties:

"[to] perform their obligations under the Customer Contract in accordance with the Project, Implementation and Payment Plan, when applicable" (Part 2 of the Agreement, clause 11.4.1).

10.31 According to those incorporated provisions, the Project, Implementation and Payment Plan,

"shall include, where applicable, the information substantially in the form of Schedule S2 of Part 4" (Part 2 of the Agreement, clause 11.4.2).

10.32 Schedule S2 of Part 4 of the Agreement, in turn, identifies a number of "aspects" which a "Project plan" should address, being in summary:

- (a) the nature and extent of the Deliverables including provisions about the form in which the Deliverables are to be produced and any equipment necessary for access to the Deliverables;
- (b) due dates for delivery of each Deliverable;
- (c) all relates projects tasks;

- (d) commencement dates for all tasks;
- (e) completion dates for all tasks;
- (f) the tasks to be performed by the Customer's employees;
- (g) the initial system set-up and support for data conversion;
- (h) details of site preparation;
- (i) details of prototyping;
- (j) details of how, and what phases the integration of the Products, Licensed Software and Developed Software is to be achieved (for system integration);
- (k) for each task to be performed or Milestone to be achieved, responsibilities of the Contractor and the Customer;
- (l) any work which can be performed off-site;.
- (m) the organisational and human resource management of the project team;
- (n) the times and places for the supply of Products or Services which are to be provided by the Customer;
- (o) the project methodology to be undertaken; and
- (p) details of training.

10.33 The incorporated provisions also allowed for the parties to provide:

- (a) for time to be of the essence in the completion of "Milestones" and in complying with time periods (Part 2 of the Agreement, clause 1.3.1); and
- (b) for the payment of liquidated damages for delay in performing a "Stage" (Part 2 of the Agreement, clause 11.6.1).

10.34 The importance to the State of Queensland of timely performance by the selected Prime Contractor is clearly evident in the terms of the ITO. For example:

- (a) the criteria for selection were to include "Ability to schedule and deliver on time to meet the requirements of the work-streams and the overall Solution" (ITO, Part A, para 8.2.3);
- (b) as noted in paragraph 7.5 above, accelerating the implementation timeline of the SSS Program by engaging a Prime Contractor was one of the key improvements sought to be achieved by the State of Queensland in issuing the ITO (ITO, Part C, para 1.6.2);
- (c) the role of the Prime Contractor was described as "the management of the design, build and implementation of the SS to ensure deliverables are achieved in a timely manner" (ITO, Part D, para 1.1); and
- (d) respondents to the ITO were asked to answer the question, "Under what circumstances would you not take responsibility for delays?" (ITO, Part E, para 1.1.8).

10.35 Against that background, I make the following observations as to manner in which the SSSP Customer Contract addressed the requirement of timeliness:

- (a) Schedules 1 and 2 of the SSSP Customer Contract specified that any Project, Implementation and Payment Plan would be dealt with in "the relevant SOW" (sections C1.43 and M8.6 respectively);
- (b) SOW 7, SOW 8A, SOW 8 – January 2008 and SOW 8 – June 2008 (**Lattice Replacement SOWs**) each included dates for the performance of different stages of the Lattice Replacement work, although none of the Lattice Replacement SOWs accompanied those dates with the level of detailed information which should be found in Project, Implementation and Payment Plans, as referred to in paragraph 10.32 above;
- (c) it is unclear whether the dates in SOW 8 – January 2008 were intended to be binding on IBM, as the dates are part of an "Indicative Timeline" (SOW 8 – January 2008, section 6), suggesting that the dates were not firm. Further, SOW 8 – January 2008 stated that:

"Current estimates, subject to confirmation during the development of a detailed project plan during the Detailed Design Phase, are that the interim solution will be deployed in September, 2008" (para 1.3.1),

suggesting that the deployment date was contingent and not fixed;
- (d) SOW 8 – June 2008 includes both dates for Milestones and dates for key stages of the work (SOW 8 – June 2008, section 5), but, confusingly, SOW 8 – June 2008 also includes an "Indicative Timeline" for phases of the work to be performed (section 7);
- (e) Schedule 1 of the SSSP Customer Contract specified that time would be of the essence in the completion of "Milestones" and in complying with time periods (Schedule 1: General Order, section C1.19); and
- (f) Schedules 2 of the SSSP Customer Contract specified that no liquidated damages for delay would be payable by IBM (Schedule 2: Module Order MO8, section C1.45).

10.36 In addition:

- (a) Schedule 23 of the SSSP Customer Contract is a "Program Level Timeline" which includes numerous dates for the commencement and completion of stages of work;
- (b) clause 1.3 of the SSSP Customer Contract lists "a number of high level objectives [which] apply to this Agreement", one of which is,

"to deliver a completed program of work according to the Timeline in Schedule 23" (SSSP Customer Contract, clause 1.3(f));
- (c) however, clause 1.3 provides that,

"These high level objectives are not intended to and will not form binding contractual obligations between the Parties but will be used to guide behaviours in the event of inconsistency or silence in this Customer Contract"; and
- (d) accordingly, the extent to which IBM was contractually obliged to achieve the dates is in Schedule 23 is uncertain.

10.37 In view of the importance to the State of Queensland of timely performance, it is anomalous that the SSSP Customer Contract in places treated milestone dates as "indicative" or mere estimates, and it is surprising that it did not provide for the payment of liquidated damages by IBM in the event of delay. In addition, the SSSP Customer Contract lacked fully detailed Project, Implementation and Payment Plans in relation to the Lattice Replacement. For these

reasons, I conclude that the SSSP Customer Contract did not deal with the requirement of timely performance so clearly manifested in the terms of the ITO with sufficient certainty.

PRICE

10.38 In Parts 1 and 2 of the Agreement, the term "Price" is defined as:

"the itemised price payable by a Customer for a Deliverable in accordance with the Customer Contract, in Australian dollars and shall include the GST exclusive amount; GST component and the GST inclusive amount" (Part 1 of the Agreement, clause 1.1; Part 2 of the Agreement, clause 1.1).

10.39 Schedule A3 of Part 1 of the Agreement states that the Product and Service (incorporating pricing) details are as submitted by IBM and held by the Contract Authority (implying that the Prices of the Products and Services are not pre-determined).

10.40 Part 1 of the Agreement provides that,

"any Price charged for any Service that is not offered at a pre-determined Price shall be specified in the General Order ..." (Part 1 of the Agreement, clause 4.1.1).

10.41 In turn, the General Order located at Schedule 1 of the SSSP Customer Contract provides that,

"Prices and charges are in each SOW and Schedules 15, 16, 17, 18, 19, 20 and 21" (Schedule 1: General Order, section C1.12).

10.42 The SSSP Customer Contract provided for fixed price work, best estimate work, a mechanism for converting best estimate work into fixed price work and a mechanism for varying the contract as follows:

- (a) Schedule 15 set out a summary of the pricing for fixed price work which is turn set out (initially) in Statements of Work SOW 1 to SOW 7;
- (b) Schedule 16 set out a summary of the pricing for best estimates work which in turn is sets out (initially) in Statements of Scope SOS1 to SOS3;
- (c) Schedule 17 sets out the contractual mechanism for converting best estimates into fixed price work – that is converting Statements of Scope into Statements of Work; and
- (d) Schedule 12 sets out the procedures for effecting a contract change or variation.

10.43 At the time of execution of the SSSP Customer Contract (5 December 2007):

- (a) the Lattice Replacement work was treated in SOS1 as "best estimate work" (as opposed to fixed price work); and
- (b) the best estimate for the Lattice Replacement specified in SOS 1 was **\$6,126,193** (ex GST). This estimate expressly excluded the planning and scoping phase, which was to be fixed price work under SOW7.

10.44 SOS1 was later converted into a "fixed price work" pursuant to Schedule 17, leading to the incorporation into the SSSP Customer Contract of SOW 8 of which there were at least two versions, being SOW 8 – January 2008 and SOW 8 – June 2008.

10.45 The total price of the work to be performed by IBM under SOW 8 – January 2008 is stated to **\$6,194,932.98** (ex-GST) (SOW 8 – January 2008, section 7).

- 10.46 SOW 8 – June 2008 increased this price by **\$1,887,940**, according to CR000060 dated 18 June 2008 (under which SOW 8 – June 2008 replaced SOW 8 – January 2008).
- 10.47 From the materials I have been provided, the last Change Request varying the Price of the work to be performed under SOW 8 was CR210, which specified the total price associated with SOW 8 as **\$22,774,323.00** (ex GST) including a total variation of price through Change Control Documents of **\$16,484,390.02**.
- 10.48 While the original fixed price of **\$6,194,932.98** (ex-GST) for the Lattice Replacement work to be performed under SOW 8 – January 2008 increased dramatically over the term of the SSSP Customer Contract, that increase occurred entirely by mutual agreement of the parties, pursuant to the contract change management process set out in Schedule 12. The underlying causes of the parties agreeing to increase the price appear to have had nothing to do with terms of the SSSP Customer Contract that regulate the price of the Lattice Replacement work but rather, with problems related to the Solution Scope (discussed in section 13 below). I have no basis for concluding that the terms of the SSSP Customer Contract affecting the price of IBM's services were inadequate.

11. WHETHER THE CONTRACT WAS TYPICAL

Was the Contract typical for large IT design and implementation programs? Is it usual for such a Contract to move from Statements of Scope to Statements of Work?

GITC MODULE 8

- 11.1 Contracts based on the GITC have been widely used in Australia for large IT design and implementation programs. There was nothing unusual in selecting the GITC as the basis for the contract appointing IBM as the prime contractor for the Shared Services Solution Program.
- 11.2 The GITC contractual framework allows the parties to select one or more of a number of "Modules" of service types to apply to a particular transaction. The parties to the SSSP Customer Contract selected Module 8 of the Agreement which, following the usual pattern in GICT v5, is the module covering "ICT Contracting Services".
- 11.3 For a project involving the replacement of a system with a new system, such as the Lattice Replacement project, Module 11 covering "Systems Integration" may have been a more suitable Module for the parties to select. As noted in paragraph 8.1 above, such a project would typically be called a "systems integration" project, a name which signals that the principal work product of the relevant Supplier is to be an integrated or implemented "system". This was in fact the case with the Lattice Replacement project.
- 11.4 The selection of the most suitable GITC Module to apply to a particular transaction turns on more than merely the label which GITC gives to the particular services covered by a particular Module.
- 11.5 The key operative clause of Module 11 is:
- "The Contractor shall, in accordance with the Customer Contract, supply and Integrate the System to comply with the Contract Specifications" (Module 11, clause 2.1).
- 11.6 The key operative clause of Module 8 is:
- "The Contractor shall supply to the Customer the Contracting Services in accordance with the Customer Contract" (Module 8, clause 3.1).

- 11.7 The operative clause of Module 11 emphasises the outcome which the Customer requires from the Contractor's services, namely, a System that complies with the Contract Specifications. In contrast, the operative clause of Module 8 emphasises the Contractor's *inputs* to the Customer's objective, namely, the Contractor's "Contracting Services".
- 11.8 In the last decade or so, a view has emerged among IT legal practitioners that contractual regimes focused on inputs are less conducive to the achievement of a Customer's objectives than contractual regimes focused on outcomes. I subscribe to that view. The former type of regime tends to encourage Supplier behaviour directed to expending inputs, because usually in such regimes, the Supplier will be remunerated based upon the inputs it has expended. So it was that in the SSSP Customer Contract, IBM's remuneration was primarily a function of the number of hours of work it expended in each billing period. The latter regime, in contrast, tends to encourage Supplier behaviour directed to the achievement of beneficial outcomes for the Customer, as the Supplier is remunerated accordingly.
- 11.9 In comparison with leading contemporary practice in IT project contracting, I therefore conclude that the contract for the Lattice Replacement was not typical in so far as the parties selected Module 8 to apply.

STATEMENTS OF SCOPE

- 11.10 While I am familiar with the term "Statement of Work", I am not familiar with the term "Statements of Scope". However, I consider the construct of a Statement of Scope convertible to a Statement of Work as it is found in the SSSP Customer Contract to be a useful mechanism for transforming IBM's proposal to perform certain services into a contractual commitment to perform those services.
- 11.11 As I have discussed in section 10 above, it is not unusual for parties to enter into a contract for the supply of significant IT services before the product which is to be the result of those services has been fully described in designs and specifications. To deal with the associated risks of entering into the SSSP Customer Contract without a detailed Solution Scope, the parties adopted the prudent approach of commencing with an initial scoping exercise to settle on a detailed Solution Scope and a fixed price to develop and implement the Lattice Replacement system. In that respect, the SSSP Customer Contract was fairly typical.

HIGH LEVEL OBJECTIVES AND GUIDING BEHAVIOUR PRINCIPLES

- 11.12 Clause 1.3 of the SSSP Customer Contract has the heading "High level objectives". It sets out a number of "objectives [that] apply to this Agreement". According to the introductory paragraph of clause 1.3, these objectives,
- "are not intended to and will not form binding contractual obligations between the Parties but will be used to guide behaviours in the event of inconsistency or silence in this Customer contract".
- 11.13 As has been observed above, one of the objectives contained in clause 3 is:
- "to deliver a completed program of work according to the Timeline in Schedule 23" (clause 1.3(f)).
- 11.14 It was unusual of the SSSP Customer Contract to provide that compliance with the overall timeline for the SSSP Program, set out in Schedule 23, was not a binding contractual obligation but a mere "objective".
- 11.15 Clause 2 of the SSSP Customer Contract has the heading "Guiding behaviour principles". It contains a large number of "principles" in accordance with which the parties, IBM, and the Customer respectively are to act.
- 11.16 The introductory paragraph of clause 2 is as follows:

"The principles set out in this clause 2 are intended to guide the behaviour of the parties in the performance of their obligations set out in in this Customer Contract. This clause 2 is not intended to change the scope of the other obligations contained in the remainder of this Customer Contract, but should be used to help interpret other contractual provisions where the meaning of such provisions is open to interpretation and to set out behaviour principles where the Customer Contract is otherwise silent. This clause 2 should be interpreted with a commercial focus and the obligations herein should be applied within the bounds of reasonableness. Notwithstanding clause 1.4 above [which deals with the order of precedence of clauses] and clause 2.1.13 of Part 3 of GITC [this appears intended to be a reference to clause 2.1.13 of Part 2 of GITC, which also deals with the order of precedence of clauses], to the extent there is an explicit conflict between this schedule [sic] and any other part of this Customer Contract, then this clause 2 will be read down."

11.17 The intent and effect of this paragraph are not entirely clear. It seems to convey at least the following:

- (a) clause 2 does not have the same status as the other clauses of the SSSP Customer Contract;
- (b) rather than creating separate, independent contractual obligations of the parties, the principles contained in clause 2 only have effect in relation to the obligations set out in other clauses of the contract;
- (c) the effect of those principles is:
 - (i) to serve as a guide to a party when the party has a choice as to how it should behave in performing a contractual obligation in another clause of the contract;
 - (ii) to serve as a guide to the parties when the other clauses of the contract are silent as to a particular matter; and
 - (iii) to help interpret other, ambiguous clauses of the contract; and
- (d) the principles contained in clause 2 do not require a party to do anything uncommercial or unreasonable.

11.18 If I have correctly understood the intent and effect of clause 2, then it seems that some of the principles in clause 2 should instead have been made into operative clauses with the same status as the other clauses of the SSSP Customer Contract. In particular, the following principles should have been the subject of binding obligations placed upon on or other party:

- (a) "Each Party will manage identified risks which are its responsibility" (clause 2.2(b));
- (b) "The Contractor will be pro-active. For example, if the Contractor believes that... taking a course that will unnecessarily delay the project... or missed a deadline... the Contractor will raise the issue with the Customer" (clause 2.3(a)); and
- (c) "The Customer will... make management decisions, provide input and perform reviews in a timely and decisive manner" (clause 2.4(b)(i)).

12. STRUCTURE OF THE CONTRACT

Were there known risks in proceeding in such a way with such a large procurement Contract? How could the Contract have been structured to reduce the risk which eventuated, that time and cost expanded hugely?

12.1 The parties entered into the SSSP Customer Contract before anything approximating a detailed Solution Scope was in place. In addition, in SOS1, the SSSP Customer Contract

recorded unqualified assumptions by IBM as to the suitability of two core elements of its proposed solution, namely, the use of the DOH system as a basis for the new Lattice Replacement System, and the suitability of the Workbrain product as an awards engine.

12.2 Proceeding in this way created a number of risks for the State of Queensland, including:

- (a) delivery of a Lattice Replacement system that did not satisfy the requirements of Queensland Health – that is, a system that did not serve as an adequate replacement for the then-existing legacy payroll system in the Department;
- (b) delay in the replacement of that legacy system, leaving Queensland Health with a payroll system which according to the ITO would cease to be supported by its licensor on 30 June 2008; and
- (c) costs for the work required to effect the Lattice Replacement exceeding the amount budgeted for that purpose.

12.3 I understand that each of the risks outlined immediately above materialised to a greater or lesser degree. It appears to me that the primary causes were problems related to the Solution Scope that was developed by IBM pursuant to SOW 7 and SOW 8A, and the manner in which the State of Queensland managed the SSSP Customer Contract (discussed in section 13 below). Nevertheless, I consider that certain structural features of the SSSP Customer Contract may have contributed to the risks which materialised.

12.4 The structural features which may have contributed were:

- (a) the failure to include in the SSSP Customer Contract sufficient detail as to the Solution Scope against which questions of scope could be assessed;
- (b) the treatment by the SSSP Customer Contract of milestone dates as "objectives", as "indicative" dates or as mere "estimates", the failure to provide for liquidated damages to be payable by IBM in the event of delay, and the lack of fully detailed Project, Implementation and Payment Plans in relation to the Lattice Replacement; and
- (c) the choice of GITC Module 8 rather than Module 11 for the purposes of the Lattice Replacement.

12.5 At this point it is convenient to make an observation about the use of GITC as a basis for the SSSP Customer Contract.

12.6 While contracts based on the GITC have been widely used in Australia for large IT design and implementation programs, the GITC framework tends to impose a complex structure on such contracts. This tendency is exemplified in the SSSP Customer Contract. As paragraph 9.15 above outlines, the SSSP Customer Contract comprised numerous sets of provisions originating from different sources, including provisions expressly incorporated from Part 2 and Part 3 of the Agreement. For a lay person, and perhaps even for an experienced legal practitioner, it can be difficult to identify all the terms and conditions which comprise the agreement between the parties.

12.7 A structural improvement to the SSSP Customer Contract which the parties might have considered was to set out in a single physical document all of the terms and conditions which comprised the agreement between the parties.

13. SUBSEQUENT VARIATIONS TO THE CONTRACT

Advise on the appropriateness of subsequent variations to the Contract, and change requests subsequent to the execution of the Contract. There were 47. Is the number unusual? Would tighter specification have made so many unlikely?

- 13.1 Schedule 12 of the SSSP Customer Contract sets out a process for the parties to follow when agreeing to a change to the SSSP Customer Contract, such as a change to the Solution Scope, a change to the timeframes or a change to the price.
- 13.2 Following that process, the parties agreed:
- (a) to incorporate SOW 8 – January 2008 into the SSSP Customer Contract under CR0005 dated 18 January 2008;
 - (b) to vary SOW 8 – January 2008 in the form of SOW 8 – June 2008 under CR000060 dated 28 June 2008; and
 - (c) multiple variations to SOW 8 – June 2008 under other Change Requests.
- 13.3 Each Change Request was to specify a reason for the particular change to the SSSP Customer Contract embodied in it. Therefore, it is possible to identify the ostensible reasons for there being a large number of variations to SOW 8 – June 2008.
- 13.4 The following Change Requests embody what might be termed a functional change to the Solution Scope, and record that the reason for such a change is "a missed Business Requirement":
- (a) CR000073 dated 22 September 2008, which added "Concurrent Employment" functionality to the Lattice Replacement;
 - (b) CR000074 dated 22 September 2008, which added a function to the Lattice Replacement system to provide a "Manual Entry Screen for Rosters";
 - (c) CR000094 dated 22 September 2008, which added a function to deal with "Leave Paid in Advance";
 - (d) CR000103 dated 22 September 2008, which added functionality to comply with "ISI8 Security" requirements;
 - (e) CR000133 dated 22 September 2008 added "a time code to enable the recording of leave";
 - (f) CR000135 dated 22 September 2008 added functionality to address the creation of a leave balance for days in lieu;
 - (g) CR000136 dated 22 September 2008 modified the functionality dealing with "entitlement policies";
 - (h) CR000137 dated 22 September 2008 modified the functionality dealing with "leave type, time code and payment arrangements";
 - (i) CR000138 dated 26 September 2008 added functionality to address "a requirement for the payment of the Visiting Medical Specialist (VMS) Outreach Package";
 - (j) CR000141 dated 22 September 2008 added functionality to accommodate "An additional eleven scenarios [that] have been identified during the testing of Workbrain calculation groups";
 - (k) CR000148 dated 19 November 2008 added functionality to address "a requirement for Additional Employee Group/Subgroups combination configuration";
 - (l) CR000153 dated 19 November 2008 addressed "a defect that will affect the rostering award interpretation, schedule compliance and pay outcomes of employees taking part day leave";

- (m) CR000154 dated 19 November 2008 amended "the Enterprise Structure to fully map" certain employees;
- (n) CR000155 dated 19 November 2008 added a column to the "Roster Conflict report";
- (o) CR000157 dated 19 November 2008 addressed a failure to "correctly pay meal allowance";
- (p) CR000175 dated 22 December 2008 added "23 New SAP Wage types"; and
- (q) CR000176 dated 22 December 2008 provided functionality to enable a "Workbrain Data Extract".

In addition, CR000113 dated 4 September 2008 provided for a new time code and removed "data from configuration... as they were incorrectly identified as a business requirement in a previous version".

13.5 This is the largest group of Change Requests which I have sighted. Such a large number of Change Requests resulting from a "missed Business Requirement" or an "incorrectly identified" business requirement suggests that:

- (a) the State of Queensland did not completely describe its business requirements in respect of the Lattice Replacement system when IBM conducted the requirements gathering work under SOW7;
- (b) IBM did not completely gather the requirements described by the State of Queensland when IBM conducted the requirements gathering work under SOW7 and SOW8A; or
- (c) a combination of those and possibly other factors was present.

13.6 I am unable to provide an opinion as to which of the possibilities set out immediately above applies in respect of the Lattice Replacement. Nor am I able to provide an opinion as to whether such a large number of Change Requests would typically be required as a result of a missed or incorrect business requirement in a project such as the Lattice Replacement project.

13.7 A smaller group of Change Requests appears to have been necessitated by circumstances outside either party's control. Specifically:

- (a) CR000114 dated 26 September 2008 provided for a workaround "to address a Machinery of Government change for Queensland Health";
- (b) CR000158 dated 19 November 2008 added functionality to deal with "New ATO rules effective 01/07/08";
- (c) CR000159 dated 19 November 2008 added a rule to accommodate an "update of the award by the Queensland Industrial Relation Commission";
- (d) CR000164 dated 19 November 2008 provided for "New rules regarding the non provision of a TFN by an employee" which were required by regulation;
- (e) CR 204 dated 25 November 2009 covered the provision by IBM of a new Senior Business Analyst to assist in the gathering of requirement to satisfy new enterprise bargaining agreements; and
- (f) CR 205 dated 22 December 2009 covered the design, build and implementation of the requirements gathered by the Senior Business Analyst assigned under CR 204.

13.8 I would expect that in any large and complex IT project such as the Lattice Replacement, there would be a number of changes to accommodate regulatory and other changes that are outside the parties' control.

14. MANAGEMENT OF THE CONTRACT

Given the structure and contents of the Contract, advise on how the State of Queensland should have managed the Contract.

14.1 Recognising in August 2007 that a range of improvements to the SSS Program were required, not least "accelerating the implementation timeline and reducing costs", the SS Board adopted a strategy of "engaging a Prime Contractor" (ITO, Part C, paragraph 1.6.2).

14.2 Such a strategy could only succeed if the State of Queensland was prepared to pay careful attention to the governance of the program and the management of the prime contract with IBM. I am not aware of any a Customer succeeding in a complex or large scale IT project by following a strategy of "outsourcing" or "handing off" total responsibility for the success of the project to a third party prime contractor.

14.3 Schedule 22 of the SSSP Customer Contract is entitled "Program Governance Framework". The introductory paragraphs of the schedule state that:

"a governance structure and processes will be mutually agreed as part of the formal mobilisation of the program"

and that the contents of the attached Schedule 22A were prepared by the Customer and included in the SSSP Customer Contract,

"as a non-binding document, so that both Parties understand the current state of the governance structure as expected by the Customer" (para 1.2).

14.4 Schedule 22 goes on to provide that IBM would provide "a revised Governance Schedule" by 15 December 2007, with the parties to agree upon a final, binding Governance Schedule after that date.

14.5 It would have been preferable, to better protect the interests of the State of Queensland, if the parties had agreed upon the Governance Schedule and incorporated it, in its agreed form, in the SSSP Customer Contract. This would have ensured that the governance arrangements established for the SSS Program would meet the requirements of the State of Queensland, from the commencement of IBM's work on the program.

14.6 I am not aware if a final, binding Governance Schedule was in fact agreed by the parties as contemplated in Schedule 22, or if it was agreed, whether it was adequate to protect the interests of the State of Queensland.

14.7 Regardless of the final form of the Governance Schedule, it would have been of critical importance to protect the interests of the State of Queensland that the State of Queensland exercised certain minimal governance disciplines in relation to the Lattice Replacement project. In particular, the State of Queensland should have ensured that:

(a) each design document or "artefact" was thoroughly reviewed and "signed-off" by the representatives of the State of Queensland before IBM proceeded to a later stage of the design and development of the Lattice Replacement system; and

(b) the representatives of the State of Queensland conducted each such review in a timely manner, so as not to risk delaying the Lattice Replacement project.

14.8 As I have observed in section 13 above:

- (a) there was a large number of Change Requests which recorded a missed or incorrect business requirement as a reason for a required change to the functionality of the Lattice Replacement system (**Business Requirement Changes**) ; and
- (b) the Business Requirement Changes could be attributable to various factors, including a failure by IBM to gather completely the requirements of the State of Queensland in respect of the Lattice Replacement system.

14.9 However, the large number of Business Requirement Changes might be suggestive of a failure by the representatives of the State of Queensland to exercise the particular governance discipline set out in paragraph 14.7(a) above.

14.10 In addition, it is apparent from the documents I have reviewed that the Lattice Replacement project was beset with delays, some of which might be suggestive of a failure by the representatives of the State of Queensland to exercise the particular governance discipline set out in paragraph 14.7(b) above.

14.11 In this context, I note that:

- (a) SOW 8A required IBM to continue performing the Lattice Replacement scoping and planning activities for the period from 2 January 2008 to 18 January 2008, suggesting that IBM failed to complete the work that was to be performed under SOW 7 by December 2007 as required in SOW 7. The causes of such delay are not apparent on the face of SOW 8A;

- (b) SOW 8 – January 2008 records that there was, in fact, a delay in the completion of the Lattice Replacement scoping and planning activities and that this may have been caused by grid-lock in the SDA:

"a number of open issues remain unresolved at this point of time and that when resolved may result in a change to the scope of work required under this SOW (8)... the deliverable "QHIC Project Scope Definition – Version 0.12"... was delivered to the Solution design Authority on the 24th of December as required under the previous statement of work (SOW 7). As at the 8th of January, 2008, the contractor had not received comment from Customer regarding this deliverable and this being the case this SOW (8) is based on the version identified above" (SOW 8 – January 2008, section 1.3);

- (c) SOW 8 – June 2008, which replaced SOW 8 – January 2008 pursuant to CR000060, provided that:

"This Statement of Work has been amended to reflect the issues articulated in CR000060 and the associated issue (IS-000112 – Queensland Health interfaces) and change control documents.

A number of issues internal to Queensland Health prevented the scope defined by SOW 8 from being delivered. This version of SOW 8 reflects only the costs and other impacts associated with IS-000112 and does not include provision for other Change Requests that relate to SOW 8.

This revision reflects a delay to the QHIC project schedule of 6-7 weeks detailed in issue IS-000112" (SOW 8 – June 2008, section 1.1);

- (d) SOW 8 – June 2008 further provides that:

"It was agreed at the "QHIC Scope Definition" deliverable review meeting held on the 17th of January, 2008 that a number of open issues remained unresolved at this point of time and that when resolved may result in a change to the scope of work required under this SOW (8)... a change to the

level of testing detailed in the Scope Definition may be required" (SOW 8 – June 2008, section 1.3).

- 14.12 Further extensive delays to the Lattice Replacement were reflected in a number of Change Requests which varied SOW 8 – June 2008. I consider these Change Requests in the following section of this Report.

15. TERMINATION OF THE CONTRACT

Advise on whether and how the State of Queensland could have terminated the Contract having regard to the terms of the Contract, identifying any clear points at which the State had an opportunity to cease acquiring any further services from IBM.

TERMINATION FOR CONVENIENCE

- 15.1 Under clause 16.10 of Part 2 of the Agreement, incorporated into the SSSP Customer Contract, the State was entitled to terminate the SSSP Customer Contract for convenience. In that event,

"the Contractor may recover from the Customer the amount of any loss or damage suffered by the Contractor as a result of the suspension or termination" (clause 16.10.5) and "payment for all work performed and accepted by the Customer in accordance with the Customer Contract up to the date of... termination" (clause 16.10.6).

- 15.2 Schedule 1 of the SSSP Customer Contract further provided that:

"If the Customer terminates the Customer Contract for convenience under clause 16.10, it will pay as compensation to the Contractor

- the Contractor's actual wind down costs; and

- the Supplier's [sic] margin of 20% applied to all charges payable for work to be completed under the projected timeline in the first 12 months from the Commencement Date (less any amount already paid).

The parties acknowledge and agree that this is not a penalty and is a genuine pre-estimate of the Contractor's loss associated with termination for convenience" (Schedule 1: General Order, section 1.8).

- 15.3 It is unclear if the for "actual wind down costs" payable to IBM under Schedule 1 was intended to be:

- (a) in place of the compensation for "any loss or damage suffered by the Contractor as a result of the suspension or termination" in clause 16.10.5;
- (b) additional to that general compensation; or
- (c) clarification that the general compensation included "actual wind down costs".

- 15.4 It is reasonably clear, however, that the compensation for a 20% margin earned or to be earned by IBM over the first 12 months was intended to supplement the compensation for IBM's costs as a result of the termination. This represented, in total, a relatively generous compensation package for IBM if the State of Queensland if it had exercised its right to terminate the SSSP Customer Contract for convenience.

TERMINATION FOR CAUSE

- 15.5 Under clause 16.6.1 of Part 2 of the Agreement, incorporated into the SSSP Customer Contract, the State was entitled to issue to IBM a "Notice to Show Cause" if IBM committed "a

material breach" of the SSSP Customer Contract. The notice would have to provide details of the breach, and require IBM,

"within the period specified in the notice, such period being at least seven (7) days, to show cause, in writing, why the Customer should not terminate the Customer Contract" (clause 16.6.1(b)).

- 15.6 Under clause 16.6.1 of Part 2 of the Agreement, incorporated into the SSSP Customer Contract, the State was entitled to issue to IBM a "Notice of Termination", terminating the SSSP Customer Contract, if IBM failed,

"to show reasonable cause in writing within the time specified in [the] Notice to Show Cause why the Customer Contract should not be terminated" (clause 16.7.1(a)).

- 15.7 The above provisions established a procedural hurdle which the State of Queensland would have to have cleared before it could terminate the SSSP Customer Contract for material breach by IBM. The State of Queensland could not have terminated the SSSP Customer Contract for material breach if IBM showed reasonable cause why the contract should not be terminated.

- 15.8 The result is that, should there have been:

- (a) a material breach by IBM which otherwise would have entitled to State of Queensland to terminate the SSSP Customer Contract; and
- (b) a written response purporting to show reasonable cause why the SSSP Customer Contract should not be terminated, from IBM in response to any Notice to Show Cause,

the State of Queensland would have been put to the difficult assessment of whether IBM had, in fact, shown reasonable cause or not.

- 15.9 In contracts for significant IT projects involving private sector Customers, it is rare to find that the Customer has such a procedural hurdle to clear before it may issue a notice terminating the contract. A termination regime in which the right of the Customer to terminate for material breach turned on the Supplier's failure to rectify the breach, rather than the Supplier's failure to show reasonable cause, is more typical in a private sector IT project.

- 15.10 I would usually advise any client intending to enter a contract for an IT project as a Customer against the inclusion of a "show cause" hurdle in an express contractual right of termination because of the difficult assessment required, and the potential for the client to repudiate the contract if it purports to terminate following an incorrect assessment.

- 15.11 I do not know if the State ever intended to terminate the SSSP Customer Contract for an alleged material breach by IBM. However, the SSSP Customer Contract would have been more difficult to terminate for material breach by IBM than it could have been had the termination regime been drafted in a form more typical of private sector IT contracts.

DELAYS

- 15.12 SOW 8 – January 2008 included an "Indicative Timeline" (SOW 8 – January 2008, section 6), and stated that:

"Current estimates, subject to confirmation during the development of a detailed project plan during the Detailed Design Phase, are that the interim solution will be deployed in September, 2008" (para 1.3.1),

- 15.13 SOW 8 – June 2008 stated that:

"IBM will start work under this SOW on 19/012008 and will complete this work by September 2008" (section 9).

- 15.14 IBM did not complete the work under SOW 8 – June 2008 by September 2008.
- 15.15 On 4 September 2008, the parties agreed to change the "Go-Live date" to "no later than 30 June 2009". Their agreement to extend that date was set out in CR 129, but it was subject to the following "condition precedent":
- "The Customer accepts that the Contractor has demonstrated achievement of both the following Payroll Performance Test Criteria (Enclosure 1) and WorkBrain Award Interpretation Test Criteria (Enclosure 2) on or before 30th November 2008" (CR 129, section 7).
- 15.16 The following subsequent Change Requests varied the date by which that condition precedent was to be satisfied (**CP Date**):
- (a) CR 174 dated 27 November 2008, which extended the CP Date to 5 December 2008;
 - (b) CR 177 dated 4 December 2008, which extended the CP Date to 11 December 2008; and
 - (c) CR 179 dated 4 December 2008, which extended the CP Date to 23 December 2008.
- 15.17 In each of the Change Requests referred to in the precedent two paragraphs, it is expressly stated that the parties' agreement to the matters set out in the Change Request,
- "is not a waiver or variation by either the Customer or the Contractor of any rights that such a party may have."
- 15.18 I do not know if the condition precedent was met by the final CP Date, or met at all, as this is not recorded in any of the materials I have reviewed; in any case, it is clear that 30 June 2008 passed without the Lattice Replacement system "going-live".
- 15.19 In CR184 dated 26 June 2009, the parties recorded that the SSS Program had been suspended, leaving the Lattice Replacement project to continue, and that they had agreed IBM was to "complete this work [that is, the work under SOW 8 – June 2008] on the 31st December 2009".
- 15.20 The following subsequent Change Requests varied the dates for milestones in the Lattice Replacement project:
- (a) CR200 dated 14 August 2009, which extended the date for the developed Lattice Replacement system to enter the "UAT" (user acceptance testing) phase;
 - (b) CR201 dated 13 October 2010, which extended certain milestones by 2 weeks, pushing the "Milestone Completion Date for Acceptance of LATTICE Replacement Solution" back to 14 January 2010;
 - (c) CR 207 dated 7 December 2009, which refers to a March 2010 go-live date; and
 - (d) CR 208 dated 22 December 2009, which "[moves] the completion date for the Deployable Solution to the 22nd March 2010.
- 15.21 As I have noted in paragraph 10.35(e), the parties specified in Schedule 1 of the SSSP Customer Contract that time was to be of the essence. The number and extent of the delays to the completion of the Lattice Replacement project beg the question, why did not the State of Queensland appear to initiate the process for terminating the SSSP Customer Contract for delay, instead of repeatedly agreeing to extend the date for completion?

- 15.22 The answer to this question might be found in Schedule 24 of the SSP Customer Contract. This schedule set out the processes to be followed by the parties if a delay is anticipated or occurs.
- 15.23 Under Schedule 24, if the cause of a delay is:
- (a) "an act or omission of the Customer, an Agency or a third party under the control and direction of the Customer"; or
 - (b) "a change in law which directly and materially impacts on the performance of the Services" (para 1.5),
- IBM is entitled to claim and the State is required to grant to IBM an extension of time, on certain conditions (specifically, IBM has complied with certain notice requirements, and endeavours to minimise the delay).
- 15.24 Assuming that the numerous Change Requests referred to above were properly initiated by one or other party (as to which, I make some observations in section 16 below), the State may in fact have considered that its own acts or omissions had caused the delays which were addressed in those Change Requests. According to Schedule 24 of the SSSP Customer Contract, the State would have been obliged in such circumstances to grant the extensions of time set out in the Change Requests.
- 15.25 There were two other features of Schedule 24 which might supply an answer to the question posed in paragraph 15.21 above.
- 15.26 First, Schedule 24 provides that even if the cause of a delay was an act or omission of IBM, the parties were obliged to "enter into good faith discussions for an extension of time", provided that in such cases,
- "The Customer may, but... is not obliged to, grant an extension of time" (Schedule 24, para 1.4).
- 15.27 In addition, certain of the "principles" set out in clause 2 of the SSSP Customer Contract, discussed in paragraphs 11.12 to 11.18 above, might be construed to show an intention of the parties that each of them would tolerate a degree of contractual non-compliance by the other, rather than enforce their strict legal rights.. Those principles included the following:
- (a) "The Parties will not knowingly... use... any element of duress (including... unreasonable threat of enforcing legal rights...) (clause 2.2(g));
 - (b) "A Party must act considerately and with respect towards the other Party, including by meeting with and openly discussing issues, and giving due and proper consideration to the views and needs of the other Party as against their own views and needs, in a professional and responsible manner" (clause 2.2(h); and
 - (c) "The Parties acknowledge and accept that genuine mistakes may be made during the life of the Customer Contract. The intention of the Parties is for mistakes to be corrected or dealt with in a professional manner that ensures the project proceeds according to the agreed plan" (clause 2.2(k)).
- 15.28 It is unclear whether the State considered itself obliged to grant an extension of time in some cases of delay caused by IBM, rather than enforce its strict legal rights against IBM, by reason of:
- (a) the obligation in Schedule 24 to discuss extensions of time in all cases of delay; and
 - (b) the principles set out in clause 2 of the SSSP Customer Contract.

15.29 Second, Schedule 24 goes on to set out certain specific consequences of delays caused by the acts or omissions of IBM. Where the act or omission of IBM is the cause of the delay, and the Customer does not grant an extension of time, then:

- "(c) the Contractor must as soon as possible issue a progress report and achieve the affected Milestone or provide the affected Deliverable as soon as possible;
- (d) the Timeline in Schedule 23 remains unchanged; and
- (e) the Contractor must:
 - (i) do, at no additional cost to the Customer, all things reasonably necessary to overcome the actual or possible delay.; and
 - (ii) inform the Customer of all relevant solutions and strategies to overcome, manage or minimise the Delay" (para 1.4).

15.30 Further, in such cases:

"Where a Milestone date is not reached or a Deliverable is not provided by the specified date then that Milestone or Deliverable date slip may be included in the assessment of the At Risk Amount (if applicable)" (Schedule 24, para 1.4).

15.31 These consequences are neither expressed in Schedule 24 to be exhaustive nor, alternately, to be without limitation to any other rights of the State of Queensland where IBM causes a delay. Accordingly, it is unclear on the terms of the SSSP Customer Contract if, in the case of a delay caused by an act or omission of IBM, the State of Queensland's rights were limited to those set out in Schedule 24, or included additionally a right to terminate the SSSP Customer Contract for delay.

16. OTHER COMMENTS AND OBSERVATIONS

Any other comment or observation you wish to make which may be relevant to our Terms of Reference which occur to you from your perusal of the material.

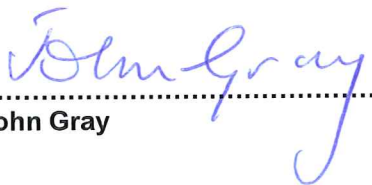
- 16.1 I have noted above that there were numerous Change Requests which recorded a missed or incorrect business requirement as the rationale for a change to the SSSP Customer Contract, and that the number of such Change Requests contributed to the delays and price increases in the Lattice Replacement project.
- 16.2 I have also noted above that a number of factors might have contributed to the missing of a business requirement, but that it is not possible, based solely on the terms of the relevant Change Requests, to assess which factors applied in the case of any particular Change Request.
- 16.3 A second, smaller set of Change Requests record the rationale for the relevant change as the correction of "defects" in the Lattice Replacement system. These, too, contributed to delays and price increases in the project.
- 16.4 Assuming that the rationale so recorded in all such Change Requests was authentic, a legitimate question to be asked is whether IBM, using the expertise and exercising the skill of a professional Supplier organisation, ought to have ensured there were not so many missed business requirements or defects.

17. EXPERT WITNESS DECLARATION

17.1 I confirm:

- (a) the factual matters stated in this Report are, as far as I know, are true;

- (b) I have made all enquiries I consider appropriate;
- (c) the opinions stated in this Report are genuinely held by me;
- (d) this Report contains references to all matters I consider significant; and
- (e) I have prepared this Report on the basis that as an expert I have a duty to assist the Commissioner and that this duty overrides any obligation I may have to any party involved in the Inquiry or to any person who is liable for my fees.
- (f) I understand the duty specified above and I have complied with that duty.


.....
John Gray

Annexure 1 - Letters of Instructions

Our reference: 2137176
Your reference John Gray

Queensland Health Payroll System
Commission of Inquiry

15 March 2013

Mr John Gray
Partner
HWL Ebsworth Lawyers
Level 14, Australia Square
264-278 George Street
SYDNEY NSW 2000

Dear Mr Gray

QUEENSLAND HEALTH PAYROLL COMMISSION OF INQUIRY

I refer to your email on 14 March 2013.

After your discussions with Jonathan Horton and Wylie Nunn on 11 and 12 March 2013, the instructions contained in our letter dated 21 February 2013 require amendment.

Specifically, Questions 5 and 6 should be amended as follows:

5. Given the structure and contents of the Contract, advise on how the State of Queensland should have managed the Contract.
6. Advise on whether and how the State of Queensland could have terminated the Contract having regard to the terms of the Contract, identifying any clear points at which the State had an opportunity to cease acquiring any further services from IBM.

We confirm our instructions to provide an expert opinion in respect of Questions 1 to 4 and 7 as contained in our letter dated 21 February 2013.

Please do not hesitate to contact me if you have any queries.

Yours sincerely



Fran Copley
Official Solicitor
Queensland Health Payroll System Commission of Inquiry

Our reference: 2116913
Your reference John Gray

Queensland Health Payroll System
Commission of Inquiry

21 February 2013

Mr John Gray
Partner
HWL Ebsworth Lawyers
Level 14, Australia Square
264-278 George Street
SYDNEY NSW 2000

Dear Mr Gray

QUEENSLAND HEALTH PAYROLL COMMISSION OF INQUIRY

I refer to your telephone conversation with the Commissioner, Mr Chesterman, and Counsel Assisting on 13 February 2013.

Overview

On 5 December 2007, the State of Queensland entered into a contract with IBM Australia Limited (**IBM**). Under the contract, IBM was appointed Prime Contractor for the Shared Services Solution Program for the Queensland Government (the **Contract**).

The Contract was awarded following a "closed" tender process to which three companies submitted responses. The successful tenderer, IBM, agreed to provide certain "ICT" services to the State of Queensland.

The key participants in the project were:

1. **Corp Tech:** A specialised business unit of Treasury Department (established in 2003) and subsequently located within the Department of Public Works providing a whole of government role over the acquisition of information technology. Corp Tech's role in the provision of "shared services" (payroll was one such service) changed over time.
2. **IBM:** The Prime Contractor for provisions of the ICT services.
3. **Queensland Health:** The Queensland Department of Health.

Commission of Inquiry

The Terms of Reference of the Inquiry requires the Commissioner to examine the adequacy of the contractual arrangements between the State of Queensland and IBM, and why and to what extent the contract price for the Queensland Health payroll system increased over time. The Commissioner is also asked to determine whether any contractual provisions may have been breached. The Commissioner is further required to recommend changes to existing procurement, contract and project management (including governance) policies and contractual arrangements for major Queensland government information and communication technology projects initiated in the future to ensure the delivery of high quality and cost effective products and systems. The Terms of Reference are attached.

Expert Opinion Sought

We will brief you with all relevant documents in the Commission's possession concerning the Contract between the State and IBM.

The Contract takes the form of the Government Information Technology Contract (GITC) version 5 Contract (Q11).

Initially IBM was to design and implement an HR and financial transaction/recording system for many Queensland government departments ("whole of government").

The work which IBM was to perform under the Contract was defined in a series of Statements of Work and included as a priority replacing the then-existing payroll system in Queensland Health (known as the LATTICE system). The LATTICE system needed replacement because it was inadequate and its supplier indicated it would no longer support it.

The Contract was "re-scoped" in 2009 and became limited to replacing LATTICE. Scope of Work 8 is relevant to the re-scoped Contract.

You will note that the Contract consisted of a number of "Statements of Scope", without a fixed price, the subject matters of which were to change into Statements of Work with a fixed price.

We ask for your help with the following:

1. Advise whether the contractual arrangements between the State of Queensland and IBM were adequate, and in particular whether the scope of work was sufficiently identified and defined in the Contract.
2. Was the Contract typical for large IT design and implementation programs? Is it usual for such a Contract to move from Statements of Scope to Statements of Work?
3. Were there known risks in proceeding in such a way with such a large procurement Contract? How could the Contract have been structured to reduce the risk which eventuated, that time and cost expanded hugely?
4. Advise on the appropriateness of subsequent variations to the Contract, and change requests subsequent to the execution of the Contract. There were 47. Is the number unusual? Would a tighter specification have made so many unlikely?
5. Identify any anomalies in the contractual provisions and whether any contractual provisions may have been breached.
6. Identify best industry practice with respect to contractual arrangements for major government information and communication technology projects to ensure the delivery of high quality and cost effective products and systems.
7. Any other comment or observation you wish to make which may be relevant to our Terms of Reference which occur to you from your perusal of the material.

For the purposes of compiling your report, it will be necessary for you to set out in some detail your expertise and experience in relation to contractual arrangements for major information and communication technology projects, specifically those relating to government.

May we have your report by Friday, 22 March 2013? It is anticipated that you will be required to give evidence in the week commencing Monday, 8 April 2013.

Thank you for your assistance.

Yours sincerely



Fran Copley
Official Solicitor
Queensland Health Payroll System Commission of Inquiry

Encl

*Education (General Provisions) Act 2006***SCHOOL ENROLMENT MANAGEMENT PLAN**

In accordance with Chapter 8, Part 3 Section 170, of the *Education (General Provisions) Act 2006*, School Enrolment Management Plans for the following school has been prepared by the Regional Director, South East Region, delegate of the chief executive.

Copies of School Enrolment Management Plans are available for public inspection, without charge, during normal business hours at the department's head office, and accessible on the department's website <http://education.qld.gov.au/schools/catchment>

Region: South East Region
School: Benowa State High School (new)

*Commissions of Inquiry Act 1950***COMMISSIONS OF INQUIRY ORDER (NO. 2) 2012
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Short title

1. This Order in Council may be cited as the *Commissions of Inquiry Order (No. 2) 2012*.

Commencement

2. This Order in Council commences on 1 February 2013.

Appointment of Commission

3. UNDER the provisions of the *Commissions of Inquiry Act 1950* the Governor in Council hereby appoints the Honourable Richard Chesterman AO RFD QC from 1 February 2013, to make full and careful inquiry, in an open and independent manner, into the implementation of the Queensland Health payroll system with respect to the following matters, and having regard to previous reviews of the Queensland Health payroll system implementation, including the KPMG implementation review and the Auditor-General of Queensland's report titled *Information systems governance and control, including the Queensland Health Implementation of Continuity Project* (2010):

- a. the adequacy and integrity of the procurement, contract management, project management, governance and implementation process;
- b. whether any laws, contractual provisions, codes of conduct or other government standards may have been breached during the procurement and/or implementation process and who may be accountable;
- c. the contractual arrangements between the State of Queensland and IBM Australia Ltd and why and to what extent the contract price for the Queensland Health payroll system increased over time;
- d. any recommended changes to existing procurement, contract and project management (including governance) policies, processes, standards and contractual arrangements for major Queensland government information and communication technology projects initiated in the future to ensure the delivery of high quality and cost effective products and systems; and
- e. any other matter relevant to this review.

Commission to report

4. AND directs that the Commissioner make full and faithful report and recommendations on the aforesaid subject matter of inquiry, and transmit the same to the Honourable the Premier by 30 April 2013.

Application of Act

5. THE provisions of the *Commissions of Inquiry Act 1950* shall be applicable for the purposes of this inquiry except for section 19C – Authority to use listening devices.

Conduct of Inquiry

6. THE Commissioner may hold public and private hearings in such a manner and in such locations as may be necessary and convenient.

ENDNOTES

1. Made by the Governor in Council on 13 December 2012.
2. Notified in the Gazette on 14 December 2012.
3. Not required to be laid before the Legislative Assembly.
4. The administering agency is the Department of Justice and Attorney-General.

Department of National Parks, Recreation, Sport and Racing
Brisbane, 13 December 2012

Her Excellency the Governor, acting by and with the advice of the Executive Council and in pursuance of the provisions of the *Major Sports Facilities Act 2001*, has declared the major sports facility events outlined in Schedule 1 as declared events for the periods indicated:

SCHEDULE 1

Major Sports Facility event	Declared Period	Major Sports Facility
Super Rugby Round 2 – Queensland Reds v New South Wales Waratahs	23 February 2013 11:00am – 11:00pm	Suncorp Stadium
Super Rugby Round 3 – Queensland Reds v Hurricanes	1 March 2013 11:00am – 11:00pm	Suncorp Stadium
National Rugby League Round 1 – Brisbane Broncos v Manly Sea Eagles	8 March 2013 11:00am – 11:00pm	Suncorp Stadium
NAB Cup Round 1	23 February 2013 11:00am – 11:30pm	Metricon Stadium

Steve Dickson MP
Minister for National Parks, Recreation, Sport and Racing

*Queensland Heritage Act 1992***DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION
Heritage Register Decision**

Under the provisions of s.54 of the *Queensland Heritage Act 1992*, the Department of Environment and Heritage Protection gives public notice that on 7 December 2012 the Queensland Heritage Council entered in the Queensland Heritage Register the following as State Heritage Places:

HRN 602814	Bundaberg	Fallon House 1 Maryborough Street
HRN 602815	Bundaberg	St John's Lutheran Church 30 George Street
HRN 602816	Indooroopilly	Chapel of St Peter's Lutheran College 66 Harts Road

*Queensland Heritage Act 1992***DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION
Heritage Register Decision**

Under the provisions of s.54 of the *Queensland Heritage Act 1992*, the Department of Environment and Heritage Protection gives public notice that a decision has been made by the Queensland Heritage Council on the 7 December 2012 not to enter in the Queensland Heritage Register the following as a State Heritage Place HRN 602577:

Green Island Green Island Underwater Observatory

Annexure 2 – Rule 428



Queensland Consolidated Regulations

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UNIFORM CIVIL PROCEDURE RULES 1999 - SECT 428

428 Requirements for report

- (1) An expert's report must be addressed to the court and signed by the expert.
- (2) The report must include the following information—
 - (a) the expert's qualifications;
 - (b) all material facts, whether written or oral, on which the report is based;
 - (c) references to any literature or other material relied on by the expert to prepare the report;
 - (d) for any inspection, examination or experiment conducted, initiated, or relied on by the expert to prepare the report—
 - (i) a description of what was done; and
 - (ii) whether the inspection, examination or experiment was done by the expert or under the expert's supervision; and
 - (iii) the name and qualifications of any other person involved; and
 - (iv) the result;
 - (e) if there is a range of opinion on matters dealt with in the report, a summary of the range of opinion, and the reasons why the expert adopted a particular opinion;
 - (f) a summary of the conclusions reached by the expert;
 - (g) a statement about whether access to any readily ascertainable additional facts would assist the expert in reaching a more reliable conclusion.
- (3) The expert must confirm, at the end of the report—
 - (a) the factual matters stated in the report are, as far as the expert knows, true; and
 - (b) the expert has made all enquiries considered appropriate; and
 - (c) the opinions stated in the report are genuinely held by the expert; and
 - (d) the report contains reference to all matters the expert considers significant; and
 - (e) the expert understands the expert's duty to the court and has complied with the duty.

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Annexure 3

Qualifications

Academic Qualifications:	Bachelor of Laws (Hons), Sydney University Bachelor of Arts, Sydney University
Jurisdictions Admitted:	New South Wales (since 1992) and Hong Kong (2003 – 2004)

Experience

Upon my admission as a solicitor in July 1992, I joined **Freehill, Hollingdale & Page** (now Herbert Smith Freehills) (Sydney) where I practised in the banking and finance, and intellectual property litigation practice groups. I developed legal skills in commercial law and litigation from work which included:

- Advising a multinational IT company in litigation with the New South Wales State Authorities Superannuation Board;
- Secondment to IBM Australia Limited legal department in Sydney for 6 months;
- Solicitor on the float of a gaming company on the Australian Stock Exchange;
- Various business acquisitions for a venture capital fund; and
- General corporations law advice for public listed companies.

In March 1995, I joined the legal department of **Unisys Australia Limited** (Sydney), where I gained experience in the review and drafting of IT contracts including the review of the Government Information Technology Conditions (**GITC**) proposed by public sector organisations for use in the procurement of IT goods and services.

In November 1996, I joined **Gilbert + Tobin** (Sydney and Hong Kong), where as a solicitor and then as a partner I developed expertise in general commercial law with a particular focus on technology, intellectual property, telecommunications, media and corporate matters. Specific work at that law firm included:

- IT and telecommunications outsourcing agreements for financial institutions and for companies in the energy, food and beverage, manufacturing, health, media, entertainment, telecommunications and retail sectors;
- Business process outsourcing agreements for financial institutions, including “offshoring” of business processes to India;
- IT system and infrastructure acquisition agreements for public and private sector clients, including the acquisition of systems and infrastructure supporting supply chain automation, energy distribution, telecommunications networks and billing systems and the delivery of new banking and financial services products;
- Advising on regulatory issues relating to outsourcing, IT and telecommunications projects, including prudential requirements for banks, telecommunications regulation and privacy law;
- Agreements for online commerce, including web development and hosting agreements, online contracting, “business-to-business” purchasing consortia, encryption and digital certificates;
- Advising on intellectual property proprietorship, rights protection and enforcement;
- Intellectual property assignment, licensing and commercialisation agreements;

- Content acquisition for print, electronic and digital media;
- Sponsorship, film production and book publishing agreements;
- Intellectual property due diligence in connection with mergers, acquisitions and initial public offerings;
- Corporate mergers, sales and purchases of businesses, the establishment of joint ventures, and shareholder and share subscription agreements;
- General commercial work for public and private sector clients, including sales of goods, loans and leasing arrangements;
- Government grant funding for information technology and biotechnology companies;
- Distribution and reseller agreements; and
- Advising on Australian Federal and State Government consumer protection and trade practices law, including product recalls, door-to-door selling and referral selling, third-line forcing and exclusive dealing.

In early 2006, I was approached by **Corrs Chambers Westgarth** (Sydney) to lead that firm's IT practice group in Sydney. Major clients of the practice included IT and telecommunications companies, various public sector entities, and private sector entities in the retail, financial services, manufacturing, health, media, energy and fast moving consumer goods sectors. Experience gained in that role included:

- Member of the team acting for the Australian Federal Government in a major telecommunications infrastructure project;
- Acting for the organisers of a Sydney-based, international event on the host broadcasting agreement with IMG Media, the agreement for the supply of telecommunications services to the event with Telstra, and numerous sponsorship agreements with telecommunications and IT Suppliers;
- Advising a listed industrial company on the information technology and telecommunications aspects of the supply of over 700 new rail carriages to the New South Wales Government;
- Advising an Australian bank on the procurement of banking software systems;
- Advising on the procurement of IT and telecommunications systems for one of Australia's largest retail organisations;
- Advising a regional bank on the negotiation and drafting of a Master Services Agreement with one of India's largest back office outsourcing service providers; and
- Acting for a global IT company on all aspects of the re-structuring of the distribution channels for gaming and software products; acting on the supply of software to the Commonwealth of Australia, the State of New South Wales, the State of Tasmania and the State of Queensland under contracts based on the GITC; advising in relation to an online joint venture and various internet-related issues.

On 1 July 2009, I became a partner of **HWL Ebsworth**. Upon commencement, I was appointed the leader of the firm's national Intellectual Property & Technology practice group, a position which I continue to hold. In addition, from October 2010, I have been the National Practice Group Head of the firm's Commercial practice group. Major work performed at this firm has included:

- Being the sole IT legal advisor to an Australian electronic payments service organisation. Projects have included the procurement of a new core payments software hub; data centre services agreements; system integration; hardware procurement; and acting on licensing disputes with global IT companies;
- Acting for an insurance company in the replacement of its core policy management system;
- Acting for a life insurance company in various IT projects including the procurement of a new communications platform;
- Acting for a serviced office provider in the procurement of hosted application services from an Indian IT company and in the establishment of co-location arrangements for hosting its core IT systems by that company.

Citations

- Chamber's Global World's Leading Lawyers (2001-2002, and 2002-2003 editions), for Communications; (2008-2009 edition) for TMT: Information Technology;
- Legal Profiles 2001-2002, for both Information Technology and Health;
- The Asia Pacific Legal 500, as one of Hong Kong's "leading individuals" in IT and telecommunications law (2002/2003 and 2003/2004 editions);
- The Asia Pacific Legal 500, in Gilbert + Tobin's citation as a premier Australian TMT law firm (2004/2005 edition);
- PLC Which Lawyer Yearbooks 2008 - 2012, for Outsourcing and TMT: Technology;
- Chambers Asia Pacific 2011 and 2012 (and the upcoming 2013 edition) for TMT: Information Technology; and
- Listed in the 2009, 2010, 2011, 2012 and 2013 editions of "The Best Lawyers in Australia" published in the *Australian Financial Review* for Information Technology.

Seminars and Publications

China Commercial Contracts (Lexis Nexis), Chapter on "Outsourcing" (original chapter editor)

Numerous seminars in Sydney, Hong Kong, Singapore and Kuala Lumpur on Service Level Agreements, Intellectual Property and Technology Contracting.

In my 12 years as a partner of Gilbert + Tobin, Corrs Chambers Westgarth and HW Ebsworth, I have given over 40 presentations in Sydney, Singapore and Malaysia, on topics such as technology contracting, service levels, intellectual property and outsourcing.

Employment History

July 2009 to present

HWL Ebsworth

Partner, IP & Technology
National Practice Group Head, Commercial Practice Group

March 2006 to June 2009

Corrs Chambers Westgarth

Partner, IP, Technology and Competition Practice Group

Jul 2000 to March 2006

Gilbert + Tobin

Partner in the Corporate, Communications and Technology Group

Nov 1996 to Jun 2000

Gilbert + Tobin

Senior Lawyer (corporate, IT, telecommunications and intellectual property)

Mar 1995 to Oct 1996

Unisys Australia Limited

Legal Officer

Jul 1992 to Mar 1995

Freehill Hollingdale & Page

Solicitor (banking and finance, corporate and IP practice groups)

Oct 1993 to Mar 1994

IBM Australia Limited

Seconded from Freehills