In the matter of the *Commissions of Inquiry Act 1950*

And in the matter of the *Commissions of Inquiry Order (No 2) 2012*

Queensland Government

Crown Law

Department of Justice and Attorney-General

SUBMISSIONS ON BEHALF OF THE STATE OF QUEENSLAND

(SETTLEMENT)

QUESTION 1

Was it provident for the State of Queensland to enter into the Supplemental Agreement dated 22 September 2010?

[1] This issue is tied up with other issues in the list, but is somewhat over-arching. We take the issue as an inquiry as to whether entering into the supplemental deed was the making of a timely preparation for the future; that is, whether it was prudent, cautious, economical and far sighted; in summary, whether the entering into the Supplemental Agreement was the right or prudent decision for the State at the time. This necessarily involves the risk of a judgement based on hindsight.

[2] The approach of the law – exemplified in its treatment of both administrative and judicial discretion – is to refrain from being over-ready to second-guess those exercising discretionary powers. This is not a legal proceeding, but the law's approach on these matters reflects common, elemental experience: hindsight bestows benefits not enjoyed at the time a decision is made.

[3] Hindsight, even if it were correct, should be resisted in the Commission's fact finding exercise. As McHugh J said in *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 34:

> … before holding a defendant negligent even though that person has complied with common practice, the tribunal of fact had better first make certain that it has not used hindsight to find negligence. Compliance with common practice is powerful, but not decisive, evidence that the defendant did not act negligently. And the evidentiary presumption that arises from complying with common practice should be displaced only where there is a persuasive reason for concluding that the common practice of the field of activity fell short of what reasonable care required.

While the Commission is not a Court, nevertheless caution should be exercised in reaching its findings, and the above warning as to hindsight should be borne in mind.

[4] It is submitted that in a retrospective consideration such as this it is important to bear in mind that there may be more than one proper or prudent course of action in a complex

G R Cooper
Crown Solicitor
11th Floor
State Law Building
50 Ann Street
BRISBANE Q 4000

State Law Building
50 Ann Street Brisbane
GPO Box 149 Brisbane
Queensland 4001 Australia
DX 40121 Brisbane Uptown
Telephone 07 3239 6703
Facsimile 07 3239 0407
ABN 13 846 673 994

and difficult set of circumstances such as the State was faced with in the months from July to September 2010. For example, it may well have been a reasonable decision to terminate the contract on the basis that IBM had breached an important obligation, with the intention of negotiating a reasonable outcome for the State at the time. Equally in all the circumstances the action taken by the State to enter into the Supplemental Agreement may have been a reasonable decision and thus not imprudent or incautious. The State makes no positive submission either way on this, rather points to the way in which the decision was arrived at.

[5] It was driven; it would seem on the evidence, by some of the factors which are the subject of specific issues raised later in the list. These factors included:

(a) the overwhelming concern that the pain for the staff cease; that is, the payroll for Queensland Health staff, which had suffered so many serious problems after Go Live, continue to be supported and improved by IBM, its workers and sub-contractors, such that the staff would be paid with as few problems as possible;

(b) the real fear that termination could result in IBM walking off the job, leaving the solution largely unsupported with consequent increased risk to payroll;

(c) the option of possibly entering into litigation against IBM carried with it significant risks including, at the very least, that the State would be involving itself in lengthy, complex and expensive litigation against a determined and well-resourced litigant, possibly dragging out for some years, with the likelihood, nevertheless, that the matter would eventually settle in any case; and

(d) there were, as professionally advised, serious risks as to the prospects of the litigation generally.[1]

[6] To review the decision taken at the time with a critical eye, which is a perfectly proper, indeed necessary exercise, carries with it an obligation to properly weigh the competing factors and pressures. One example is the (no doubt correct) submission that the Auditor-General's critical report was not then in an admissible form; the implication is that it really posed no threat to the State. However that, with respect, may be too simplistic; it misses the point that many if not most of its damaging elements would likely have been provable in one way or another by IBM at a trial (many of them, for example, by cross examining the State's witnesses). Those observations and conclusions posed a very real threat.

[7] This is emblematic of the necessity to avoid a counsel of perfection with the benefit of hindsight. In this submission the State does not wish to detract from the Commission's important work, rather simply sound a note of caution.

[8] While reasonable minds might differ as to the best course of action in these difficult circumstances, it is submitted that the action taken by the State was within the range of reasonable responses. It must be borne in mind that the State did achieve the agreement to fix the 35 defects by 31 October 2010, an undertaking which may not

[1] See Mr Swinson's opinion, TB3, Vol 2 p327.

have been forthcoming without the negotiated settlements, and one which was of some value to the State.

[9] So, in judging whether those who sought to reach a compromise with IBM acted "providently", fairness requires that we take into account the immediate circumstances facing those decision-makers and exclude those things now apparent with the benefit of hindsight.

[10] This question essentially asks whether or not the State acted rationally in entering into the transaction. Put another way, did the State obtain sufficient value in return for the rights it gave away?

[11] It may be doubted whether this question can ever be satisfactorily answered. The transaction was not one in which a definite amount was paid in return for some easily valued right. The compromise represented in the transaction was, as is so often the case, the parties' attempt to make certain that which is inherently uncertain.

[12] The starting point in determining whether the transaction was provident for the State must be to examine what the Supplemental Agreement obtained and gave away.

The effect of the Supplemental Agreement

[13] The releases provided under the Supplemental Agreement are set out in clause 5. Clause 5.1(b) provided that, if certain conditions were met:

> … the State releases the IBM Parties from all Claims ("State Release") and agrees that the IBM Parties may plead this agreement to bar any Claim and the State agrees that it will not sue those parties in any jurisdiction in respect of the Claims and agrees that such covenant will not be terminated ("State Covenant").

[14] Clause 5.2(a) provided:

> If the conditions to the release in clause 5.1(b) are satisfied, then IBM releases and discharges the State, its current and former officers, employees and agents ("State Parties") from any and all Claims ("IBM Release") and agrees that the IBM Parties may plead this agreement to bar any Claim and covenants with the State Parties that it will not sue those parties in any jurisdiction in respect of the Claims and agrees that such covenant will not be terminated ("IBM Covenant").

[15] The word "Claim" was defined in clause 7.3 to mean:

(a) in respect of clause 5.1, actions (whether in contract, tort or otherwise) arising from failures by IBM to meet requirements of the Lattice SOW's; and

(b) in respect of clause 5.2, actions (whether in contract, tort or otherwise) arising from failure by the State to provide resources to IBM under the Lattice SOW's.

[16] So, the only specific releases for which the Supplemental Agreement provided were from claims arising from failures in performance of the Contract.

[17] Each of clauses 5.1(e) and 5.2(e) relevantly provided:

> Each party acknowledges that (except as specifically set out in this agreement) it:
>
> …
>
> (iii) enters into this agreement with the intention of settling on a final basis, according to the provisions of this agreement, all claims in respect of the Contract and any other disputes which now exist, or may exist or have ever existed between the State and any IBM Party, in any way related to the Contract notwithstanding that any party may become aware of or come into possession of new information with respect to the Contract.

[18] That language does not stand alone. Its repetition in clauses 5.1 and 5.2 demands that it be harmonised with the specific releases in each of those clauses. Objectively viewed, that language operates only as an aid to interpretation of the specific releases in each of clauses 5.1 and 5.2. To view it otherwise is to regard the language of the specific releases as superfluous.

[19] That interpretation is supported by Recital B in the Supplemental Agreement:

> The State and IBM are in dispute over certain matters in relation to the Contract and have agreed to resolve their dispute without any admission of liability by either party, on the terms of this agreement, pursuant to the dispute resolution process in the Contract.

[20] That recital demonstrates that the purpose of the Supplemental Agreement was to deal with matters arising under the contract, as distinct from, for example, matters arising from the genesis of the contract.

[21] So, the State effectively gave up the right to bring actions on the contract up to that point. One then asks: what actions were available to the State immediately before the Supplemental Agreement was concluded? It is submitted that the options (however unpalatable) were to:

(a) terminate the contract and find a new contractor to finish the work, taking the risk that IBM may sue;

(b) attempt to continue with the contract and reserve the right to litigate, taking the risk that IBM would refuse to continue; or

(c) come to a compromise such as the one reached.

The circumstances facing the decision-makers

[22] In return for giving up the "Claims", the State obtained certainty. For reasons that we develop below, obtaining that certainty was crucial to the ongoing viability of the Lattice replacement project.

[23] It is important in considering whether the transaction was provident from the State's point of view to acknowledge that, more often than not, compromises are reached

precisely because it is impossible to estimate where further dispute will take the parties.

[24] In this case, all of the more aggressive options were distinctly unpalatable. Termination would put the State in the position of having to go to the market in a position of critical distress. That market provided – it seems plain – only very few players capable of undertaking the project. Employing a new contractor in the shortest of time frames would have been to repeat one of the foundation errors – the very short time frame within which the ITO responses were required.

[25] As well, that new contractor could have commanded its own price for finishing the project. It would have required time to familiarise itself with the state of the project at the time. Having done so, it would only then have been in a position to inform the State as to its view on completion of the project.

[26] Moreover, any new contractor would have very little reputational risk in taking on the work and attempting to rescue the project. In contrast, a compromise with IBM meant keeping pressure on a party whose commercial reputation was at risk if the project failed.

[27] The State also had a critical business imperative to fulfil: the continuation of one of its central services, the public health system. As we have pointed out in earlier submissions, disarray in the payroll system was a real risk. Disarray in that system carried with it risks that unhappy staff may (or might have to) seek employment elsewhere.

[28] As we demonstrate below, the risk that IBM would walk and leave the State having to obtain a new contractor was a real one. Against that, one must ask, what rights was the State protecting. Whether IBM was shown the door or left of its own accord, it may be doubted whether any significant action for damages was available by this stage.

[29] The State was not in the position of a commercial entity able to point to avoidable costs incurred by reason of the delays or to profit lost as a result of any breaches by IBM. Rather, the State made choices about whether to devote funds to the project or to some other public initiative. Its losses (in the colloquial sense) were constituted by its inability to undertake other public initiatives rather than by loss of profit.

[30] The only loss which the State could plausibly have pursued was the loss of expectation arising from IBM's failure to deliver that for which the State had paid. Such a claim was obviously fraught with difficulties. Every expansion of the project had been agreed by way of a change request. Consent to each change request arguably carried with it an acceptance that the change request was necessary to achieve some end desired by the State for which the contract had not already provided.

[31] The instability of scope until very late in the project demonstrates that the State's expectation under the contract was ill-defined throughout that period. The failure at an early stage accurately to define scope left the prospect of quantifying the loss of expectation the State might recover as nigh impossible.

[32] The extent of any such claim is, even at the end of the inquiry, impossible to quantify. In obtaining certainty as the State did, it guarded against the risk of significant upheaval amongst its staff, it bound IBM to rectify the specified defects so that Queensland Health could continue to operate effectively, and the State avoided exposure to claims IBM might make against it.

[33] In any event, as important as financial considerations were, the State had to consider the welfare of its staff and the concomitant risk to the public of failures in the public health system which might arise.[2] Because the State was not acting as a mere commercial entity, its decision-making processes should not be assessed only by reference to the financial; the social consequences of its actions are at least as important.

QUESTION 2

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

[34] With respect, the more pertinent question is whether the State should have obtained appropriate legal advice. There is no particular magic in obtaining advice from someone with particular post-nominals, although we acknowledge, of course, the particular erudition of the Solicitor-General and, more generally, that of the senior bar.

[35] The question carries with it the implicit suggestion – with which we respectfully concur – that advice from someone of advanced skill and learning in the relevant areas of law should have been obtained.

[36] Such advice was obtained.

[37] Mr Swinson, who provided that advice, has an impressive and relevant resume.[3] It demonstrates 14 years as a partner with King & Wood Mallesons, time as a senior associate there beforehand, several years' practice in New York, a masters degree from Harvard, election as a Fulbright Scholar, a first class undergraduate degree in law and a degree in computer science. He practises (inter alia) in IT disputes and government contracting and procurement. It is difficult to imagine someone better qualified to give advice; even, with all respect, amongst the ranks of the senior bar.

[38] Moreover, Mr Swinson had the advantage of familiarity with the facts of the matter which no new legal advisor could hope to obtain within the timeframes required by the parties. If the Solicitor-General, or another silk, had been briefed at the time that advice was required, that person would first have to bring him or herself up to the level of knowledge which Mr Swinson already had, before giving advice. There is no reason to think, even with that extra effort, that senior counsel would be able to give better advice than Mr Swinson.

---

[2] A point made, inter alia, by Ms Bligh; transcript 32-19, l 40.

[3] A copy of his resume is set out on the firm website.

[39] Mr Swinson provided Mallesons' written advice by way of the document entitled "Options Paper" dated 17 June 2010.[4] That paper, as its title suggested, traversed options available to the State in the particular circumstances it faced. Clause 1.3 of the paper was in the following terms:

> We have considered the following options for the Payroll Contract:
>
> 1. Termination of the Payroll Contract;
>
> 2. Suspension of the Payroll Contract;
>
> 3. Negotiation of a settlement with IBM; and
>
> 4. Continuing with the Payroll Contract.
>
> We outline these options below. The State will need to consider the benefits and associated risk of each option to determine its preferred option.

[40] The approach, therefore, was to provide those reading the advice with the information necessary to make their own decision as to which course to take.

[41] Mr Swinson's advice was supplemented by a letter from the Assistant Crown Solicitor, Mr Boughey, dated 23 June 2010. It took the form of commentary on Mr Swinson's advice but refrained from making any recommendation.

[42] Both documents identified significant risks attending termination of the contract. Mr Boughey warned that "the State should be prepared for IBM to cease co-operating with the State …" and of the possibility of a claim for wrongful termination.

[43] Mr Swinson and Mr Boughey both pointed out that, if it terminated, the State would have to "find a third party to rectify the defects in the payroll system, with consequential delays and difficulties." In that connection, they noted, the State had no express right to assignment by IBM of its third party contracts.

[44] It is true to say that Mr Swinson did not write enthusiastically in favour of compromise. At section 4.3 of his paper he wrote:

> Ultimately, the State is in a strong position contractually. Conversely, IBM is in a weak position. Agreeing to a settlement runs the risk that the State will give up significant existing legal rights against IBM. The State can always reconsider the negotiated settlement option at any point in the future (ie after the Notice to Show Cause, or even after a Notice of Termination). However, by pursuing this option now, it may become more difficult for the State to exercise other rights (such as the right to termination) if negotiations are unsuccessful.

[45] That was Mr Swinson's view, but it was not supplemented by a clear recommendation against a negotiated compromise. If Mr Swinson regarded the prospect of a negotiated compromise as plainly dangerous or improvident, he could easily have said so (and one would have expected such an experienced practitioner to say so).

---

[4] TB3, vol 1, page 133.

[46] In any event, it is difficult to see what more a silk could have brought to the process. Mr Swinson's in-depth knowledge both of the particular facts and the relevant areas of law provided the necessary level of sophistication to advise effectively. Those taking his advice had no reason to suppose that more sophisticated advice was available or necessary.

[47] We have not detected any suggestion that the advice obtained both from Crown Law and from Mr Swinson was anything other than competent. Similarly, we have not heard articulated the further advantage likely to have been gained from senior counsel weighing in on the questions traversed in Mr Swinson's advice. Counsel Assisting suggested that the Solicitor-General might have given advice on quantum,[5]

[48] Competent counsel – senior or junior – being briefed urgently to give advice, and being apprised of the pressures to which the State was then subject, would undoubtedly have advised that:

(a) no real assessment of the extent of any claim without a very detailed investigation;

(b) that investigation would take many months;

(c) such an investigation would have to be with the assistance of State personnel as well as with the assistance of IT and accounting expertise.

[49] In short, competent counsel could not have given advice very different from that obtained.

[50] The advice from Mr Swinson and the advice from Crown Law formed part of the material accompanying the recommendation considered by Cabinet on 22 July 2010. Minister Schwarten proposed a compromise. The risks and benefits were considered at paragraphs 45 – 49 of the submission. Of particular note was paragraph 47:

> The consequence of taking this course of action means the State giving up some undefined set of potential legal claims against IBM, which in the case of a damages claim really cannot be fully quantified at this time.

[51] That observation was undoubtedly correct. Moreover, there was no real prospect of fully assessing either the prospects of success of any litigation or the quantum of any such claim within any acceptable timeframe.

[52] Without seeking to be exhaustive, we observe that an assessment of the prospects of litigation would have involved an inquiry – even more detailed than that conducted by this Commission of Inquiry – into:

(a) the conduct of the scoping process;

(b) the circumstances surrounding each change request;

---

[5] See, for example, the questioning of Ms Bligh, transcript 32-19, l 40.

(c) whether each change request represented value for money;

(d) the justification by IBM for each change request and whether there had been any misleading and deceptive conduct in obtaining the change request;

(e) the extent to which change requests were genuine in the sense of requesting some change to what would have been required for a working Lattice replacement in any event.

[53] Those sorts of inquiries have been the work of many months for this Commission of Inquiry and earlier inquiries by the Auditor-General and KPMG. None of those inquiries have been undertaken with a view to obtaining the degree of precision necessary to particularise a case. The particularity which IBM would doubtless demand would be very complex.

[54] Mr Swinson gave advice, in broad terms, on the risks of the contemplated litigation. He identified the complexity of the matter, the large volume of documents, personnel changes, waiver of rights and the possible defences that IBM may raise in relation to breach of contract claims.[6]

[55] Put shortly, obtaining advice from senior counsel could not have provided any advantage over that provided by the advice already obtained. It is possible that senior counsel might have weighed more heavily in favour of termination, but the State, having had the benefit of Mr Swinson's strong caution on pursuing a compromise, chose to pursue that course in any event because, as material people judged, other considerations outweighed the ability to legally enforce the contract.

QUESTION 3

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

(a) ***not honour its post-termination obligations under the Contract (including remedying Severity 2 defects);***

(b) ***immediately cease providing services under the Contract (including remedying Severity 2 defects); or***

(c) ***hinder the State seeking to contract with existing IBM sub-contractors including Infor and Presence of IT?***

[56] It is submitted that the scenario posed by this question was a very serious one.

[57] The first point is that as at the middle months of 2010, the payroll solution was still unstable. Although the "Payroll Stabilisation Project" had been renamed the "Payroll Improvement Project" this change of name was not overly significant. Mr Lucas said that from July 2010 after the name change he visited health facilities around Queensland and employees constantly spoke to him about the problems they were

[6] TB3, Volume 2, starting at page 320, particularly page 327.

having; resources continued to be devoted to reducing backlog before they could be freed up to working on improving the system. As to when the crisis may have passed, he said that very significant resources continued to be devoted to the solution for the entirety of his time as Minister.[7]

[58] Mr Grierson gave evidence about the name change and said that it was irrelevant. It was based, he said, on the need for Queensland Health to get the data right in relation to rostering decisions. Pay slips were to be improved, but the major problems with people not being paid had not been fixed as there were modules outstanding such as concurrent employment. Further, there were 35 defects still present.[8]

[59] Mr Reid said that by July 2010 the system had stabilised to an extent but not all problems had been fixed. It remained a system which was a significant break down of public policy; employees were still getting no pay, under paid or half pay. Concurrent employment remained a problem. Staff had been greatly increased to do work arounds and the system continued to display elements of significant problems.[9]

[60] Thus the solution was not stable, and withdrawal of IBM support was a real concern.

[61] It is submitted that there was a real risk of walk off by IBM. As early as January 2009, IBM through Mr Doak had threatened to stop work if the State "went legal" and that IBM would walk off the job.[10] Mr Swinson took this threat seriously, although he did not think a walkout was likely.[11]

[62] Mr Lucas said at T35-18, l39:

> Well, KPMG indicated in their document – and it wasn't just that, you know. Mal Grierson had indicated to me, Michael Walsh had indicated it to me, and we were not prepared to put people through the terrible inconvenience because I sort of – can I say to you that in many respects, Mr Flanagan, we've got the ability to look at it now, but it would have been so much worse if what happened is that they had walked away and it happened and you were asking me, you know, 'it wasn't equivocal, was it, about the ability to take action?' IBM had disputed the issues, but nevertheless you charged in and sued them. They walked off the job and you didn't have anyone getting paid for two months … and that is my concern.

[63] He referred to the KPMG report. Relevant passages are at volume 2 of TB3 at page 357-358, part of the material considered by the Cabinet Budget Review Committee on 22 July 2010. Relevant points include:

(a) A transition approach should be adopted in negotiating with IBM;

(b) If successful, this would see ten of the required twenty two IBM resources remaining with CorpTech, thus providing critical continuity of resourcing and knowledge;

---

[7] T35-8 to 35-9.

[8] T34-25, l 40 to 34-26, l 35.

[9] T33-5 to 33-6.

[10] Statement of John Swinson, signed 13 March 2013, para 90.

[11] T19-95, l 35.

(c) Discussions had commenced with the relevant suppliers regarding their interests and willingness to contract directly to CorpTech. The majority of contracts between the sub-contractors at IBM expired at the end of August 2010;

(d) Some of these organisations have a long history of working with IBM and this may impact on their willingness to contract directly with CorpTech. Early indications are that there is a willingness to work with CorpTech. This is likely to be enhanced if there was a negotiated transition of IBM. Should the contract with IBM be terminated this may prove to be more difficult;

(e) As continuity of resourcing is critical, sufficient time needs to be provided to allow CorpTech to secure the identified resources;

(f) In considering any decisions regarding how they progress the contractual options in relation to the QH HR program, consideration needs to be given to impact on the broader relationship between IBM and the State Government, and the potential impact this may have on other programs being delivered;

(g) The critical business risk is the ability to continue to support the QH HR program in processing the fortnightly QH payroll, in addressing identified defects in the system, and in implementation of enhancements to support changes to the QH payroll model. The resources currently provided by IBM are a key component in ensuring this continuity of support;

(h) CorpTech had made progress in developing a strategy to maintain the transition of these key resources from IBM thus ensuring continuity of support. The authors did not believe it would be prudent for the Government to sever its relationship with IBM until such time as it has a level of comfort that it can effectively manage the transition of the identified resources supplemented by an effective handover of key QH HR documentation and status of the work programs being managed by IBM;

(i) As outlined in the CPRC submission, this is more likely to be achieved under the option which seeks to negotiate a settlement with IBM thus allowing time to effect the transition.

[64] In the Options Paper from Mallesons Stephen Jacques of 19 July 2010[12] the Solicitors pointed out on page 5 of the document that "IBM may walk out immediately it receives the Notice of Termination, and so the State will have to be ready to deal with the situation. IBM would be in breach of contract if it did so (see Schedule 43 in light of clause 2.3(k))." Later on page 6 the Solicitors said "Further, there is a practical risk that IBM will 'play hardball' and (despite its contractual obligations) refuse to negotiate, walk off the job immediately upon termination and make handover more difficult. Thus, timing of the Notice of Termination will be important."

[65] True it is that there were disengagement obligations under the contract. However it was pointed out by Mr Lucas that if there was a termination of the contract by the State,

[12] TB3, Volume 2, page165.

IBM might (the risk was, correctly) interpret that as a wrongful repudiation of the contract by the State, and accept the repudiation thereby putting the contract at an end, and thereby (on IBM's case at least) putting at an end any of their contractual obligations in relation to disengagement.[13] As was pointed out by the Commissioner at T35-26, l1-3, IBM in doing so would have run the risk that their legal analysis of the position might have been incorrect, which could of course have exposed them to consequences in Court proceedings; the battle would have been as to the merits of the State's termination. The facts surrounding this were hotly contested. Mr Lucas said "there is a risk of litigation and there was not an appetite for anything that put our staff at risk." It is submitted that it was by no means certain that the post-termination obligations under the contract provided sufficient assurance to the State to make termination of the contract the only proper decision. Putting it another way, the decision not to terminate but instead to negotiate a settlement was within a range of proper responses to the difficult circumstances the State found itself in.

[66] On the question of the quality of evidence as to the risk of "walk off", Mr Lucas was asked about this at T35-19, l35 and said that he was not sure what point there would have been in asking IBM what they would do. He expanded on this at T35-42, l55 to 35-43, l18, saying that a response to such an enquiry would not have given him any comfort. It is submitted this is correct; in a highly charged pre-litigation atmosphere, IBM could not be expected to give reliable forecasts about their response when sacked, and it would be brave to attempt to rely on any assurances given in those circumstances. He could not readily envisage any other reliable enquiries that could have been made to further establish such details. He referred to a lack of precedent for the situation.

[67] As to the State being able to contract with existing IBM sub-contractors including Infor and Presence of IT, Mr Lucas said at T35-21, l10 that IBM were "getting pretty cranky about us talking to Infor and sub-contractors that were very critical …". He said "I think if it ended acrimoniously with IBM, I think it is very hard to imagine Infor, being a worldwide partner of theirs – I think it would have been extremely difficult for them to continue to engage with the State."

[13] T35-24 to 35-25.

QUESTION 4

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

(a) the criticisms in the Auditor-General's Report tabled 29 June 2010 of the conduct of the State and difficulties with the changing project scope as outlined in that Report;

(b) an assertion that IBM would sue the State if it terminated the Contract;

(c) that CorpTech's involvement in remedying defects and in carrying out enhancements to the Interim Solution might void the warranties contained in the Contract; and

(d) the risks of litigation.

[68] Those queries invite the further question: too much emphasis at the expense of what? The apparent answer is the benefit to be obtained from litigation. For the reasons set out above, the benefits to be obtained from litigation have not been quantified, but the risks of it are identifiable at least in broad terms.

[69] The factors enumerated in question 4 were all known risks to be considered against what was, as we set out above, was a complete unknown: the benefit that litigation might bring.

(a) The Auditor-General's criticisms

[70] The Auditor-General's report was most significant concentration of facts available to the State at the time that it was making the decisions which led to the Supplemental Agreement. In it, the Auditor-General expressed conclusions to the effect. In his submission to the Cabinet Budget Committee of 22 July 2010, Minister Schwarten asserted that:

> An orderly transition out of the contract allows the best opportunity to put in place alternate support arrangements to ensure that the Queensland Health rostering and payroll solution is not exposed to unnecessary risk. The consequence of taking this course of action means the State giving up an undefined set of potential legal claims against IBM which in the case of a damages claim cannot be fully quantified at this time. This needs to be balanced against the option of litigation where IBM has access to all project documentation and the Auditor-General's *Report to Parliament No. 7 of 2010*, which it will use to vigorously mount a legal defence.

[71] The suggestion that too much emphasis was placed on the Auditor-General's report seems to be based on two propositions:

(a) it was inadmissible in a trial against the State;[14] and

[14] Transcript 32-23, l 44.

(b) it was at odds with legal advice from Mr Swinson that the State was on strong contractual ground.[15]

[72] The first of those propositions is only of marginal relevance. Regardless of the admissibility of the report, it provided a roadmap for further inquiry and obtaining documentary proof for IBM's defence and any counterclaim it might wish to launch by way of alleging the State breached the contract in failing to provide necessary co-operation. Certainly, the value of the document as inspiration for further inquiry by an opposing party is a material consideration.

[73] It should be noted that Mr Swinson specifically advised that "[t]he issues raised in the Auditor-General's report" would likely be raised as bases for defence by IBM.[16] The fact that some matters were not provable by simply seeking to tender the Auditor-General's report did not mean they were not provable at all.

[74] The second proposition misunderstands the effect of Mr Swinson's advice. Mr Swinson's advice was that the State was on strong contractual ground in seeking to terminate for breach. His contemporaneous advice on claims for damages noted significant risks in such litigation.[17]

(b) An assertion that IBM would sue the State if it terminated the Contract

[75] In the first instance, Mr Brown and Mr Grierson disagreed on whether Mr Grierson told him that IBM had threatened to sue if the State terminated.[18] Under cross-examination, Mr Brown modified his account. The effect of his responses to Mr Mumford was that there was concern that IBM would counterclaim in litigation.[19]

[76] The tenor of the questioning by Counsel Assisting on this topic seems to be that there was no good reason to fear a suit from IBM. Whether or not this was so, the prospect of it was something properly to be taken into account.

[77] The defences which IBM would likely mount to any claim by the State would include allegations that it was the State which had breached the agreement, not IBM. Given IBM's use of contractors, it was readily to be apprehended that IBM may have incurred avoidable costs sounding in damages. Also, IBM stood to lose profits as a result of termination. Whether IBM took the initiative and sued, or set up a counterclaim alongside its defence to an action by the State, the prospect of claims by IBM had to be taken seriously.

[78] In any event, it is plain, as we argue above, that the State's concerns were principally that the system may fail and that this may have repercussions both for staff and for the patients relying on Queensland Health's services.

---

[15] Transcript 32-23, l 55.

[16] TB3, Volume 2, page 325.

[17] TB3, Volume 2, page 327.

[18] Mr Brown's initial statements are at transcript 33-104, l 45 and 33-107, l 51. Mr Grierson's denial is at 34-62, l 13.

[19] Transcript 34-13, l 5.

(c) The risk that warranties may be voided

[79] Mr Grierson gave voice to this concern in the course of his oral evidence. It was a live concern with others as well. Ms McDonald raised the issue in an e-mail to Mr Grierson on 25 June 2010.[20] Mr James Brown raised the issue in his e-mail to Ms Berenyi and others on 15 August 2010.[21] Ms Stewart explained the difficulties her team faced in trying to manage the payroll system without impacting on IBM's warranty.[22]

[80] The Contract with IBM expressly stated that IBM was liable only to the extent that a defect was caused by IBM.[23] Schedule 26 further elaborated upon IBM obligations regarding warranty.[24] It relates to elements of functionality in deliverables provided by IBM. The necessary implication is that, where a defect is caused by work performed to the system by CorpTech or other than because of an IBM deliverable, IBM would not be liable to rectify the defect.

[81] The risk having been identified, it surely was material to considering what action to take in respect of IBM's perceived breaches of contract. It is difficult to identify evidence from which it might be said that undue emphasis was placed on this concern. There is no evidence that any hysteria was provoked by it.

[82] Ms Stewart nevertheless considered that the State would be in a better postion in relation to resolving the system issues if IBM exited and she could be in control of managing the system without having to be concerned about the complexities of the warranty issues.[25]

(d) Risks of litigation

[83] It should also be noted that the scope of any litigation would be huge, and hugely detailed. It would have to traverse every discussion of scope, every memorandum or e-mail regarding the prospect of a change request, every complaint about the failure to produce results on time, every complaint about movements of staff. It would involve masses of accounting evidence to establish quantum. It would involve at least the effort devoted to this Commission of Inquiry, but without this Commission's powers to compel.

[84] It would likely occupy months, not weeks of Court time. It would likely drag for years as parties completed disclosure and fought over pleadings. It would not finish with a trial. There would be appeals. The preparation would potentially divert vital staff from their duties with the payroll.

[85] One would expect the litigation to be bitterly fought by IBM. The prospect of losing would not only impact IBM's immediate financial interests but also its reputation in

---

[20] Second statement of Mr Grierson, exhibits at pages 8 – 9.

[21] Second statement of Mr Grierson, exhibits at page 22.

[22] T29-98, l 50, T29-104, l 10, T29-106, l 1.

[23] Clause 9.5 of the Customer Contract, TB2, Volume 1, page 16.

[24] TB2, Volume 1, page 140.

[25] T29-104 l 17 and 32.

Australia and perhaps globally. IBM, it may be accepted, would zealously seek to avoid curial findings that it had acted incompetently or deceptively.

[86] It is submitted that appropriate consideration was given to the risks of litigation and balanced against the State's immediate imperative of ensuring a workable payroll system.

QUESTION 5

Was the primary consideration in settling with IBM that if terminating the Contract created <u>any</u> risk that any staff member would not be paid or not be correctly paid, then such a risk was too great?

[87] Evidence from Ms Bligh, the Honourable Mr Schwarten and Mr Lucas suggests that the risk that staff members would not be paid, or not correctly paid, was a consideration forefront in their minds after go-live and during the settlement negotiations. However, their evidence does not go so far as saying, as the question suggests, that *any* risk that *any* staff member would not be paid or paid correctly was a primary consideration.

[88] Certainly, Mr Schwarten has said that his prime objective was to get the payroll project issues solved and ensure there were no further problems.[26] In oral evidence, he confirmed that the uppermost thought he had at the time was about the people affected by the issues with the payroll system. He said that whatever had to be done to get it fixed was what he though the government should do.[27] The legal advice did not provide certainty and his concern was to ensure people were paid.[28]

[89] Mr Lucas gave evidence that:

> Our absolute motivation - it's all very fine to sort of embark upon litigation and then, you know, if you think you've got prospects - and, as I said to you, the track record of governments in litigation is they always end up getting settled. We are a model litigant. We need to actually genuinely embark upon negotiations when we actually take proceedings, we do it with full disclosure and all of those sorts of issues, that what absolutely motivated us - if I thought that we could have sued IBM and not had a risk or a downside with respect to our staff then that would have been a completely different picture, but it wasn't like that.

[90] Mr Lucas also said that there was a need to consider the consequences for people in taking certain action; implicitly suggesting that it was not sufficient to focus solely on the legal issues.[29] An award of damages some time down the track would not assist in regard to the immediate issues with the payroll system.[30]

[91] Ms Bligh gave evidence that:

---

[26] Undated statement of Mr Schwarten paragraph [42].
[27] T32-68, l 10.
[28] T32-69, l 10.
[29] T35-23, l 20.
[30] T35-24, l 1.

(a) her primary concern was that Queensland Health employees continued to get paid and that the system worked;[31]

(b) she, and the government, had to consider the practical consequences of any decision to exercise legal rights, about which there had been mixed legal advice;[32]

(c) compromises were made to secure a smooth transition and ensure the continued support for the system;[33]

(d) given the legal advice received was not unequivocal and the inherent risks and costs associated with litigation, the orderly transition out of the contract in the way that best protected the employees of Queensland Health was the most responsible course of action;[34] and

(e) she put the practical considerations above the legal considerations in making the decision to settle with IBM and believed that was the right thing to do.[35]

[92] Ultimately, Ms Bligh stated that regardless of whether further advice had been obtained about quantum and prospects, if there remained a risk to the system then she would have made the same decision.[36] However, that does not mean that her decision would have been the same if *any* risk to *any* employee existed; her comment was premised on the existence of the same risk that had been explained to her at the time, not any other risk.

[93] Mr Grierson, when questioned about this issue, stated that his instructions were to:

> … negotiate to hopefully arrive at a settlement as per the cabinet instructions within six weeks. The overriding parameter - you've mentioned the list of parameters. Nowhere in those list of parameters does it mention, "And make sure you keep the payroll running," but that was the overriding parameter with all of this exercise.[37]

[94] It is clear that the risks associated with termination of the contract with IBM weighed heavily on the minds of those involved in the decision to settle. They believed that termination posed a risk to the successful running of the payroll system and could result in detrimental impacts on the pay of Queensland Health employees.

[95] The real issue that was considered and weighed by Cabinet was whether, in light of the risks and uncertainties associated with termination and litigation, an approach should be adopted that put the payroll system and the pay of Queensland Health staff at risk. Those involved were not willing to take that risk in respect of staff.[38]

---

[31] T32-16, l 40.
[32] T32-19, l 50.
[33] T32-26, l 40.
[34] T32-33, l 10.
[35] T32-36, l 50.
[36] T32-37, l 50.
[37] T34-34, l 20.
[38] T35-26, l 30.

[96] Therefore, it is submitted that the primary consideration in settling with IBM was not whether any minor risk affecting only one staff member existed. Rather, the risk as understood by the decision makers at the time, i.e. that termination of the contract with IBM would detrimentally affect the stability of the entire payroll system and its ability to pay staff correctly, was one of the primary considerations.

[97] It is further submitted that is a reasonable and appropriate matter to consider. Practical consequences to business or government are matters that must be considered before taking legal action.

QUESTION 6

If this was the primary consideration, was adequate consideration given to the impact on the Interim Solution (including the nature of such impact and the number of staff affected) of the 35 defects IBM was required to remedy pursuant to the Supplemental Agreement?

QUESTION 7

Was the impact of these 35 defects on the Interim Solution adequately investigated in the context of the proposed settlement with IBM and any assessment of the risk of terminating the Contract?

QUESTION 8

What was the impact of these 35 defects on the Interim Solution (including the nature of such impact and the number of staff affected)?

We will answer these questions together.

[98] The Supplemental Agreement was produced after a significant period of negotiation and the 35 defects were part of this process. Much of the relevant evidence is set out in the attachments to the statement of Margaret Berenyi, particularly attachment 22.

[99] As Ms Berenyi says in paragraph 71 of her statement of 24th May 2013, John Beeston and Jane Stewart co-ordinated the list of defects in priority order as specified by Queensland Health. This was the starting point of negotiations on this issue. The negotiations resulted in a reduced list of defects from that provided with the Notice to Remedy issued on 12 May 2010 (TB3, vol 1, 108-115). Queensland Health endorsed the work schedule and committed to undertake the associated testing activities in line with it. It was agreed that all remaining defects were to be prioritised by Queensland Health and rectified by CorpTech following IBM's departure. The negotiations took place in meetings with IBM over several weeks in August/September 2010. There were negotiations between Mallesons and Clayton Utz and the IBM legal representatives to finalise the Supplemental Agreement.

[100] The contents of attachment 22 give further details along these lines, and indicate the degree of consideration given to the importance of the defects and the investigation of them as follows:

(a) The e-mail from Ms Berenyi to Mr Skippington on the 19th August at 12.55pm advising that the State was currently in the negotiating phase of the contract dispute process and thus it was legally prudent to take a "snapshot" of the payroll system in case there developed a more protracted dispute. This was to be comprehensive, of evidentiary standard and able to be secured off site;

(b) In Ms Berenyi's e-mail of 25th August 2010 at 5:08pm, it was mentioned that there were 67 items outstanding and it was discussed that IBM would meet a delivery timeframe of 31st October. The attached list indicates that 67 items and concurrent employment were to be completed by 31 October 2010;

(c) Ms Berenyi's e-mail of 26th August 2010 at 11:36am indicating that there was ongoing work on the Supplemental Agreement. There was to be a meeting with IBM and CorpTech in relation to defect delivery capacity;

(d) In Ms Berenyi's e-mail of 27th August 2010 at 4:49pm, it was said that the list from CorpTech contains 75 items; 16 of those were to be implemented in the August/September 8 release; two of them were duplicates; two were CorpTech items for action; four of them were new and of the remaining items, 24 could be implemented by the October release. This left a total in the scope of 31 items including concurrent employment. There was an attached list;

(e) In the e-mail from Mr Brown on 27th August 2010 at 5:38pm, there was a list of outstanding items concerning the still ongoing negotiations (this included warranty obligations) and the updated settlement principles. The first page of the settlement principles included rectification of the attached list of items. At that stage there seemed to remain some outstanding disagreement between the parties on that issue;

(f) In Mr Dymock's e-mail of 28th August 2010 at 10:46am, he indicated the outcome of discussions with Mr Hood about the issue. He said, "this would mean that we would have 31 items from the original CT list provided, plus the 3 infor Quick Wins. Karmen will send through the four items from the list that replaced the other four "additional" items. The response was to be reviewed by Jane Stewart. It is noteworthy that by that stage Mr Dymock, who was apparently an IBM employee as Projects Director, also had a CorpTech e-mail address. This may indicate a degree of integration between IBM and CorpTech Resources;

(g) Ms Berenyi's e-mail of Sunday, 29th August 2010 at 11:55am to Mr Grierson and others, dealt with outstanding issues. There had apparently been discussions that day. Warranty and public comment remained disputed items. IBM was to provide concurrent employment by 4pm the next day. Ernst & Young were apparently retained to meet with IBM and CorpTech on Tuesday to review the costings. It was hoped that a Supplemental Agreement would shortly be agreed. The lawyers were to work on the remaining issues attached to that e-mail. In relation to a warranty, IBM wished to be released from warranty obligations after 31 October 2010. The State said that for that to happen, IBM had to forego 50% of the $1.419 million apparently outstanding. In relation to defect fixes, by the 29th August IBM had agreed to the State paying for defect fixes on a pro-rata basis with $1.85 million not to be exceeded. IBM agreed to be paid upon implementation into production or 14 days after successful completion of UAT;

(h) Ms Stewart's e-mail of 30 August 2010 at 4:17pm attached a dot point summary of discussions. This included the following:

> Emerging priority items that are having significant impact on the business or pay run and require emergent changes will be assessed for impact on the agreed release scope and should there be a requirement to remove an item of similar effort from the release to accommodate the emergent change, this will be agreed by all parties at CAB. Where agreement cannot be reached by all parties, escalation to the XXX Committee will occur.

Thus, it is submitted, the nature and impact of defects was continually being assessed;

(i) The e-mail exchange between Mr Swinson and Mr Brown on 31st August 2010 indicates that there had been changes required by IBM to the Supplemental Agreement which Mr Brown was not happy with;

(j) The e-mail exchange between Mr Doak and Mr Brown commencing on 31st August at 8:18am, indicated an ongoing dispute in negotiations, including differences about "surviving obligations";

(k) Ms Berenyi's e-mail of 31st August 2010 at 8:34am indicates a meeting to be held concerning the outstanding issues. Later that day, a meeting was held according to Mr Brown's e-mail of the 31st August at 12:23pm attaching an updated Supplemental Agreement. This included the provision as to rectification for new severity level 2 defects, in clause 3.3(b), and the release by the State in clause 5.1 which provided for a qualified release, there being no ongoing severity level 1 defects and no unremedied material breaches;

(l) Mr Hood's e-mail on 31st August at 9:54am mentioned the rectification of defects and the obligation of IBM to deliver concurrent employment;

(m) Ms Berenyi's e-mail of 2nd September 2010 at 5:56pm indicated the outcome of a meeting with IBM at 2:00pm, including the legal teams. There had apparently been division within the IBM camp, on "release of obligations". The result was that IBM "has largely agreed to the State's release position". The e-mail says:

> We have been firm in communicating but the State will not shift from the position of 'no better/no worse off than if the contract was concluded normally.'

[101] This summary indicates that the contents of the Supplemental Agreement, including the list of defects, were the subject of intensive and ongoing negotiations for some time between the parties. In relation to defects, technical people such as Ms Stewart and Mr Hood were involved in the process and had input to it. This indicates that there was proper consideration of the impact on the interim solution of the 35 defects, they were adequately investigated and, once rectified, they did not have any ongoing impact on the interim solution. As to their prospective impact on the interim solution had they not been rectified, it is not clear that the evidence descends into that level of detail. However the reasonable inference, it is submitted, is that, given the degree of attention that the topic received, those concerned were sufficiently worried out the potential impact of the defects as to insist on their rectification during the negotiating process. That is, it is reasonably inferred that the people involved did not waste their time negotiating about defects unless they had some importance.

[102] There was oral evidence given on the subject. Mr Reid said[39] that the 35 defects were identified through the payroll stabilisation process; there was a very large process of getting people to identify things that were occurring within payroll. There was then a detailed process of prioritising those, assessing their risk, determining the ability of rectifying them and putting them in some priority order. He said that would have formed the basis for the 35 items. Mr Reid also said that as at July 2010, Queensland Health was confident that no new serious defects would be found within the next six months.[40] This attitude seems to have been soundly based in that the list of defects did not grow markedly between July and the end of October.

[103] Mr Grierson said that there were 35 defects identified by the Health Department as being the critical defects that they wanted fixed as part of any Supplemental Agreement.[41] Mr Grierson also gave evidence of an employee not being paid for his leave entitlements and the problem being addressed by Phillip Hood.[42]

[104] Mr Lucas gave evidence that the 35 defects would have been highly significant that required IBM's cooperation to fix. There were serious ongoing problems and skilled people identified the defects and the fact that IBM's cooperation was needed. He assumed there was a hierarchy of such defects of varying severity. The concurrent employment was a particularly serious issue. He expected the 35 most significant ones were those that IBM were required to assist with.[43]

[105] Mr Killey said in his statement at paragraph 34 that CorpTech insisted that IBM fix the specified number of defects in exchange for the settlement.

[106] Ms Stewart said that the 35 defects were assessed as being Queensland Health's top priorities.[44] This is consistent with the evidence of Reid, Grierson, Lucas and Killey.

[107] Thus it is submitted that the impact of the 35 defects on the final solution was considered by those involved at the time, and considered adequately; the most important ones were identified. The impact of the defects on the interim solution was the subject of investigation by the relevant technical staff during the period of negotiation. The potential impact of the defects seems to have been serious, but it did not eventuate because IBM was required to remedy the defects. Thus the inclusion of this as part of the Supplemental Agreement was of significant value to the State, as Mr Grierson said.

---

[39] T33-14, l 50 to 33-15, l 5.

[40] T33-21, l 1-10.

[41] T34-19, l 50-55.

[42] T34-36, l 10-25.

[43] T35-26, l 50 to 35-28, l 9.

[44] T29-104, l 30-45.

QUESTION 9

Was there any (or any adequate) evidence to support the perception that the Interim Solution was at risk of collapsing if the Contract was terminated?

[108] The issue posed here relates to not simply the circumstances of the termination of the contract, but the further circumstance of IBM thereupon walking away from the project. This has been dealt with above; for the reasons set out, this was a real risk as perceived by those involved at the time.

[109] Mr Reid set out numerous serious problems with the solution in paragraph 56 of his statement of 23 April 2013. He said that by July of 2010 his perception was that there was not an imminent chance of complete collapse of the system. IBM was still on the ground at that stage, working on payroll stabilisation/ improvement. Had all of the IBM resources suddenly left, however, he was concerned about that circumstance possibly giving rise to another chance of a complete collapse of the solution.[45] He does not seem to have been challenged in the course of evidence as to the evidentiary basis of this concern. Logic suggests that in the context of the many problems he knew of, he was concerned about such a risk because of his understandable focus on identifying and rectifying the problems at the time.[46]

[110] The statement of Michael Walsh of the 9th May 2013 also sets out the number and nature of the problems post go-live. He does not address the question of possible sudden withdrawal of IBM resources; he wasn't asked.

[111] There is no body of precise forensic evidence which the State can point to as to the degree of the risk of collapse in the wake of an IBM walk off. This is not surprising, because the question was not investigated in a focused way at the time; those involved had more pressing duties. In the vivid language of Ms Stewart:

> There are no words to describe the intensity of the pressure, anxiety and fatigue that was experienced because of the overnight pay processing issues in the first approximately twelve (12) months following Go Live.47

Diverting resources from their necessary duties to investigate such (possibly important, but nonetheless abstract) questions would not have been practical.

It does not follow that there was no risk.

[112] It is true that the project name, from a Queensland Health perspective, changed from "Stabilisation" to "Improvement" in July 2010. It is submitted this nomenclature should not be overvalued. Ms Stewart explained that it had little relevance to what she was doing.[48]

---

[45] T33-21, l 2.

[46] Mr Reid statement, signed 23rd May 2013, para 10.

[47] Ms Stewart statement para 101.

[48] T29-103, l 49.

[113] Ms Stewart also said that although she wanted "IBM gone", she had certain dependencies in terms of resources and contractors; CorpTech couldn't do it on their own, but should "have the reins".[49] She felt the contract constrained her; this was a logical reason to proceed to a negotiated exit for IBM.

[114] Thus the issue of evidence for the perception of the risk of collapse is as outlined above; however the examination of this issue should not obscure the, it is submitted, correct approach to such a risk. Even if the risk, examined objectively or on a purely evidence based approach was small, and the cost of avoidance was relatively high, this recedes in relevance compared to the disastrous consequences if the risk materialises. This reasoning is, of course found in the law of tort, particularly negligence; see *Wyong Shire Council v Shirt*[50]*; Ingram v Britten*[51]*;* s9(2) of the Civil Liability Act 2003(Qld). This submission is not that the relevant decisions were consciously taken at the time according to tortious principles; rather the point is that prudence requires that possibly unlikely but potentially disastrous consequences be weighed carefully, and this is echoed in our jurisprudence. It is the proper way to assess the actions of those involved at the time.

QUESTION 12

Did Mr Grierson, in negotiating with IBM on 19 August 2010, depart from the negotiating protocols established by Clayton Utz?

QUESTION 13

If Mr Grierson did depart from the protocols established by Clayton Utz, was it prudent for him to have done so?

We will answer these questions together.

[115] It should be noted at the outset that the Cabinet Budget Review Committee (**CBRC**) authority to negotiate a settlement between the State and IBM expressly appointed Mr Grierson as the State's delegate. It did not confer upon Clayton Utz the authority to determine the process and content of settlement discussions. CBRC decision number 3019 of 22 July 2010 indicated that the Committee had decided:[52]

> To authorise the Director-General, the Department of Public Works to act as the State's delegate in progressing the preferred option

[116] The same decision approved contract negotiation parameters, set out in Table 1 to that document. Those parameters were approved *"subject to approval of the preferred option"* and *"noting that further CBRC endorsement will be obtained prior to finalising any proposed settlement."*[53]

---

[49] T29-105, ll 10-30.

[50] (1980) 146 CLR 40.

[51] (1994) Aust Torts reports 81-291.

[52] TB3, Volume 2, page 226, paragraph 4.

[53] TB3, Volume 2, page 226, paragraph 3.

[117] To the extent that Clayton Utz were involved, it was in the capacity as legal advisor, for the sole purpose of assisting Mr Grierson to discharge the responsibility the CBRC had given him. Mr Grierson had, and always retained, the authority to adopt whatever protocols or processes he believed would best achieve a result in the interests of the State.

[118] That this was the case is supported by the evidence given by Mr Schwarten and Ms Bligh, both of whom were a part of the CBRC meeting which decided to authorise Mr Grierson as delegate. Both witnesses were unsurprised that Mr Grierson met with IBM representatives outside of the processes Clayton Utz had established, and indeed, indicated that they expected he would do so. So much demonstrates their belief that to so meet was within the scope of the CBRC authority of 22 July 2010. In examination in chief, Mr Flanagan and Ms Bligh had this exchange:[54]

> Through your director-general, Mr Ken Smith, were you ever informed that Mr Grierson in effect departed from the structured negotiation that had been established by Clayton Utz and had a face-to-face meeting with his associate deputy-director, Ms McDonald (sic), with two other representatives from IBM where certain principles were nutted out in the course of two-and-a-half hours. Did you become aware of that? --- I don't have any memory of that level of detail, but again, it would not surprise me to know that the person that the CBRC had authorised to conduct the negotiations had sat down face-to-face with the other party. It's hard to know how these things get settled without something like that happening eventually.

[119] Mr Schwarten similarly said in examination in chief:[55]

> Did you have any personal knowledge of when that process that had been established by Clayton Utz was departed from and that there were face-to-face meetings between Mr Grierson and Ms MacDonald on the part of your department and Mr Doak and another person on behalf of IBM? --- No, I didn't, but I was made aware of it after the event. Mal [Grierson] may have said to me that he was going to go down that path at some stage … I wouldn't have had any objection to him doing it, put it that way, because whatever it took, as far as I was concerned, to bring the thing to a head and try and get some resolution to it was okay by me.

[120] In questioning by Mr Foley, Mr Schwarten added:[56]

> Given the history of discussions and negotiations, was it a matter of concern to you that Mr Grierson had decided to go directly to negotiate matters with senior officers of IBM? --- No, not at all.
>
> And were you satisfied that he had the proper authority of the Cabinet Budget Review Committee to do so in accordance with that decision? --- Yes, I was.

[121] Mr Grierson was entitled to take advice from legal advisors and senior staff, but at no time did it mean that Mr Grierson was bound by that advice. The authority and the

---

[54] T32-30, l 11-26.

[55] T32-83, l 20-33.

[56] T32-108, l 1-9.

responsibility to discharge the CBRC's will rested with him at all times, and he was able, indeed, duty-bound, to do all that he could to achieve that result. From over thirty years of experience in the negotiation of contracts for major projects, he was sufficiently skilled to negotiate without Clayton Utz's assistance in the event he believed it would better achieve the State's objectives.

[122] The Department of Public Works engaged Clayton Utz on or about 26 July 2010. Clayton Utz, in their letter of 26 July 2010, described the scope of their instructions as *"to advise on the negotiation process and strategy and to conduct the negotiations to a conclusion."*[57] The approval for Clayton Utz's involvement was given by Mr Grierson in the following terms: *"the conduct of negotiations to occur according to the model provided by, and with the guidance of, Clayton Utz."*[58]

[123] Mr Grierson approved the conduct of negotiations according to "the model"; that is, using Clayton Utz's framework as *"a standard or example for imitation or comparison; a pattern."*[59] Nothing about this definition suggests that Mr Grierson was to be bound by this approach.

[124] Mr Grierson, in participating in a smaller meeting with IBM representatives, departed from the Clayton Utz model for the negotiations – but that does not mean it was wrong for him to do so. The scope of his CBRC authority did not tie him to the process that Clayton Utz had in mind, and indeed, it was his responsibility to take additional steps if it was not achieving the necessary results within the time frame required.

[125] It was reported to Mr Grierson that, by the time he held the meeting on 19 August 2010 IBM was not negotiating with Clayton Utz in good faith.[60] The process was not delivering a swift result within the negotiation parameters. In those circumstances it was entirely appropriate for Mr Grierson to meet with IBM representatives with a view to accelerating the process. Indeed, that Mr Grierson would do so was anticipated by Ms Bligh and Mr Schwarten as both likely and fitting given the significance of the matter and the short timeline for resolution.

[126] Counsel Assisting the Commission suggested in the course of questioning that, by departing from the Clayton Utz process, the State's position was undermined. In summary, that reasoning appears to have been:

(a) IBM had from the outset wanted to exclude lawyers from the settlement negotiations;[61]

(b) the Clayton Utz process was designed to ensure that one-on-one negotiations did not occur until an appropriate time in the negotiations;[62]

---

[57] TB3, Volume 2, page 402.

[58] TB3, Volume 2, page 418.

[59] Macquarie Dictionary.

[60] See also the file note of Mr Backhouse dated 10 August 2010, TB3, Volume 3, page 68.

[61] T32-84 l 49-30, T32-85, l 1-2.

[62] T32-84 l 49-30, T32-85, l 1-2.

(c) as at 19 August 2010, the parties had exchanged, but had not yet received responses to, terms sheets exchanged in accordance with the Clayton Utz process;[63]

(d) by separately meeting with IBM representatives, Mr Grierson undermined the prospects of achieving a desirable result from the Clayton Utz process, and in particular, conceded a more fulsome release to IBM than was desirable.

[127] This reasoning is not borne out by the evidence of Mr Grierson, Mr Schwarten or Ms Bligh. Ms Bligh told the Commission that, based on the way these negotiations tend to operate, it is usually necessary for small-meeting negotiations to occur.[64] Mr Schwarten said that he knew Mr Grierson had achieved results in small meetings before, and expected he would work according to his usual practice in this case.[65] Both acknowledged the pressing concern of the short time frame for agreement,[66] and the fundamental priority of ensuring stability in the pay run for Queensland Health employees.[67] They regarded the meeting between Mr Grierson and IBM representatives on 19 August 2010 as an appropriate advancement of the State's interests.

[128] Mr Grierson's motivation was to advance the negotiations far beyond what had been, or was likely to have been achieved by Clayton Utz, in the interests of the State of Queensland and to meet the requirements of the CBRC's delegation.

[129] In light of these considerations, it was both:

(a) within Mr Grierson's authority to depart from the Clayton Utz processes; and

(b) desirable in the interests of the State of Queensland for him to have done so.

[130] Mr Grierson was tasked by the CBRC with the responsibility to negotiate a settlement with IBM that would achieve the State's key priorities to:

(a) facilitate a smooth transition from IBM to CorpTech; and

(b) do so without disruption to the payroll.[68]

By any measure, Mr Grierson achieved those objectives. Table 1 to the CBRC decision of 22 July 2010 set out parameters that reflected the State's other priorities, and there was some flexibility provided in those, along with the entirety of the negotiations being subject to further CBRC endorsement.[69] That there was some movement in those is unsurprising given that negotiation is a process of "give and take".

---

[63] T32-83, l 41-60; T32-84, l 1-3.
[64] T32-30, l 11-26.
[65] T32-84, l 1-3.
[66] T32-75, l 9-14.
[67] T32-56, l 54-60; T32-30, l 33-38; T32-32, l 36-40.
[68] T34-32, l 7-16.
[69] T34-37, l 5-17.

QUESTION 14

If Mr Grierson did depart from the protocols established by Clayton Utz, might a better outcome have been achieved for the State had Mr Grierson not departed from those protocols?

[131] Would a better outcome have been achieved if Mr Grierson had kept to the Clayton Utz protocols? In our submission, it would not. Mr Grierson's decision to negotiate in a small meeting format on 19 August 2010 reflected:

(a) the need to achieve a result within the six-week time frame stipulated by CBRC, necessitated by time limits on the State's contractual rights;

(b) the paramount concern of the Government for ensuring continuity and stability in the pay run for Queensland Health employees;[70] and

(c) the need to ensure an effective relationship between IBM and CorpTech, so that there could be a seamless handover of responsibility upon IBM's exit, including securing the ongoing assistance of necessary subcontractors.

[132] In contrast, the Clayton Utz process appeared to have reached a stalemate, such that at 10 August 2010 Clayton Utz reported to Mr Backhouse that IBM was *"not showing signs of genuinely negotiating"*.[71] In those circumstances, that process was unlikely to have yielded a desirable outcome for the State within the necessary timeframe.[72] Indeed, had the negotiations broken down altogether, the State faced the potential for lengthy, expensive litigation in which a positive outcome was far from assured[73] and during which time the stability of the payroll would be uncertain.

[133] Mr Grierson's departure from the Clayton Utz processes was within his authority, appropriate to the scope of the CBRC's delegation, and a prudent step towards achieving the best outcome that was possible in the circumstances.

QUESTION 15

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

QUESTION 16

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

We will answer these questions together.

---

[70] T34-32, l 7-16; T34-34, l 27-35; T34-41, l 46-51.

[71] TB3, Volume 3, page 68.

[72] Particularly given the last time that IBM had used this tactic, it had taken six months to reach an agreement: TB3, Volume 3, page 68. Even Mr Charleston expressed a concern about time delays in his evidence: T33-35, l 48-51.

[73] Evidence of Ms Bligh, T32-32, l 41-60; T32-33, l 1-12; evidence of Mr Grierson, T34-41, l-8.

The content of the 19 August 2010 negotiations

[134] Much of the questioning on this subject focused on Table 1 to the CBRC decision number 3019 of 22 July 2010. In particular, Counsel Assisting the Commission seemed concerned by Item 6 of that table, dealing with the legal release of IBM's obligations.

[135] It is true to say that the terms that were discussed between the IBM representatives and Mr Grierson on 19 August 2010 included some form of release for IBM. But it is also true to say that Mr Grierson made no promises in that regard. It is clear from subsequent emails that the matter of the release was not finally resolved on 19 August and was the subject of further negotiations with IBM. Further, it was made clear to IBM that all discussions were subject to CBRC approval of the preferred option, and subject to further CBRC endorsement prior to finalising any settlement.[74]

[136] Mr Grierson's authority to negotiate was always subject to those approvals. He could not act or bind the state without the CBRC's express endorsement of any proposed terms.

[137] It is also worth noting that those parameters are plainly an incomplete picture of the priorities and the issues that motivated the members of the CBRC in their decision-making. In evidence, both Ms Bligh and Mr Schwarten repeatedly emphasised that their priorities were to ensure the stability and accuracy of the pay run, and the smooth transition of responsibility for payroll from IBM to CorpTech. Yet, neither of these matters is reflected in Table 1. It cannot be considered in isolation from the discussions and directions Mr Grierson received at the CBRC meeting.

[138] Furthermore, the approvals required by paragraph 3 of the CBRC decision of 22 July 2010 were ultimately sought and obtained.[75]

[139] Ms Bligh weighed up whether the value of the waiver was worth the advantages the State received in the settlement.[76] She made a decision to *"prioritise the practical consequences over some of the legal considerations"* because the top priority was to ensure that Queensland Health employees were paid.[77] Similarly, Mr Schwarten was focussed on ensuring staff were paid[78], and while he would have preferred to limit the release given to IBM because it would allow the State to *"have our cake and eat it, too"*,[79] he was realistic enough to admit that *"whether or not that could actually be negotiated was another thing"* entirely.[80] Mr Lucas' evidence was consistent with that view: he said that *"the likelihood of IBM agreeing even to a qualified release was*

[74] Ms MacDonald statement, signed 31 May 2013, paras 9 and 14.
[75] CBRC decision number 3040, 26 August 2010, TB3, Volume 3, page 178, paragraph 4.
[76] T32-34, l 43-51.
[77] T32-35, l 2-3; see also T35-19, l 15-25; T35-31, l 23-37.
[78] T32-68, l 18-23.
[79] T32-72, l 35-40.
[80] T32-86, l 3-15.

indicated as essentially non-existent" and that Table 1 should be understood as an instruction to *"at least attempt"* to give a more limited release.[81]

[140] At no stage was the CBRC required to accept the proposed settlement terms negotiated between Mr Grierson and IBM. The CBRC chose to endorse them because, as Mr Schwarten described it, *"we recognised the fact was he* [Mr Grierson] *made the best out of a bad deal."*[82] There can be no breach of Mr Grierson's authority to negotiate in circumstances where the proposed settlement terms were wholly endorsed by the CBRC.

David Kent
Barrister-at-Law

Nicholas Ferrett
Barrister-at-Law

Amanda Stoker
Barrister-at-Law

[81] T35-14, l 35-60; T35-15, l 1-7.
[82] T32-86, l 11-15.