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

The Queensland Health Payroll System Commission of Inquiry

Submissions on behalf of IBM Australia Ltd

THE PROCUREMENT PROCESS

14 JUNE 2013

PRELIMINARY

1. These submissions are made on behalf of IBM Australia Ltd (**IBM**).[1]

2. They address the:

   (a) issues identified by the Queensland Health Payroll System Commission of Inquiry (the **Commission**) to IBM as matters on which submissions were sought in relation to what the Commission referred to as the procurement process; and

   (b) matters otherwise arising out of submissions made by Counsel Assisting,[2] and other parties[3] before the Commission.

3. Principally, these submissions explain the reasons why:-

   (a) IBM did not have any unfair advantage in the procurement process. It started from a position of distinct competitive disadvantage, and did its best to meaningfully participate.

   (b) It prepared, as an experienced, respected and leading Information Technology company, a detailed response to the Invitation to Offer, in good faith, despite the short, State-mandated time frame. It provided pricing estimates in the form requested, and articulated a series of detailed assumptions to which the State had regard. There is no basis to conclude that the cost or time estimates were misleading or made otherwise than *bona fide*.

   (c) The State (through the evaluation process it established and operated) was in a position to be fully aware of all aspects of the IBM response to the Invitation to Offer. It made requests for, and received, further information from IBM as necessary to clarify aspects of IBM's bid.

   (d) Neither the proposal to use WorkBrain for award interpretation (including for Queensland Health) nor the integration of WorkBrain with SAP was an idea

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1 In referring to oral evidence given, reference is made to transcripts by day, page and approximate line numbers. The line numbers in the transcripts provided are inaccurate, in that more than 10 lines appear between line notations. The tender bundles are referred to as "PTB" (Procurement Tender Bundle), "CMTB" (Contract Management Tender Bundle) and "STB" (Settlement Tender Bundle) respectively.

2 Submissions of Counsel Assisting, 26 April 2013.

3 In particular, the submissions of the State dated 26 April 2013.

new to CorpTech. IBM adopted the existing product mix accepted by CorpTech. The "innovative" aspect of the proposal was to use WorkBrain for non-rostering agencies, for which IBM gave particular contractual warranties which were satisfied.

(e) As to events which occurred before the decision to issue an Invitation to Offer for the appointment of a Prime Contractor, which are, as explained below, before any procurement process had begun:

(i) there was nothing improper in the meetings between IBM and Mr Burns. IBM's competitors had and received at least the same level of access to State representatives.

(ii) there is, likewise, no significance in Mr Burns' employment with IBM in the distant past.

(iii) the concerns about misuse by IBM of confidential information are misplaced and wrong as a matter of law.

(iv) in the absence of a thorough investigation of the position of IBM's competitors during 2007[4] any conclusion that there was unfairness (to them) or that IBM was inappropriately favoured would be unsafe and will be unfair to IBM.

Background

4. In March 2010, a new payroll and human resources system for Queensland Health was implemented by the Queensland Government, based upon two software products: SAP HR and WorkBrain. IBM was the Prime Contractor with overall responsibility for the development of these software components as part of an interim payroll solution. The implementation of the system also required the adoption of new business structures and processes within Queensland Health, for which IBM was not responsible.

5. In the weeks following the implementation of the new system, employees of Queensland Health were not paid or not paid correctly. The working assumption (at

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4 Based on a view that the terms of reference of the Commission only directed attention to IBM's position during the tender process: T16-54, line 35 to T16-55 line 50 (Porter).

least in the press (and sometimes elsewhere) has been that this is principally because of defects within the software designed by IBM. But no cogent evidence of this has emerged. These matters are to be addressed in further submissions shortly to be provided.

6. Rather, the evidence which has emerged in the course of the hearings of the Commission has demonstrated that serious factual misconceptions have underpinned this, and a number of other assumptions concerning the tender process, the issues experienced during the course of the project, and the way in which the software performed after it went live in March 2010.

7. The evidence which has been given in the hearings, and which is addressed in these submissions and further submissions to be provided, has demonstrated that:-

   (a) IBM did not have any special advantage over its primary competitor during the course of the tender process, and provided a competitive bid in good faith which was accepted by the State after a selection process.

   (b) IBM diligently defined and obtained sign off on the scope of the interim payroll replacement project, but faced continued requests to change (to expand) the scope of works;

   (c) IBM performed competently in very difficult circumstances during the course of the project;

   (d) A number of unexpected non-software issues were the primary cause of the pay problems which were experienced after the new system was implemented;

   (e) Although some software issues arose, these were not of a kind to distinguish the implementation of the software from the usual implementation of any large and complex new software system – and did not (of themselves) cause any miscalculations of pay or non-payments of employees.

THE PROCUREMENT ISSUES

8. The broad thrust of the unfounded criticisms of IBM which have emerged during the hearings of the Commission concerning the procurement issues, and subsequently, in the submissions of Counsel Assisting and the State are that:

(a) IBM's response to the CorpTech Invitation to Offer involved:

(i) a proposal to use WorkBrain for award interpretation that was unduly risky or improper;[5]

(ii) cost and times estimates which were misleading, or not made *bona fide*.[6]

(b) the conduct of Mr.Burns, and his relationship with IBM was inappropriate, and materially different to the contact Mr.Burns had with any of IBM's competitors;[7]

(c) IBM employees received confidential information of others, and used that information improperly; [8]

(d) the "tender process" as a whole unfairly favoured IBM.[9]

9. For the reasons which follow these criticisms:

(a) conflate two distinct processes, and amplify out of all proportion matters occurring before the procurement process began; and

(b) are based upon serious factual inaccuracies, errors of law and an artificially narrow focus upon particular meetings, documents and conversations without regard to the broader context in which they occurred.

10. Any finding which adopts the criticisms would be unsafe and unfair to IBM.

11. A number of the findings and conclusions which are urged by Counsel Assisting and the State in their respective submissions (and which are addressed below) also implicitly invite the Commission to depart from the usual practice of Commissions of Inquiry[10] in not making adverse findings on the basis of "indirect proofs, indefinite testimony or indirect inferences".[11]

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5 Submissions of Counsel Assisting dated 26 April 2013, paragraphs 66 – 69; Submissions of the State dated 26 April 2013, paragraphs58 – 63.

6 Submissions of the State dated 26 April 2013, paragraphs 3, 43, 45.

7 Submissions of Counsel Assisting dated 26 April 2013, paragraphs 7, 56 – 65. Submissions of the State dated 26 April 2013, paragraphs 13, 25, 27-33.

8 Submissions of Counsel Assisting dated 26 April 2013, paragraphs 7, 31 – 55. Submissions of the State dated 26 April 2013, paragraphs 44 – 57.

9 Submissions of Counsel Assisting dated 26 April 2013, paragraphs 7, 71.

10 See e.g. Hon. Terrence Cole, *Final Report of the Royal Commission into the Building and Construction*

12. In circumstances in which findings are proposed to be made on the basis of inference and circumstantial matters, particular care must be taken. As Dixon CJ observed in *Jones v Dunkel* (1959) 101 CLR 298 at 305:

> *But the law... does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of the fact which the tribunal of fact may reasonably be satisfied.*

13. Although not strictly bound to do so, the Commission should follow this approach and so refrain from making findings which may affect IBM 's reputation, or the reputation of its employees, unless it can be "reasonably satisfied" of the truth of the findings after having regarding to the seriousness of the allegation, the inherent unlikelihood of the occurrence alleged and the gravity of the consequences flowing from a particular finding.[12]

14. Further, although the Commission is not bound by formal rules of evidence, it should nevertheless base its conclusions on material having "rational probative force".[13]

THE PROCUREMENT PROCESS

15. The terms of reference of the Commission, set out in the *Commissions of Inquiry Order (No 2) 2012*, direct attention to the "adequacy and integrity of the procurement... process".

16. There are two difficulties with the way in which the term "procurement process" has been approached.

17. ***First***, a working assumption has been adopted, uncritically, that the procurement process "comprised three stages" which commenced with the issuance of a so-called "RFI" on or about 2 July 2007.[14]

Industry, Vol 2, pp 48-49 (February 2003); Hon. Neville Owen *Final Report of the HIH Royal Commission,* Vol 1, [1.2.6] (April 2003); Hon Terrence Cole *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme,* Vol 1, [6.17] – [6.18] (November 2006).

11 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 (Dixon J).

12 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 (Dixon J).

13 *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 492 (Brennan J); see also *Sudath v Health Care Complaints Commission* [2012] NSWCA 171 at [79] (Meagher JA).

14 Submissions of Counsel Assisting dated 26 April 2013, paragraphs 2, 8 - 9.

18. What has not been made clear is how the informal "preparatory processes"[15] which preceded the decision made by the State on 16 August 2007[16] to appoint a Prime Contractor and issue an Invitation to Offer for that purpose (the **Procurement Decision**) could properly be described as part of a "procurement process":-

(a) The steps which preceded the Procurement Decision were "informal",[17] "casual",[18] and "loose".[19] Those from the State involved in the so-called "RFP" knew it to be (at most) an informal[20] "RFI"[21] and nothing more than "early market engagement sourcing information that [could] help aid in the future processes" that the State might engage in.[22]

(b) The steps were not directed to any particular procurement outcome. Nor did they lead to one. At the time of the so-called "RFI" and "RFP", there was nothing to be procured.[23]

(c) The State first made a decision to seek tenders for the services of a Prime Contractor on 16 August 2007, after completion of the informal market engagement referred to above.

(d) The legal advice ultimately obtained by the State was (unsurprisingly) that it could not in fact procure anything as a result of these informal processes, but would need to engage in a normal, formal, procurement process,[24] which then occurred.

19. The events which pre-date the Procurement Decision must be understood as part of a separate, anterior process involving a review of the existing program by Mr.Burns and others, and the sourcing of ideas so as to enable the State to reach a decision to commence a procurement process, which followed.

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15 Submissions of Counsel Assisting dated 26 April 2013, paragraph 3.
16 PTB, Vol 28, p 699.
17 See e.g. PTB, Vol 28, p 462; PTB, Vol 6, p 71; T6-84, lines 31-55; PTB, Vol 32, item 31, pp 1-2; T15-26, lines 26-36 (Burns).
18 T1-99, lines 25-30, 53 (Salouk).
19 Statement of Marcus Salouk, paragraph 55.
20 PTB, Vol 6, p 71.
21 PTB, Vol 28, p 689; Vol 6, p 73; Accenture pricing section of ITO response; PTB, Vol 33, p 18.
22 T6-85, lines 1-5 (Bugden). The fact that Accenture wanted the process to be something different to what it was is of no moment.
23 See, e.g. PTB, Vol 6, pp 1-2.
24 See, e.g. PTB, Vol 10, p 5; T8-71, line 37 to T8-72 line 8 (Swinson).

20. There was break between the initial steps and the Invitation to Offer, which was a self-contained and fresh approach to vendors. There has been no evidence of how matters which occurred prior to the issue of the ITO had any effect upon the ITO results. Accordingly, the significance of what occurred before in the early period is (rightly) diminished.

21. In these submissions, we refer to the events between the initial engagement of Mr. Burns in early April 2007 and the Procurement Decision on 16 August 2007 as the "Program Review Process". We refer to events between the Procurement Decision on 16 August 2007 and the selection of IBM as the preferred bidder on 26 November 2007 as the "Procurement Process".

22. ***Secondly***, remarkably little attention has been given to the relevance of the timing of various events to which attention has been directed,[25] except where that timing could (unrealistically and artificially) be made into a basis to criticize IBM.[26]

23. While the Commission is empowered to inquire as to "any other matter relevant to [its] review", events which occurred outside of the Procurement Process should be identified as such. No real effort to draw this distinction is apparent from the submissions of Counsel Assisting[27] or the State.[28]

24. But the time at which the events in question occurred colours the significance and effect of those events.

25. For example:

    (a) The meetings between Mr.Bloomfield and Mr.Burns (in May and June 2007) to which so much attention was directed occurred long before the Procurement Process began, and before even the informal requests for information in the Program Review Process were made.

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25 See e.g. Submissions of Counsel Assisting dated 26 April 2013 at paragraph 71 – which conflates interactions between Mr Burns and IBM early in the Program Review Process with the later "government competitive tender process".

26 See e.g. Submissions of Counsel Assisting dated 26 April 2013, paragraph 59.

27 Submissions of Counsel Assisting dated 26 April 2013, paragraphs [2], [9], [71], [31].

28 Submissions on behalf of State of Queensland dated 26 April 2013, paragraphs [1(d)], [27], [31], [44] .

(b) By contrast, Accenture had, during the latter part of the Program Review Process, a lot of "interaction with Terry… face-to-face"[29] during which time Mr.Burns was "very generous in his information".[30] The exploration of this face-to-face time was very limited.

26. It is not possible to fairly understand, analyse or characterise the significance and relevance of the conduct of any of the participants without careful regard to both:

(a) the time and stage at which that conduct occurred; and

(b) the surrounding context of other prior and subsequent events.

27. One obvious application of this should be to avoid assessing conduct which occurred before the Procurement Process against notions of tender probity which applied during the actual procurement phase.[31] The probity requirement that all tenderers should be treated even-handedly in the provision of information obviously applied (and was followed) following the issuance of the Invitation to Offer. How it should apply during informal processes, before any decision is taken to go to market and at a time when potential vendors were already starting from different positions by reason of differing levels of familiarity with the Program, has not been made clear.

28. Undue focus upon individual conversations, interactions or emails, in isolation from the broader context, leads inevitably to a skewed view and a mistaken appreciation of the true significance of the conduct being examined.

29. Moreover, we emphasise that the skewing is further accentuated by a decision[32] not to fully inquire into the conduct of suppliers other than IBM. Thus one party is put under the microscope without a similar focus being given to others.

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29 Statement of Marcus Salouk, paragraph [63], [64].

30 Statement of Marcus Salouk, paragraph [68].

31 As is done in the. Submissions of Counsel Assisting dated 26 April 2013, paragraphs 59-60, which address an alleged disparity of treatment in May 2007 (and at unspecified times thereafter), and then (at paragraph 61) link this to probity advice given by John Swinson on 27 August 2007, after the State had actually decided to go to market for a Prime Contractor.

32 Which decision is not itself criticized – the time constraints within which the Commission and those appearing before it have had to work have been a challenge.

30. Below, we set out in short compass the major events which occurred during the Program Review Process and the Procurement Process, and which form a necessary background to the submissions which follow.

Early 2007

31. In early 2007, the State was in the process of the implementation of the Shared Services Program. The Program was managed by CorpTech, who was utilizing a variety of contractors on a "time and materials" basis to carry out the necessary work.[33]

32. Accenture had some 200 employees or contractors integrated within CorpTech and government departments.[34] Logica had some 80 employees.[35] By contrast, IBM had only a handful of employees or contractors involved.[36] The only real evidence as to numbers suggests that IBM had two employees at a site separate from the main CorpTech site.[37]

33. In "very early 2007", CorpTech made contact with Accenture, IBM, Logica and SAP to informally seek ideas about how CorpTech might work with each of them in the future.[38]

34. IBM provided a proposal about its involvement to Geoff Waite of CorpTech on 12 March 2007.[39] That proposal envisaged Accenture continuing to manage the build of SAP HR, but IBM taking on greater roles in other areas, including in the implementation of the built solution in the agencies, including Queensland Health.[40] Accenture also delivered a proposal on about8 May 2007.[41]

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33 Statement of Marcus Salouk, paragraph [19] and [27]. T1-19 lines 35-40 (Salouk).
34 Transcript of Interview of Joseph Sullivan, T1-7 lines 4-9 and T1-20 lines 14-21 (Ex 152).
35 T2-13 lines 42-45 (Duke).
36 Transcript of Interview of Joseph Sullivan, T1-7 lines 4-9 and T1-20 lines 14-21 (Ex 152)
37 Transcript of Interview of Joseph Sullivan, T1-7 lines 4-9 and T1-20 lines 14-21 (Ex 152)
38 T2-42 lines 13-16 (Bond).
39 PTB, Vol 27, p 4.
40 PTB, Vol 27, pp 4-19 (esp at p 10); T11-47 lines 40-44 (Cameron) ; T11-48 lines 11-12 (Cameron); Statement of Lochlan Bloomfield dated 18 March 2013 at paragraph [38](b).
41 Ex 51 (statement of Simon Porter dated 28 March 2013), paragraph [5].

35. In March 2007, Dr Leo Keliher delivered a report to the Premier on behalf of the Service Delivery and Performance Commission.[42] Among other things, Dr Keliher:

(a) Noted that as at 31 July 2006, there were some 255 contractors working on the Shared Services Solution;[43]

(b) Foreshadowed the acceleration of the go-live date for payroll replacement for Queensland Health to a date before October 2008.[44]

36. Mr.Burns was engaged to assist with a five-day "snapshot" review which was presented on 18 April 2007.[45] This review was generally critical of the current state of the Shared Services Program.

37. A further, more detailed review was subsequently conducted, and presented by Mr.Burns on late May 2007.[46] This review was also critical of the way in which the Shared Services Program had been run to date. No recommendation was made in that presentation to appoint a Prime Contractor.

38. It was during this this time that the meetings between Mr.Burns and Mr.Bloomfield to which most attention has been directed (and which are dealt with further below) occurred.

39. In June 2007, IBM submitted a proposal to take on the role of providing a Program Management Office.[47] That proposal was unsuccessful.[48]

The early July Request (the "First Informal RFI")

40. On 29 June 2007, a range of vendors were invited by email to attend a supplier briefing to be held at CorpTech offices on 2 July 2007.[49]

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42 PTB, Vol 1, pp 36-157.
43 PTB, Vol 1, p 109.
44 PTB, Vol 1, p 111.
45 PTB, Vol 1, pp 158-181.
46 PTB, Vol 1, pp 216-400
47 See e.g. PTB, Vol 28, pp 386, 404-423.
48 PTB, Vol 28, p 428.
49 See e.g Vol 28, p 429.

41. At the supplier briefing of 2 July 2007 a presentation, subsequently provided in hard copy to (at least) SAP, Accenture, IBM and SMS Management,[50] informed the vendors that:

    (a) Phase III of the "replanning" for the Shared Services Initiative had commenced;[51]

    (b) One of the objectives of Phase III was to manage the SSS Program "within current available funding".[52] This was discussed at the presentation.[53]

    (c) The State was "[s]eeking innovative ideas and scenarios from vendors/partners".[54]

42. On about 6 July 2007[55] the State issued a letter requesting information to be provided by a range of vendor[56] parties in relation to the SSP. The letter sought:[57]

> *innovative ideas and scenarios on managing the Design and Implementation process within the SSS Program... You are invited to provide high level information on how the Project can effectively manage the SDA requirements.*

43. Information proposals were to be provided by 12 July 2007, with the opportunity to make a presentation of the proposals the following day.

44. It is unclear how many vendors responded, but at least IBM, [58] Accenture[59] and Logica[60] submitted a proposal and gave a presentation on Friday 13 July 2007.

The late July request (the "Second Informal RFI")

45. On 25 July 2007, Mr.Burns sent a short email to vendors, including IBM and Accenture, asking them to submit "a firm proposal" addressing a short list of specific

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50 PTB, Vol 28, p 450.
51 PTB, Vol 28, p 432.
52 PTB, Vol 28, p 433.
53 T2-31, lines 11-15 (Duke).
54 PTB, Vol 28, p 445.
55 PTB, Vol 28, p 430.
56 At least nine vendors: PTB, Vol 6, pp 1-18.
57 PTB, Vol 6, p 2.
58 PTB, Vol 28, p 463.
59 T1-32, lines 17-18 (Salouk).
60 T2-11 line 45 to T2-12 line 3 (Duke).

issues and questions. The email asked for vendors to provide "cost ranges and timescale ranges."[61]

46. Although referred to as an "RFP" in the Commission hearings, the contemporaneous view (as revealed by the documents) was that it was an informal[62] "RFI".[63] Regardless of labels, it was informal and superficial, as even a cursory comparison of the email from Mr Burns[64] with the subsequent Invitation to Offer document[65] makes plain. It was not what one would realistically expect to lead to a procurement, IBM was never told it would, and it did not.

47. Proposals were submitted by the parties. IBM gave a presentation on 7 August 2007 at CorpTech's offices. [66] Accenture appears to have made presentations on 7, 8 and 9 August. [67] Its 8 August presentation, at least, involved State representatives attending Accenture's offices at Milton.[68] Logica also made a presentation.[69]

48. There is a suggestion that IBM obtained some unfair advantage in securing an opportunity to conduct a "dry-run" of its presentation before the formal presentation. This is quite wrong, and is dealt with further below.

The Procurement Process and the Invitation to Offer (the ITO)

49. An Invitation to Offer (**ITO**) was issued on 12 September 2007. Its issuance followed a decision by the State on 16 August 2007 to move to appoint a Prime Contractor.[70] The ITO called for a response by 1 October 2007, but that date was subsequently amended to 8 October 2007.[71] A number of witnesses have identified the period set by the government for tendering parties to respond as unduly short.[72]

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61 PTB, Vol 6, pp 20, 41.
62 PTB, Vol 6, p 71.
63 PTB, Vol 28, p 689; Vol 6, p 73; Accenture pricing section of ITO response; PTB, Vol 33, p 18.
64 PTB, Vol 6, pp 20, 41.
65 PTB, Vol 12.
66 Ex 35 (statement of Lochlan Bloomfield dated 18 March 2013), paragraph [100]; PTB, Vol 28 at pp 596-687.
67 Ex 5 (statement of Marcus Salouk dated 5 March 2013), paragraphs [45], [46], [47]; PTB, Vol 26 at pp 1167, 1170; T8-71.
68 PTB, Vol 26, p 1170.
69 T2-12 lines 55- T2-13 line 8 (Duke); T1-87 lines 11-16 (Salouk).
70 PTB, Vol 28, p 699.
71 Ex 35 (statement of Lochlan Bloomfield dated 18 March 2013), paragraph [126]; PTB, Vol 29, p 791.
72 T3-46 lines 44-47 and T3-57 lines 16-20 (Hood) and Statement of Phillip Hood dated 4 March 2013 at para [32]; Statement of Maree Blakeney, undated at para [22]; T8-92 lines 26-39 (Swinson) (Also

50. The ITO document indicated that Queensland Health was required to be given priority:

> *On 16 August 2007, the Shared Services CEO Governing Board agreed to a range of improvements to the SSS Program... The planned improvements include... mitigating risks associated with supporting legacy systems by giving priority to Queensland Health, the Department of Emergency Services (DES), Queensland Corrective Services (QCS) and the Department of Education, Training and the Arts (DETA) in the business solution implementation schedule and some interim technical upgrades for Aurion HR systems.*[73]
>
> *The highest priority activity is the replacement of the legacy HR systems that utilize the Lattice Human Resource Information System (Lattice) and The Solution Series Software. In replacing these solutions, the strategy is to replace the legacy systems through a full or partial implementation of the shared services HR business solution.*[74]
>
> *It is desirable to implement these agencies in a rapid time frame, to reduce legacy and business risk and cost. While the most critical risk is in relation to Lattice Support for Health, DES and QCS there are also critical timeframes for DETA. The preferred approach is for the contractor to meet all of the critical timeframes for each of these agencies. If it is not possible to achieve this, then the overall order of priority is Lattice agencies first and then TSS, that is: Health, DES, QCS and then DETA.*[75]
>
> *There are no upgrade options to the Lattice solutions.*[76]

51. Accenture, IBM and Logica submitted responses to the ITO on 8 October 2011.

52. Each subsequently provided a series of further responses to clarification questions from the State.[77]

53. There were two issues involving vendors during the ITO process:

    (a) ***First***, and most seriously, an Accenture contractor gained access to IBM's pricing information.[78] Although this was ultimately dealt with, it suggests laxness in the way in which the State treated information provided to it.

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acknowledged by the Commissioner at T15-8 lines 7-11 and Burns appears to accept the comment at T15-8 lines 11-21); T17-15 line 51 to T18 line 2 (Perrott).

73 PTB, Vol 12, p 16.

74 PTB, Vol 12, p 28.

75 PTB, Vol 12, p 28.

76 PTB, Vol 12, p 31.

77 See, e.g. PTB IBM Responses.

78 See e.g. T8-79, lines 14-40 (Swinson); T 16-56.

(b) ***Secondly***, IBM accidently sent one email to the wrong CorpTech representative (although the tender officer was carbon copied on the email).[79] This should be treated simply as an oversight which was of no consequence.

54. The evaluation process was completed on 23 October 2007,[80] and IBM was selected as the preferred bidder.

55. IBM has since been criticised in relation to its ITO response. It is these issues, relating to the Procurement Process itself, which fall within the Commission's core terms of reference and which are addressed first below.

56. The remaining issues, which arise out of the Program Review Process are addressed subsequently.

IBM'S RESPONSE TO THE ITO

57. It is suggested that IBM may have been "unwise" to propose the use of WorkBrain.[81] The State also has suggested that questions have been raised as to whether IBM's pricing was based upon a "fundamental misrepresentation" that it was impliedly giving its best estimate of cost in its ITO Response.

58. The evidence does not bear out either of these concerns.

59. Before turning to the detail, it must be clear that in approaching the ITO Response and the assessment of it by the State, we are concerned with two large, commercially capable entities. The State:

(a) In evaluating the ITO Responses, had access to experienced internal IT specialists,[82] qualified accountants,[83] and external contractors.[84] Those persons carefully reviewed and scored each of the ITO Responses,[85] sought clarifications,[86] and ultimately arrived at a final assessment[87] in which IBM

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79 PTB, Vol 29, pp733-738.
80 PTB, Vol 22, Item 19.
81 Submissions of Counsel Assisting, 26 April 2013, paragraph 66.
82 T2-104, lines 35-45 (Bond).
83 T3-71, lines 8-9 (Orange).
84 See e.g. T3-74, lines 44-51 (Orange).
85 See e.g. T2-62 lines 5-21 (Bond);
86 PTB, Vol 13, See Item 13 generally.
87 PTB, Vol 22, pp 1- 32.

was the highest rated vendor. No individual "had a controlling say in the outcome".[88]

(b) Had the benefit of a robust range of views within CorpTech about the appropriateness of appointing a Prime Contractor,[89] so that the State was not ignorant of risks inherent in adopting that structure.

60. The timeframe for the assessment (and indeed the provision of responses by vendors) was State imposed.

61. Against this backdrop, the State now wishes to assert that: [90]

> *"It must have been apparent to IBM during the procurement processes that … its estimates as to price and timeframes would have to be taken on faith. … [IBM] was much better placed to estimate the cost and timeframes of the solution it was proposing. That better position was informed not least by the specialized skill and knowledge that IBM had and which, as it knew, CorpTech lacked".*

62. It is, with respect, incredible to suggest that the State of Queensland was in some sort of position of disadvantage, despite its:

(a) significant internal resources, many with deep IT experience;

(b) position of power in controlling the tender process;

(c) access to advice from a leading national law firm (Mallesons Stephen Jaques[91]) and officers within Crown Law with deep experience relating to government tenders;

(d) examination of competing tenders.

Proposal to use WorkBrain

63. The suggestion that IBM acted improperly or imprudently[92] in proposing the use of WorkBrain in its ITO response cannot be sustained.

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88 T2-89, lines 31-32 (Bond).
89 See e.g. Darrin Bond Presentation; T2-96 line 25 to T2-97 line 19 (Bond).
90 Submissions on behalf of the State of Queensland, 26 April 2013, [55].
91 Now King & Wood Mallesons.
92 Or "may have been unwise": Submissions of Counsel Assisting, paragraph 66.

64. In the first place, IBM was open about what it was proposing, the State had a full opportunity to carefully consider the proposal[93] with the assistance of technical specialists and experienced IT managers,[94] identify areas of concerns and investigate those concerns.[95] Ultimately, the proposal was accepted.

65. In the second place, neither the use of WorkBrain to perform award interpretation functions nor the integration of WorkBrain with SAP was a new idea to CorpTech, nor was it 'unconventional'.[96] CorpTech had resolved to use WorkBrain (integrated with SAP) for award interpretation in rostering agencies before the ITO was issued.[97] Queensland Health was one of those rostering agencies in which it was to be used.[98] Accordingly, IBM's proposal, insofar as it concerned Queensland Health was simply the adoption of the "product mix"[99] which CorpTech was already pursuing.[100] The only "innovative" aspect was to use WorkBrain for *non-rostering* agencies. The use of WorkBrain in that context never came to fruition and is outside the terms of reference of this Commission in any case.

66. Because much of the examination of witnesses proceeded upon the erroneous assumption that the idea to use WorkBrain for awards interpretation *at all* (e.g. for award interpretation for Queensland Health)[101] was IBM's innovative idea, many of the answers,[102] and indeed submissions,[103] are of little utility.

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93 See e.g. T3-24 lines 25 to T3-25 line 10 (Bond).

94 T5-4 line 51 to T5-5 line 26 (Shah) T3-94 lines 30-32, 50-52 and T3-85 lines37-50 (Orange); T4-36 lines 18-20 (DiCarlo) ; T6-86 lines 40-45 (Bugden); T10-18 lines 12-38 (Atzeni); T2-104 lines 31-41 and T2-110 line 34-52 (Bond); T4-59 lines 4-7 (DiCarlo); T3-45 lines 1-22 (Hood).

95 See, e.g. T2-109, lines 23-55; T3-27 line 25 to T3-28, line 10.

96 Submissions on behalf of the State, 26 April 2013, [63].

97 See, e.g. Ex 10, pp 7-8; Vol 12, p 41 "HR Awards are currently planned to be developed primarily in SAP. For rostering awards, the time components are planned to be developed in the Workbrain application" This explains, as identified by the Commissioner (T2-81 lines 29-37) why the warranties in the 5 December 2007 contract relating to WorkBrain were given only in respect of *non-rostering* agencies: see PTB, Vol 31, p 1521 (clause 5.3) and p 1624 (schedule 24). Contra, e.g. the opening statement of Counsel Assisting: T1-15 lines 27-32; PTB, Vol 27, pp 20-77, especially p 38.

98 See e.g. PTB, Vol 32, Item 32, Invitation to Offer Documentation, Attachment 7 – Business Priorities Matrix.

99 T3-36, lines 9-46 (Hood); PTB, Vol 12, pp40-41.

100 See e.g. the "Payrules" slide in PTB, Vol 27, p 38.

101 E.g. T2-70, lines 26-33; T2-70 line 55 to T2-71 line 30; T2-80, lines 25-30.

102 E.g. T3-28, lines 35-41 (Bond).

103 See. Eg Submissions of Counsel Assisting at [66], [67].

67. Suggestions that WorkBrain was "untested" or "untried",[104] must be tempered by the fact that CorpTech itself had done significant work on the functional design of WorkBrain for use as an awards interpreter to integrate with SAP.[105]

68. In the third place, it was uncontroversial that configuring awards in SAP was very complex and time consuming.[106] Mr. Bond, the "architect"[107] within CorpTech for the build and implementation of the software explained that "award configuration in SAP, the newer version of SAP was very complex."[108] He further conceded that, unless SAP altered its product, "it had become evidence that [by mid-2007] the SAP application would be unable to process the award interpretation functions… across other departments within an acceptable time frame to meet the SSS business requirements".[109]

69. There has not been investigation by the Commission about whether Accenture's proposal to use SAP to do all award configuration[110] might have in fact been a technically inferior, or more risky solution to IBM's proposal. The appropriateness of IBM's proposal can only properly be assessed by reference to the other potential options. No evidence of technically better options has been proffered. Thus the Commission is not in a position to make such an assessment. On the other hand, CorpTech's Evaluation Teams were able to undertake that assessment. They chose IBM.

70. In the fourth place, objective reviews of WorkBrain suggested it:

    (a) Had a "strong time and attendance functionality that can scale to large volumes".[111] The "time and attendance" module is of course that part of WorkBrain which had the capacity to "automate… pay rules".[112]

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104 T2-91, lines 39-42 (Bond).
105 PTB, Vol 27, p22, 29, 30, 38. See also T10-14, line 4 to T10-17, line 33 (Atzeni); and Ex 135a, 135b and 135c.
106 See e.g. T2-43 ll 34-50 (Mr Bond); T5-10, line 52 to T5-53, line 1 (Shah).
107 T2-39 line 39 (Bond).
108 T2-43 lines 38-39 (Bond).
109 T3-17, lines 18-23 (Bond).
110 PTB, Vol 17, p 406-409.
111 Gartner Report: PTB, Vol 30, p 1463.
112 PTB, Vol 30, p 1456.

(b) Could handle award interpretation functions for 250,000 employees and 4,000 concurrent users and 780,000 with 3,000 concurrent users.[113]

71. This is consistent with the views of Dr Manfield, who concluded that:

(a) "IBM's offering of Workbrain in its ITO response as part of a SAP/Workbrain solution was sensible and prudent subject to its ability to manage its associated risks".[114]

(b) "The reasons for IBM's choice of Workbrain in its ITO response make sense both technically and business-wise; it is a mature product and credibly offered the potential for quicker implementation through its design capability by configuration and extensions."[115]

72. In the fifth place, as events transpired, WorkBrain passed[116] the scalability testing set out in the Contract.[117]

Price and time estimates

73. In its submissions, the State:

(a) calls in to question whether IBM had made "a fundamental representation … (of) impliedly giv(ing) its best estimate in its ITO response", and calls IBM's identification of a total price cryptic.[118]

(b) argues that "the IBM bid was unrealistic both in terms of price and in terms of timeframes",[119] asserting that "hindsight",[120] "history"[121] or Porter's email

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113 PTB, Vol 30, pp 1439 – 1452 (see especially p 1440 – "the benchmark simulated a customer with 250,000 employees and 4000 concurrent users running Workbrain Time and Attendance…"; p 1443 – "The application configuration includes a representative set of business rules… the test included the following rules… Complex: Weekly Overtime Rule"; p 1447 – "The benchmark demonstrated an average response time under 2.6 seconds with 3,000 simulated concurrent users. Users performed Time and Attendance functions against a database containing 780,000 employees; p 1450 – "The application configuration included a representative set of Workbrain pay rules… Complex: Weekly overtime rules"); p T3-4 to T3-6 (Bond).

114 Ex 123, p 2.

115 Ex 123, p 2.

116 Ex 107.

117 PTB, Vol 31, p 1521 (clause 5.3) and p 1624 (schedule 24). Ex 10.

118 Submissions on behalf of the State of Queensland, 26 April 2013, [3].

119 Submissions on behalf of the State of Queensland, 26 April 2013, [43], [51].

120 Submissions on behalf of the State of Queensland, 26 April 2013, [43].

121 Submissions on behalf of the State of Queensland, 26 April 2013, [51].

would be the foundation for such a view,[122] and suggesting that correspondence of Mr.Doak supported that.[123]

74. These submissions are premised upon a number of false assumptions and serious factual inaccuracies.

75. ***First***, there was nothing "cryptic" in IBM's pricing response. It provided its price in the form requested by the State, in the ITO,[124] a "more complicated" format than usually required by customers.[125] It is remarkable that the State should criticize IBM for this. Further, and contrary to the suggestion that IBM generally failed to provide fixed prices (and instead provided best estimates) where it was required to provide fixed prices,[126] IBM in fact provided fixed prices for Items 1A to 1F,[127] and best estimates for the remaining items, just as the State requested in the ITO documentation.[128]

76. ***Secondly***, along with pricing spreadsheets, IBM provided a detailed set of assumptions within its response.[129] CorpTech reviewed these assumptions.[130] These assumptions included that:[131]

(a) For awards and rostering:

(i) that appropriately skilled client resources as per resource schedule from applicable agencies will be available to advise the awards team and make binding decisions;

(ii) that CorpTech would be responsible for compiling awards, acts and requirements and using the awards templates provided by IBM and seek necessary approvals;

(b) For Priority HR – Awards and Rostering:

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122 Submissions on behalf of the State of Queensland, 26 April 2013, [51].
123 Submissions on behalf of the State of Queensland, 26 April 2013, [51].
124 PTB, Vol 12, pp58-73.
125 Ex 57 (Statement of Brooke Freeman), p 2.
126 T3-87 lines 25-33; T3-88, lines 36-43.
127 PTB, Vol 15, pp 616 (fixed price for 1A), 617 (fixed price for 1B), 618 (fixed price for 1C), 619 (fixed price for 1D), 621 (fixed price for 1E), 624 (fixed price for 1F).
128 PTB, Vol 12, pp 24-27.
129 PTB, Vol 15, pp714-731.
130 See, e.g. PTB, Vol 30, p 1509; PTB, Vol 22, p 26; T3-84, lines 34-41 (Orange).
131 PTB, Vol 15, pp 717-731.

(i) that all WorkBrain functional designs delivered [by CorpTech] as part of the Request for Offer are final and will be implemented unchanged, unless a specific change request is raised (p 722);

(ii) that appropriately skilled client resources will be available to advise the rostering team, and make binding decisions (p 722).

(c) For Legacy Solution Upgrades:

(i) that the scope of work required to reach Queensland Health's minimum requirements for an interim solution are within the range allowed for in IBM's build estimates. These estimates are presented in the form of RICEF category and complexity (p728). These were clarified by IBM on 12 October 2007;[132]

(ii) that CorpTech appoints a prime contractor in a timeframe which will allow the Lattice replacement project to commence on 5 November 2007 (p 729);

(iii) that the existing DOH SAP HR/Payroll solution included the functionality expected to deliver the minimum Queensland Health requirement (p 729).

77. A number of these assumptions never came to fruition.[133] It is disingenuous, and wrong, for the State to point to the fact that the time taken to complete work and the ultimate cost of that work was higher, without regard to the State's performance in connection with the non-fulfillment of these assumptions.

78. As emerged during the course of the Commission hearings relating to the performance of the Contract, the time and cost for the work increased because of significant and frequent change requests from the State, described by Dr Manfield as

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132 PTB, Vol 30, p 1248.

133 The RICEF counts initially suggested by IBM changed substantially, first under Statement of Work 8, and then in the solution as delivered: ex 164 (Statement of Nicholas Kwiatkowski) para 58 and 59; the WorkBrain functional designs delivered by CorpTech were not able to be implemented unchanged: See e.g CMTB Vol 6, p 43, CMTB Vol 6, p 71, CMTB Vol 6 p 83, CMTB Vol 6, pp 95 – 107 (especially p 104); Ex 100. The DoH SAP HR/Payroll system had to be supplemented with additional functionality: CMTB Vol 4, p 17; The Contract was not signed until 5 December 2007, and although IBM commenced formal scoping in good faith before this time, it did not commence until late November 2007: see Ex 110 (statement of Christopher Prebble, paragraph 19).

a "slicing the salami" approach.[134] This matter will be dealt with in detail in further submissions relating to that topic.

79. ***Thirdly***, the direct evidence given about IBM's pricing was that it was produced in good faith, and represented an honest assessment of price.[135]

80. Ms. Freeman said that:[136]

(a) IBM adopted its usual processes in estimating the price components for its ITO response;[137]

(b) IBM provided its fixed prices and best estimates on the basis of a considered assessment of the effort it would take to complete the specified work;[138]

(c) There was no difference of significance between the price assessment approach IBM adopted in responding to the CorpTech ITO as compared to other tender responses.[139]

81. Ms. Freeman also dealt fully with the suggestion that there was something surprising or concerning about the variation between the indicative price range provided by IBM in response to the Second Informal RFI and the fixed and best estimate prices provided in IBM's ITO response.[140] She has not been challenged on any of this evidence.

82. ***Fourthly***, the Contract ultimately signed between IBM and the State contained explicit provisions restricting IBM's ability to increase price over time:

(a) It could not increase the price of work on fixed price items (including the Queensland Health interim replacement project under Statements of Work 7, 8A and 8) without a formal contract variation agreed to by the State.[141]

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134 See e.g. T30-58, lines 5-32; T30-59, lines 1-45; T31-2, lines 28 – 48 (Dr Manfield).
135 In addition to the evidence dealt with below, see also the information provided by IBM in Ex 6.
136 Ex 57.
137 Ex 57, pp 1, 4.
138 Ex 57, p 1.
139 Ex 57, p 4.
140 Ex 57, pp 5-7.
141 CTB, Vol 1, pp 55-57 (Schedule 12).

(b) When converting best estimate prices to fixed prices for other work, if IBM increased the price of work beyond 15% of the best estimate price, the State had the right to obtain an independent assessment of IBM's pricing and IBM was required to provide its internal costings to the independent assessor for that purpose.[142]

83. ***Fifthly***, the only other possible basis for impugning IBM's pricing was that it was below Accenture's pricing, and Accenture complained that the work could not be done for less than Accenture was bidding. That complaint, of course, begs the question of exactly what "work" was being bid. As Mr. Duke of Logica rightly identified, in terms of pricing:[143]

> *It all depends on what the scope and assumptions were and constraints they put around that particular price.*

84. IBM is not in a position to make detailed submissions about the differences between the work and assumptions in its ITO response as compared to Accenture. That is because pursuant to confidentiality orders made by the Commission, IBM employees were not permitted to review or analyse the ITO Response of Accenture.[144] Accordingly, IBM is not in a position to give instructions on the differences between the Accenture and IBM responses. No finding adverse to IBM's pricing can be made given the way it has been prevented from undertaking an informed comparison of its tender with Accenture's tender.

85. Further, when Mr. Salouk, who was closely involved in the preparation of Accenture's ITO response, was given access to IBM's ITO response (albeit for a limited time[145]) his impression was that there appeared to be things that Accenture had priced, but IBM had not[146] – bearing out Mr. Duke's observation set out above.

86. For these reasons, IBM's response to the ITO should not be impugned. Such a finding would be a serious one to make against IBM, and there is no sufficient basis for the Commission to be reasonably satisfied of such findings.

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142 CTB, Vol 1, pp 63-72 (Schedule 17).
143 T2-24, lines 50-53 (Duke).
144 Order of the Hon Commissioner Chesterman AO RFD QC dated 13 March 2013.
145 T1-65, lines 50-51.
146 T1-73, lines 45-58.

OTHER MATTERS RELATING TO THE PROCUREMENT PROCESS

87. Significant attention was directed to the internal mechanisms by which the State conducted its evaluation of the ITO responses.

88. Whatever findings the Commission makes about those internal processes (about which IBM makes no comment save for what follows), the Commission ought not:

(a) find that IBM's proposal was inferior to, or did not deserve to be scored higher than Accenture's proposal;

(b) make any finding which suggests that IBM knew or ought to have known that Mr. Burns took any steps at IBM's behest with respect to the evaluation process, particularly given it is asserted against Mr. Burns that he 'interfered' in that process.[147]

89. Much time and attention was also directed[148] to seeking to find something improper in the fact that the ITO scoring and assessments changed over time to favour IBM. But the evidence revealed nothing concerning about this. The review and moderation of draft scores was explicitly contemplated as part of the ITO evaluation process.[149] Accordingly, the initial scores were always likely to change,[150] especially given the iterative process including obtaining clarifications on particular topics.[151] Most witnesses were not shown the clarifications provided by the vendors before giving their evidence, or in questioning by Counsel Assisting.[152] This made their responses on this topic in evidence in chief difficult to rely upon.

90. Further, in circumstances in which IBM was ultimately successful, it is hardly surprising (and nothing adverse should be inferred from the fact) that draft scores were revised in a way which (ultimately) favoured IBM. This is particularly so where there was no real effort to explore whether:

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147 Submissions of Counsel Assisting, 26 April 2013, para [28].
148 See e.g. T2-62 to T2-77 (Bond); T3-35 to T3-47 (Hood).
149 PTB, Vol 22, pp 3-4; T2-104, lines 1-18; see also T3-40, lines 53-55; T3-69 lines 1-35 (Hood).
150 See e.g. T2-89 lines 42 to T2-90 line 18 (Bond).
151 See e.g. T2-106, lines 1-29 (Bond); T3-38, lines 15-20 (Hood); T3-61 line 1 to T3-62 line 18 (Hood).
152 E.g. T3-64, lines 1-9 and lines 50-54, T3-66, lines 17-22 (Hood).

(a) the changes in the scoring of the ITO Responses were justified on objective grounds;

(b) the initial scoring might have unfairly or improperly favoured the incumbent, Accenture.

91. It was suggested to several witnesses that Mr. Burns had improperly urged a re-grading when Accenture had been ahead.[153] This proposition was rejected, though some witnesses recalled a general exhortation to take into account all factors.[154] No witness felt that they had been pressured to change their scores,[155] nor did any witness suggest that their grades were anything other than their truthful assessment of the respective merits of the responses lodged by the tendering parties.[156]

92. Some further time was committed to dealing with a suggestion that the SAP-Workbrain combination was risky. For the reasons set out above, there was nothing imprudent about suggesting the use of WorkBrain. This contention will be further addressed in IBM's submissions relating to the performance of the Contract.

93. It was also suggested that the evaluation of the ITO response was undertaken, at least in part, by reference to the existing budget.[157] The implication was that this produced an advantage to IBM, because it knew that this was to be a major factor, but its competitor, Accenture, did not. But:

(a) The remaining budget was not a factor at all in the evaluation process;[158]

(b) As set out below the amount of the remaining budget and its importance was made known to both IBM and Accenture before the ITO commenced;

94. Accordingly, no finding adverse to IBM should be made in connection with this issue.

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153 T2-63 line 1 – T-64 line 49 (Bond); T3-41 line 16– T3-47 (Hood); T4-59 line 51 – T4-60 – T4-61 line 35 (Lewis); T5-29 line 53 - 5-30 line 53 (Shah).

154 T2-63 lines 11-37 (Bond)T7-51 lines 1-31 (Mander).

155 T3-43 lines 14-20, lines 31-38, and T3-45 lines 27-35 (Hood); T4-59 line 51- T4-60 line 18, and T4-61 lines 8-13 (Lewis).

156 T3-47 lines 8-18 (Hood); T4-60 lines 20-25 and T4-61 lines 30-34(Lewis).

157 See e.g. T1-72 line 54 T1-73 line 8.

158 Contra all the question at, e.g T1-73, lines 1-28.

FAIRNESS, CONFLICT AND MR. BURNS

95. The issues which are addressed below relate to the Program Review Process, not the Procurement Process. For reasons already given, they do not fall within the Commission's primary terms of reference. Nevertheless, in view of the attention which has been directed to these issues in the Commission hearings, and in the submissions of Counsel Assisting and the State, we address these matters in some detail.

96. It is suggested:-

(a) Remarkably, that Mr. Burns' employment with IBM in another country, 35 years ago, when it was a "mainframe company"[159] was a possible source of conflict of interest in a tender evaluation in Australia in 2007;[160]

(b) That Mr. Burns had concerning "interludes"[161] and "inappropriate contact" with IBM, which were in "marked contrast" to his treatment of IBM's competitors.[162] This suggestion is based upon a view that Mr. Burns held regular one-to-one meetings with IBM representatives in a way which differed from the meetings given to IBM's competitors[163] and that through Mr. Burns, IBM received information that its competitors did not have or receive.[164]

(c) Implicitly, that IBM improperly took advantage of the relationship between Mr. Burns' and Mr. Bloomfield.

97. It is further suggested that the above matters resulted in "unfairness" to Logica and Accenture.

98. We deal with these matters in three parts:

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159 T13-97, line 42 (Burns).

160 Counsel Assisting at [56]; see also e.g. T8-85, line 32 ("He knew IBM, possibly favoured IBM").

161 Submissions on behalf of the State of Queensland, 26 April 2013, para [13].

162 Submissions on behalf of the State of Queensland, 26 April 2013, [7]; T6-40, lines.

163 T13-96 line 1 - T13-97 line 50 (Burns); T5-19 lines 12 – 33 (Shah); T11-91 line 5 – T11-92 line 13 (Bloomfield);) ; T11-83 lines 26 – 30 (Bloomfield) and T11-83 lines 53- T11-84 (Bloomfield); T12-2 line 46 – 53(Bloomfield); T14-7 line 52 –T14-8 line 20 (Burns).

164 T13-96 line 1 - T13-97 line 50 (Burns); T1-88 line 45-49 (Salouk); T2-12 lines 24-28 (Duke) and T2-14 lines 1-4 (Duke); T11-83 lines 53- T11-84 (Bloomfield); T15-64 lines 14- 28(Pedler) and T15-65 lines 4 – 12 (Pedler); T15-103 line 33 – T15-104 line 12 (Pedler); T16-19 lines 12-24 (Porter).; T1-55 lines 23-46 (Salouk).

(a) ***First***, we deal in general with the evidence which shows, quite plainly, that the interactions between Mr. Burns and IBM were unremarkable;

(b) ***Secondly***, we deal with the specific interactions between IBM and Mr. Burns to which most attention has been directed and explain why neither their form nor content can fairly be characterized as improper;

(c) ***Thirdly***, we address additional matters which prevent any general finding that IBM obtained any unfair advantage, either in the Program Review Process, or indeed in the later Procurement Process.

99. None of the contentions advanced against IBM can be sustained. Among other things, they arise from:-

(a) an artificial and myopic focus upon individual meetings or words in emails, without proper regard to context in which those meetings occurred;

(b) extending that highly artificial focus to questioning other witnesses about what they were or were not told by Mr. Burns – so that little interest was shown in the substance of interactions with these witnesses and Mr. Burns, but rather whether particular words or phrases were spoken or were accepted by those witnesses as describing their contact with Mr. Burns;[165]

(c) a decision not to thoroughly investigate the position of IBM's competitors,[166] so that it is not possible fairly to conclude that IBM's competitors were meaningfully disadvantaged, particularly when it is known that they started from a position of relative *advantage* compared to IBM.

100. When understood in the context of the Program Review Process, and the entrenchment and advantages enjoyed by IBM's major competitors – Accenture, Logica and SAP – the meetings between Mr. Burns and IBM were unsurprising and should be uncontroversial. There was nothing special or improper in holding informal one-to-one meetings during the Program Review Process – Mr. Burns (and other State representatives) met with IBM's competitors on the same basis. The content of the meetings between IBM and Mr. Burns was, once the hyperbole is

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165 See, e.g. Submissions of Counsel Assisting dated 26 April 2013 at paragraph 60.

166 See e.g. T16-54, line 35 to T16-55 line 50.

stripped away, prosaic. There is no evidence to suggest that IBM sought or obtained confidential information through Mr. Burns.

101. The implicit suggestion that all meetings between State representatives and IBM, during the Program Review Process, should have included at least three attendees[167] is also highly artificial. Moreover, it is unrealistic to criticize a commercial entity for developing a working relationship with a customer representative, especially where its competitors are entrenched and better informed (as set out below). That was the nature of Mr. Bloomfield's meetings with Mr. Burns. Mr. Burns' past association with IBM is of no material relevance and, as Mr. Swinson pointed out, is neither surprising nor concerning. The reality of the situation is that IBM's competitors had vastly superior knowledge of the workings of the Shared Services Program, and the most that the meetings with Mr. Burns can be said to have contributed to, was (as Accenture complained of) a "levelling [of] the playing field",[168] that otherwise heavily favoured IBM's competitors.

102. How this outcome can be criticized at all, and, more properly, how IBM itself can be criticized for participating in it, has never been made plain.

I. Interactions with Mr. Burns were unremarkable

103. There was nothing improper, or unfair associated with Mr. Bloomfield and any other IBM representatives meeting with Mr. Burns.

104. ***First***, the timing of the meetings is of significance, though not for the reasons asserted by Counsel Assisting their submissions.[169] There were no informal or one-to-one meetings once the Program Review Process ended and the Procurement Process began: PTB, Vol 28, p 701. Indeed, the meetings between Mr. Burns and IBM to which most focus was directed occurred well before even the First Informal RFI, at a time that:

(a) Mr. Burns was conducting a review of the existing program;

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167 See eg, T11-83 lines 26-30 (Bloomfield); T14-7 line 52 –T14-8 line 20 (Burns); T13-96 lines 18-39; T16-7 lines 14-15.

168 PTB, Vol 24, p 1167.

169 Submissions of Counsel Assisting dated 26 April 2013, paragraph 59.

(b) The State was a long way from forming a view about how the Program was to proceed;

(c) No decision had been made to appoint a Prime Contractor;

(d) Accenture and Logica both had significant numbers of contractors working with relevant State employees and documents every day.

105. ***Secondly***, Mr. Burns had numerous informal meetings with IBM's competitors during the Program Review Process, so that the submissions:

(a) of the State that "there does not seem to have been any similar attention paid to other bidders"[170]

(b) of Counsel Assisting that "there was a marked disparity… in the information to which IBM had access",[171]

must be rejected out of hand.

106. These submissions can only be made based upon a selective recount of a series of formulaic questions asked to a subset of persons with whom Mr. Burns interacted during the Program Review Process.[172]

107. In fact:-

(a) As Mr. Burns explained:[173]

> *I was meeting extremely regularly already with Accenture and SAP. They had senior people on the project. They were down the passage from where I had a shared office. They would have a habit of people would come by and sort of say, well, "Here's the document, you might find interesting. Could we have a chat?" Various topics were discussed. What did not happen, however, is that we couldn't engage with IBM because they weren't present. So that was one of the reasons we had to set up meetings, they had to typically take place somewhere where we could meet, and it was a slightly different process in trying to talk to IBM; whereas, we had a lot of access to the other vendors.*

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170 Submissions of the State dated 26 April 2013, paragraph 31.
171 Submissions of Counsel Assisting dated 26 April 2013, paragraph 60.
172 See e.g. Submissions of Counsel Assisting dated 26 April 2013 at paragraph 60(b).
173 T13-94, lines 33-50 (Burns).

(b) Mr. Pedler of SAP recalled informal meetings with Mr. Burns at least fortnightly.[174] He had a number of one-to-one meetings with Mr. Burns during the Program Review Period,[175] and accepted that he may well have had one-to-one meetings with Mr. Burns over coffee.[176] This was at a time at which SAP was "absolutely" interested in becoming Prime Contractor to CorpTech.[177]

(c) Mr. Duke has at least one private meeting with Mr. Burns (together with a Logica colleague),[178] the subject matter of which included what could be done better with the Program and Logica's views about what should be done with the non-finance component of the program.[179]

(d) Within CorpTech, Mr. Goddard[180] and Ms. Blakeney[181] both recalled a number of informal meetings between Mr. Burns and both IBM and Accenture during the Program Review Period. Mr. Goddard said that "certainly back in the RFI we were encouraging discussions because that was the purpose of that RFI… to research the market and talk to people".[182]

(e) Mr. Burns spent "a lot of time" with Ms. Mottershead,[183] an Accenture partner seconded to CorpTech including "a significant amount of time one-on-one discussions with her".[184] No statement from Ms. Mottershead to contradict this is in evidence before the Commission.

(f) Accenture had a private meeting with Mr. Burns on 24 July 2007, just a day before the email giving rise to the Second Informal RFI was sent,[185] at which it received advanced information about that process.[186]

(g) During the First Informal RFI and Second Informal RFI, Accenture made sure that "Terry Burns was copied in on a lot of Accenture's emails" and Accenture

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174 T15-67, lines 9-29 (Pedler).
175 Statement of Robert Pedler, paragraph 18.
176 T15-103, lines 38-50 (Pedler).
177 T15-65, lines 19-27 (Pedler).
178 T2-12 line 21 to T2-13 line 15.
179 T2-28 lines 17-18; T2-29 lines 1-3.
180 T7-109 line 49 – T-7-110 line 19.
181 T4-87 lines 33-56.
182 T7-109, line 49 – T7-110 line 17.
183 T13-95, lines 2-7.
184 T14-85, lines 49-53 (Burns).
185 PTB, Vol 32, item 30, p 2; PTB, Vol 6 p 41.
186 T1-95, lines 41-51.

had a lot of "interaction with Terry… face-to-face."[187] Mr. Salouk recalled, from his interactions, that Mr. Burns was "very generous in his information".[188]

(h) No inference or conclusion should be drawn from the fact that Mr. Burns (or anyone else) told IBM something which Mr. Salouk said he did not know. Mr. Salouk was not the primary person involved on behalf of Accenture, and Mr. Salouk did not even join in the process until sometime in June or July 2007.[189] His involvement in engaging with CorpTech was, when compared to others, peripheral. Specifically:

(i) He did not attend the 2 July 2007 supplier briefing;[190]

(ii) He was not the contact person to whom emails from CorpTech were generally directed;[191]

(iii) He did not attend the Accenture presentation given on 13 July 2007.[192]

108. ***Thirdly***, IBM's competitors had access to, and met (formally and informally) with, other State representatives during the Program Review Process:-

(a) IBM's competitors had much easier and "informal access" to State representatives, including Mr. Burns, because of their co-location in CorpTech offices.[193]

(b) Mr. Uhlmann recalled informal discussions with those in the "engine room" (including Accenture and Logica employees) about the issues on the project and ideas for the future;[194]

(c) Mr. Goddard recalled, and said there was nothing inappropriate about speaking with vendor employees seconded to CorpTech to explain problems to them and seek their input into what might be done.[195]

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187 Statement of Marcus Salouk, paragraph [63], [64].
188 Statement of Marcus Salouk, paragraph [68].
189 T1-20, lines 29-31.
190 T1-24, lines 18-21; T1-27, lines 43-48.
191 See Statement of Maree Blakeney undated, paragraph [24]; T4-90 lines 34-52 (Blakeney).
192 T1-32 lines 11-17.
193 T14-39, lines 8-12 (Burns).
194 T6-34 line 55 to T6-35 line 21.

(d) Accenture conducted "stakeholder mapping" which involved Accenture employees going to "talk to people within the departments and the agencies and CorpTech… [to] get feedback"[196]

(e) Accenture proposed[197] and (presumably) carried out "one-on-one meetings" with members of the Solution Design Authority – of which Mr. Burns was the head.[198]

109. Further, the matters set out below in the Overall Fairness section below show that Accenture, at least, had access to a significant amount of internal CorpTech information at all stages of the Program Review Process and the Procurement Process.

110. ***Fourthly***, the way in which the State subsequently proceeded to assess the vendors' respective responses to the Second Informal RFI belies any suggestion that Mr. Burns could have, early in the Program Review Process, conveyed any material advantage to IBM. Further, whatever happened in the Program Review Process was plainly overtaken once the State commenced the formal process of going to tender:

(a) all contact with the State became regulated;

(b) each of the vendors was given a set of detailed questions to respond to;

(c) the vendors were each given a very large amount of information about the program in an effort to put each party in the same position, though it is questionable whether the advantages of incumbency which Accenture enjoyed could ever be entirely overcome even by this process;

(d) the ITO responses were assessed by a large and diverse group of individuals.

111. ***Fifthly***, Mr. Bloomfield believed (and the matters set out above vindicate this belief) that Mr. Burns was having like discussions with other IT providers and consultants.[199]

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195 T8-35 (Goddard); T8-50 – T8-51 (Goddard).
196 T1-85, lines 52-55.
197 PTB, Vol 32, Item 3, p 2; T1-96, lines 1-31.
198 PTB, Vol 32, Item 30.1, p 2; see also T15-15, lines 12-18 (Burns).
199 T12-101 – T12-102 (Bloomfield).

II. The 2 May 2007 email, the "dry-run", and the budget information

The 2 May 2007 email

112. Much attention was directed to an internal IBM email sent by Mr. Bloomfield on 2 May 2007, relating to interactions between Mr. Bloomfield and Mr. Burns the day before, on 1 May 2007.[200] Despite the hype, and hyperbole, which attended questioning about this email, it is prosaic when read in its proper context.

113. The context of the email can be seen from the chain in which it appears in volume 27 of the Procurement Tender Bundle, pp 282-286. It was sent:

(a) during the pre-ITO Program Review Process, before the State had taken any decision on the way in which it would progress changes to the Shared Services Program;

(b) before even the First Informal RFI was sent to vendors;

(c) during the time that Mr. Burns was conducting his 5-week review of the Shared Services Program which finished at the end of May 2007;

(d) at a time in which Mr. Burns was meeting with[201] and receiving proposals and information from other vendors.

Mr. Uhlmann, who appreciated the context in which the meeting occurred, said of the topics in the email, "in general they're the sort of things that you would want to cover off".[202]

114. The themes of the conversations, as reported by Mr. Bloomfield, are dealt with below seriatim.[203]

Off the record meeting

115. The use of this phrase should not be a cause for any real concern:

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200 PTB, Vol 27, pp 283-4.
201 See e.g. Statement of Robert Pedler dated 10 April 2013, paragraph [17]-[18].
202 T6-42, lines 9-14 (Uhlmann).
203 PTB, Vol 27, pp 283 - 284.

(a) there is no record of any of Mr. Burns' meetings with anyone at around this time, so the meaning is plainly that the meeting was informal, and unscheduled;[204]

(b) Mr. Burns and other State representatives had many informal meetings with IBM's competitors (as appears above); and

(c) what was discussed was, properly understood, generic (as set out below);

116. In these circumstances it would be unsafe to found an adverse finding on this one phrase.

Innovative and expansive thinking

117. Mr. Burns' told Mr. Bloomfield that he was expecting "innovative and expansive thinking", that IBM would "push the boundaries" and that there were "no holy cows".[205] This is exactly the message conveyed to all vendors. Some examples suffice:-

(a) In the letter from CorpTech to the vendors in early July, CorpTech said that it was seeking "innovative ideas and scenarios";[206]

(b) In the supplier briefing of 2 July 2007, the presentation given by the State indicated that it was seeking "innovative ideas and scenarios from vendors/partners".[207]

(c) Mr. Porter accepted that Mr. Burns encouraged Accenture to come up with ideas and be expansive in its thinking.[208]

(d) Mr. Salouk was aware, during the Program Review Process, that the State was seeking "something innovative".[209]

(e) Mr. Pedler recalled conversations with Mr. Burns, the "gist of which"[210] was that there were "no sacred cows within CorpTech".[211]

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204 T12-19, lines 9-11 (Bloomfield).
205 PTB, Vol 27, p 284.
206 See, e.g. PTB, Vol 6, p 1.
207 PTB, Vol 28, p 445.
208 T16-26 (Porter).
209 T1-94, lines 1-3.

(f) Further, discussing the program with vendors and seeking their ideas and asking for expansive thinking was accepted by:

(i) Mr. Salouk as "perfectly acceptable and normal";[212]

(ii) Mr. Uhlmann as "perfectly normal";[213]

(iii) Mr. Goddard as "okay".[214]

"Coaching"

118. Mr. Bloomfield reported that, as at 1 May 2007, Mr. Burns was "almost… coaching" IBM and "strongly recommending" the position it should take in some areas.

119. The use of the word "coaching" was seized upon as, self-evidently suggesting something improper.[215] But a more dispassionate analysis makes it clear that nothing of concern could have been meant by the use of the term.

(a) ***First***, the term was not one used during the conversation itself. It is a term used by Mr. Bloomfield, after the conversation (and qualified by the word "almost") to describe his own perception of Mr. Burns' approach;

(b) ***Secondly***, the words which follow and which give the proper context and content to what Mr. Bloomfield meant, were that Mr. Burns was "strongly recommending" certain positions IBM should take. Had this occurred during the Procurement Process it would have (obviously) been of concern. But it did not. It occurred early in the Program Review Process:

(i) before Mr. Burns had presented his Phase II replanning report to the State;

(ii) well before any decision to appoint a Prime Contractor had been made;

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210 T15-60 lines 35-45 (Pedler).

211 Statement of Robert Pedler, paragraph 24.

212 T1-86 line 38 to T1-88 line 6.

213 T6-34 line 55 to T6-35 line 21 (Uhlmann).

214 T8-51, lines 18-20 (though Mr Goddard thought the conversation should occur at a *later* stage, during an RFI process).

215 See, e.g T6-43 lines 1-20 (Uhlmann); T7-26 lines 29 -35 (Nicholls); 8-107 lines 36-40 (Swinson); T11-84 line 48 – T11-85 lines14 (Bloomfield); T11-86 line 17 – T11-87 line 47 (Bloomfield); T12-97 lines 10 -27(Burns); T15-71 lines 10-18(Pedler); T16-89 lines 39-45 (Perrott).

(iii) It is highly incongruous to think that, at this point in time, Mr. Burns could (or did) impart information or provide assistance to IBM which gave it any advantage over its entrenched competitors.

(c) ***Thirdly***, Mr. Bloomfield's words are entirely consistent with, and can be understood without difficulty as referring to, Mr. Burns attempting to create competition by motivating IBM to expend their own time and money in coming up with, and presenting ideas for the benefit of the State:-

(i) Mr. Uhlmann said it would not be surprising for Mr. Burns, if he had particular things in mind, to be "trying to lead [the vendors] quite specifically down that path, saying 'I really want you to think about these things'".[216]

(ii) Witnesses repeatedly identified that preparing responsive material to requests from the State would be time consuming and costly,[217] so that they would need to be motivated and to be directed to where to productively expend their energies. Mr. Salouk estimated Accenture spent in the order of $1 million in preparing its ITO response.[218]

(d) ***Fourthly***, Mr. Pedler of SAP recalled that Mr. Burns speaking to him in similar terms, that is "strongly recommend a position that SAP should take" during this Program Review Period.[219] Mr. Pedler's reluctance to call this sort of interaction "coaching" only serves to demonstrate the artificiality of questioning other witnesses without defining what might be meant by the use of the term coaching in Mr. Bloomfield's email.[220]

(e) ***Fifthly***, Mr. Burns' own evidence was that he was attempting to motivate IBM to provide price competition against Accenture. [221] This explanation for Mr. Burn's conduct is credible and, when viewed against the following contemporaneous statements and conduct, inherently likely:

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216 See T6-43, lines 1-19 (Uhlmann).
217 E.g. T15-105 lines 25-35 (Pedler); T17-20 lines 19-35 (Perrott).
218 T1-57 lines 33-37.
219 T15-70, lines 42-55 (Pedler).
220 See e.g. T15-104, lines 8-20 (Pedler).
221 T14-18 line 51 to T14-19 line 8 (Burns) and T13-98 lines 1-21 (Burns).

(i) the contemporaneous "concern" of Accenture that Mr. Burns was "leveling the playing field" and "setting up for a price shootout";[222]

(ii) Mr. Bloomfield's contemporaneous concern that Mr. Burns simply baiting IBM to introduce price competition against Accenture;[223]

(iii) Mr. Burns email of 16 May 2007, criticizing IBM for having "no significant new strategies".[224]

(f) ***Sixthly***, it cannot be forgotten that IBM was a relative outsider on the project. Mr. Bloomfield thought that getting major work from CorpTech was unlikely.[225] In this context, the provision of some motivation and direction, early in the Program Review Process, was necessary and is unsurprising. This is plainly what Mr. Bloomfield is describing and his use of the term in this way is consistent with the use of the general use of the term within IBM.[226]

Once a long time IBMer

120. Much was made, during the Procurement Hearings, of Mr. Burns' past association with IBM.[227] The theme is continued in the submissions of Counsel Assisting, in which it is suggested that Mr. Burns' employment with IBM some 35 years ago gave him "expertise" in the field of "facilitator" of the tender process.[228]

121. But neither the fact of Mr. Burns past employment, or his communication of that fact to Mr. Bloomfield[229] is a cause for any concern, indeed it should never have been the focus of such attention in this Inquiry.

122. Mr. Burns' employment by IBM was in South Africa in the Cape Provence from 1968 to 1980[230] (almost 35 years ago), at a time when the Information Technology

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222 PTB, Vol 24, p 1167.
223 Ex 35 (statement of Lochlan Bloomfield dated 18 March 2013), paragraph 81.
224 PTB, Vol 27, pp267-269.
225 Statement of Bloomfield (Exhibit 35), paras [32], [36].
226 Statement of Bloomfield (Exhibit 35), para [46(d)(iv)].
227 T1-9, lines 10-13; XN of Swinson
228 Submissions of Counsel Assisting, 26 April 2013, paragraph 12.
229 Some of the questioning incorrectly assumed the statement to be that Mr Burns *was* a long-*term* IBMer (see e.g. T13-97 line 38-42). What is recorded in the email is that Mr Burns was *once* a long-*time* IBMer.
230 PTB, Vol 32, p 3.

sector, and IBM's business, was self-evidently different (in a fundamental way) from what it is today.

123. His employment history with IBM was identified on the CV provided by Arena Consulting to the State.[231]

124. Mr. Pedler and Mr. Swinson dealt with this point cogently. Mr. Pedler agreed that:[232]

(a) It was not unusual for senior people in the IT industry to have worked for a number of different companies in the past; and

(b) It was not surprising that Mr. Burns had worked for IBM in the past.

125. Mr. Swinson, a highly experienced IPT lawyer, said in his evidence:

(a) there was "absolutely not" a conflict or potential conflict arising out of Mr. Burns' employment with IBM in the distant past;[233]

(b) it was "very common" to engage consultants, and the "typical contractors you would use are people who used to work for vendors";[234]

(c) he saw no evidence that Mr. Burns favoured IBM.[235]

126. We note that Counsel Assisting called Mr. Gray as an expert witness, despite his having worked on secondment with IBM much more recently.[236] That more recent association is not thought to give rise to a conflict, but a more remote, almost historic one is somehow pressed is of significance.

127. Finally, even if there were some basis to think, as a general proposition, that a person's employment with a company thirty years ago might influence them in favour of that company in present, the circumstances in which Mr. Burns left IBM in the 1980s – setting up a business which was operating in competition with it[237] –

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231 See e.g. PTB, Vol 2, item 3.1, p 13.
232 T15-104, lines 25-48 (Pedler).
233 T8-84, lines 35-39 (Swinson).
234 T8-84, lines 40-56 (Swinson).
235 T8-85, lines 32-33 (Swinson).
236 Ex 78 (expert report of Anthony John Gray, dated 8 April 2013), page 46.
237 See Statement of Terry Burns dated 8 March 2013, para [11].

hardly suggests that Mr. Burns had (or retained) some deep loyalty to IBM. In fact it suggests the reverse.

128. Mr. Burns' involvement in the "Fonterra" project in New Zealand in 2008 is equally irrelevant. The statement that Mr. Burns worked "for" IBM on that project was abandoned by Mr. Salouk.[238] As Mr. Swinson pointed out, IBM was "on the other side of [Mr. Burns]" on the project.[239] No serious attempt was made to inquire into the extent to which Mr. Burns may have had past relationships of significance with Accenture, Logica or SAP employees.

129. Moreover, no effort has been made to explain why, if Mr. Burns' work with IBM on the Fonterra project might be a cause for concern, Mr. Bond's "extremely close"[240] relationship with Accenture arising from his work with it on the SAP implementation for the Department of Housing (a "much closer relationship"[241] than Mr. Bond had with IBM) was not of concern. Mr. Bond was, of course, directly responsible for two of the ITO scoring teams,[242] while Mr. Burns did not have a direct scoring role.

130. It defies logic to impugn Mr. Burns and IBM, but pass entirely over Mr. Bond and Accenture.

131. Finally, nothing should be read into the fact that Mr. Burns made some comment about his past association with IBM to Mr. Bloomfield, but not to other vendors.[243] He was plainly trying to build a relationship with each vendor. He can be expected to have approached each vendor in a different way, particularly early in the Program Review Process, before the First Informal RFI was even conceived.

132. Indeed, the suggestion that Mr. Burns ought, in May 2007 to have said exactly the same thing to all tenderers[244] conflates the Program Review Process, in which Mr. Burns was attempting to motivate vendors to come up with new ideas for the State in an informal environment, and the Procurement Process, during which the

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238 See Statement of Marcus Salouk, paragraph 120; T2-7, lines 40-46 (Salouk).
239 T8-106 lines, 15-21 (Swinson).
240 T2-93, line 25 (Bond).
241 T2-93, lines 15-17 (Bond).
242 T2-61 lines, 31-38 (Bond).
243 See e.g. Statement of Michael Duke dated 7 March 2013 , para [26]; T1-108 line 46 – T1-109 line 6 (Salouk); Statement of Marcus Salouk dated 5 March 2013 , para [74]; Statement of Robert Pedler dated 10 April 2013, para [23].
244 Which is the implicit suggestion in the question of witnesses about what was said to them.

flow of information and communication channels were tightly regulated (and properly so).

The Dry-Run Presentation

133. It was further suggested that IBM obtained an unfair advantage through an opportunity to have a "dry-run" of its presentation in response to the Second Informal RFI to an audience of Mr. Burns and Mr. Goddard, ahead of the final presentation to State officials,[245] when its competitors received no similar opportunity.

134. This is simply wrong.

135. Both Accenture and Logica enjoyed an opportunity early in August 2007 to present and receive feedback on aspects of their response to the Second Informal RFI in advance of the formal presentation of those responses.[246]

136. The suggestion that there was some material difference in the opportunity which IBM secured compared to its competitors[247] cannot be sustained without drawing tortured distinctions between specific words used by different witnesses[248] to describe what must, on any objective view, have been materially the same opportunity.

137. What IBM received was a one hour meeting on 3 August 2007 with Mr. Burns and Mr. Goddard to run through aspects of the presentation they were intending to make to CorpTech on 7 August 2007.

138. By way of comparison, on 2 August 2007, Accenture met with (at least):[249]

(a) the under-treasurer, Gerard Bradley;

(b) the deputy under-treasurer, David Ford;

(c) the executive director of CorpTech, Barbara Perrott; and

(d) Terry Burns.

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245 See e.g. Submissions of Counsel Assisting at paragraph 57.
246 Mr Burns encouraged it: T15-10, lines 45-55 (Burns).
247 See Submissions of Counsel Assisting at paragraph 60.
248 See e.g. T15-115, lines 7–20 (Pedler). In fact, Ms. Perrott described Accenture's opportunity as a "dry-run": T16-100, lines 8-14 (Perrott).
249 PTB, Vol 26, p 1169; see also PTB, Vol 24, p 134; T15-16, lines 20-55 (Burns).

139. The purpose of this meeting included to test key ideas with executive members from the State.[250] Ms. Perrott's recollection, which there is no reason to impugn, was as follows:[251]

> *I remember there was a slideshow and some sort of presentation and given the timing of the meeting was only a few days prior to the final presentations, I could assume that was a tactic of Accenture was getting their dry run in front of the director-general.*

140. Mr. Bradley's recollection was that Accenture:[252]

> *Went through the outline of their proposal... in very high level terms.*

141. Mr. Porter agreed that:

(a) in organizing the 2 August 2007 meeting he had in mind meeting with key decision makers to identify to them key aspects of what Accenture was intending to propose to the State, get their reaction to those ideas and try to influence them;[253]

(b) Mr. Salouk's reconstructed file note – which suggested that one purpose of the meeting was to "test one or two key ideas"[254] – was consistent with what occurred at the meeting.[255]

142. Likewise, Logica sought[256] and obtained[257] an informal meeting with Mr. Burns and Ms. Perrott, to discuss Logica's approach and seek further information, at a time after the Second Informal RFI was issued and before the final presentations occurred. Mr. Burns recollection was that general tenor of the conversation was Logica setting out key ideas they intended to present, and seeking Mr. Burns' and Ms. Perrott's reaction to those ideas.[258] Again this is not the subject of any criticism in submissions.

143. In the above circumstances:

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250 See e.g. T15-20, lines 26-29 (Burns).
251 T16-100, lines 8-14 (Perrott).
252 See T17-74 line 40 to T17-75 line 35 (Bradley).
253 T16-33, lines 1-54 (Porter).
254 PTB, Vol 26, p 1169.
255 T16-35, lines 1-8 (Porter).
256 PTB, Vol 32, item 31, p 2.
257 T15-12, lines 9-42 (Burns).
258 T15-12, lines 29-32 (Burns).

(a) Mr. Salouk's evidence that no opportunity to "go through" Accenture's presentation[259] was ever offered is wrong.

(b) It is surprising that no attempt was made to investigate why IBM was (unlike Accenture) not afforded the opportunity to gauge the reaction of either the Deputy Under-Treasurer or the Under-Treasurer to its key ideas before its presentation.

(c) It cannot be concluded that IBM obtained some unfair advantage or that the way in which the vendors were treated (to the extent of any minor differences) were of any consequence.

Knowledge of remaining budget

144. Counsel Assisting assert that "Mr. Burns revealed [to IBM] that CorpTech's budget for the project was $108 million". Gratuitously, it is then said that this was "done in the context of Mr. Bloomfield knowing that Mr. Burns was a 'long time IBMer'".

145. The connection between the first and second of these propositions is inscrutable. The language is also inaccurate. [260]

146. More importantly, Mr. Burns' revelation to IBM was nothing that Accenture did not already know. Mr. Salouk readily conceded that information about the remaining budget was "readily available" and known to Accenture. [261] Mr. Porter's infamous email itself shows that Accenture appreciated that the remaining budget was about $100 million.[262] By that means at least SAP also was aware of it.

147. There was no suggestion in the questioning of Mr. Salouk or Mr. Porter that something improper attended their knowledge about the budget. By way of contrast, Mr. Bloomfield was subjected to quite unfair suggestions that because he knew the very same information, and it was received from Mr. Burns, he had done something wrong.[263]

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259 T1-55, lines 51-53 (Salouk).

260 Mr Bloomfield's words were "**once** a long-time IBMer": PTB, Vol 27 p 230.

261 T1-40, lines 8-13 (Salouk).

262 Ex 32, p [1].

263 See, e.g. T12-8, lines 24-50 (Bloomfield); T12-15 line 16 to T12-16 line 2 (Bloomfield); T12-52 line 9 to T 12-53 line 26 (Bloomfield).

148. No submission about unfairness can be made on this basis.

149. There was a further suggestion that the *importance* of remaining budget was only communicated to IBM.[264] Again, that suggestion cannot be sustained:-

(a) The letter sent to vendors, including Accenture in early July 2007[265] explicitly indicated that the State was investigating the ability to "deliver the current scope of the Share Services Solution Program within existing the [sic] budget and time frames".

(b) The remaining budget plainly was discussed at 2 July 2007 supplier briefing, the presentation for which explicitly indicated that a goal of the re-planning of the program was to manage the contract "within current available funding".[266]

(c) Accenture itself was "acutely aware of Queensland Treasury's budgetary constraints".[267] Mr. Porter was told directly by Mr. Burns (in an email) that the State's "thinking is driven by risk and cost-mitigation needs as outlined to your before".[268] So that:

(i) Accenture knew at this point that cost-mitigation was important to the State;

(ii) The point was one which Mr. Porter had previously been told by Mr. Burns.

(d) In fact, Accenture knew, by the time of its specially organized audience with the Under Treasurer on 2 August 2007 of the importance of the budget to the State, because Mr. Salouk was told directly by the Under Treasurer that its proposed not to exceed price would "cause… a challenge within government".[269]

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264 See, e.g. the extensive questioning of Mr. Salouk on this topic at T1-29, lines 25-35, T1-40, lines 15-19, T1-44, lines 27-37 and T1-57, lines 20-31.

265 PTB, Vol 6, p 1.

266 PTB, Vol 28, p 433.

267 PTB, Vol 6, p 98.

268 PTB, Vol 32, item 30, page 3.

269 T1-39, lines 4-7 (Salouk). In this context, although Accenture may not have been actively "discouraged" from offering a higher price (T1-44 lines 25-35 (Salouk)), it cannot be doubted that they were informed of the importance of price.

(e) This is underscored by Mr. Porter's email of 3 August 2007, in which he asks Mr. Pedler to try to persuade Ms. Perrott on matters concerning the budget.[270]

(f) Logica too knew budget was enough of an issue that they sought further information about the "current funding model" during the Second Informal RFP process.[271]

III. Overall fairness of the Tender Process

150. Counsel Assisting identified a question about whether IBM gained an "unfair advantage in the tender process", including by reason of its contact with Mr. Burns.[272] They submit that "the tender process… was improper: there was a disparity of treatment of the tenderers… which resulted, necessarily, in unfairness to Logica and Accenture".[273]

151. This submission should not be accepted.

152. In the first place, the use of the term "tender process" is inexact, and conflates the quite distinct Program Review Process and Procurement Process. No potential source of unfairness to IBM's competitors during the Procurement Process – the process which actually led to the awarding of the Contract - has ever been identified.

153. As to the Program Review Period, we have already set out above:

(a) why this process properly falls outside the terms of reference of the Commission (save to the extent the process is an "other matter" relevant to the Commission's investigations);

(b) why, in any case, no finding of unfairness should be made in respect of specific interactions between IBM and Mr. Burns. In reality, as set out above, the most which occurred was a "levelling [of] the playing field".[274]

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270 Ex 32, p 1.
271 PTB, Vol 32, Item 31, p 3.
272 T1-9, lines 51-55 (Opening).
273 Submissions of Counsel Assisting, 26 April 2013, [70]-[71]. See also [7].
274 PTB, Vol 24, p 1167.

154. There are, however, additional reasons why it would be inappropriate and unsafe to make any finding in the terms urged by Counsel Assisting.

155. ***First***, even if aspects of the Program Review Period do fall within the terms of reference of the Commission, no finding about the fairness of any part of the Program Review Process can safely be made in circumstances in which the Commission did not direct its energies to inquiring into the conduct of, and relative knowledge of, the other tendering parties during the process.[275] Obvious lines of inquiry about possible (unfair) advantages enjoyed by, or preferment given to Accenture were simply not pursued. These included:

(a) How and why Accenture received advanced notice of the Second Informal RFI, after meeting with Mr. Burns, before any general email was distributed;[276]

(b) The precise nature and effect of the "extremely close"[277] relationship between Mr. Bond and Accenture - a "much closer relationship"[278] than Mr. Bond had with IBM. Mr. Bond was the head of two of the ITO scoring teams;[279]

(c) How it was that Mr. Salouk was given access to Mr. Burns' May 2007 review presented to the State.[280] There is no evidence IBM had access to this presentation;

(d) What advantages Accenture enjoyed from its incumbency.

156. ***Secondly***, although not a focus of investigation,[281] the evidence which emerged incidentally suggested at least potential unfairness to IBM in many respects:

(a) Accenture, through Mr. Salouk, was familiar with the "business case" for the Shared Services Program. The State refused to give this information to IBM:-

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275 See, e.g. T16-55, lines 33-38.
276 See, e.g. T15-14, lines 1-55 (Burns).
277 T2-93, line 25 (Bond).
278 T2-93, lines 15-17 (Bond).
279 T2-61 lines 31-38 (Bond).
280 T1-20 lines 37-38.
281 See, e.g. T16-55, lines 33-38.

(i) IBM repeatedly asked for a copy of the "original signed-off business case",[282] starting in May 2007.[283] It was refused access.[284] Indeed, this document was so "tightly held"[285] that neither Mr. Uhlmann[286] nor Mr. Burns was given full access to it.[287]

(ii) However, Mr. Salouk had great familiarity with the original business case for the Shared Services Program - he was the "lead" during its development for the Queensland Treasury in 2002.[288] As a result, he knew (among other things) the "net present value" of the benefits that would accrue to the government from implementation of the Shared Services Program.[289]

(b) IBM was never told that the State considered it could or might contract directly from the Second Informal RFI. Accenture sought and obtained a special meeting with the Under-Treasurer (before the August Proposals were submitted)[290] at which it extracted from the State confirmation that the State (then) considered it could contract directly from the informal RFP process. Remarkably, this critical information was not passed on to IBM.[291]

(c) "Accenture personnel knew [CorpTech staff] exceptionally well", so much so that Accenture had a number of "sources"[292] within CorpTech, who apparently provided a range of information over time, [293] including (we infer):

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282 PTB, Vol 28, p 551.
283 PTB, Vol 27, p 249.
284 PTB, Vol 27, p 525; PTB, Vol 28, p 591.
285 T4-14, line 30 (Di Carlo).
286 T6-15, lines 20-45 (Uhlmann).
287 T13-87, lines 12-19 (Burns).
288 T1-17, line 39 to T1-18 line 9 (Salouk); T1-19, lines 14-17 (Salouk).
289 T1-81, lines 25-26 (Salouk). Although the Business Case was refreshed in 2005, the key financial aspects were not significantly different from those with which Mr Salouk would have been familiar: See comparison table at PTB, Vol 1, p 121. In any case, IBM had only requested the "original" business case.
290 PTB, Vol 26, p 1167.
291 See, e.g. T13-14, lines 23-30 (Bloomfield).
292 T1-47, lines 55-58. (Salouk).
293 Although no questioning about these sources was ever pursued by Counsel Assisting: T1-47 line 45 to T1-48 line 10. (Salouk).

(i) sufficient details of IBM's ITO response for Accenture to prepare a list of 'confidential differentiators' between Accenture's ITO response and IBM's ITO response;[294] (this fact alone raises serious concerns);

(ii) intelligence, received by no later than 6 November 2007, that IBM's ITO response price was "considerably lower" than Accenture's ITO response price;[295]

(iii) that Accenture won the Second Informal RFI process;[296] and

(iv) "intel" about the structure of the ITO assessment teams.[297]

(d) Accenture, in July 2007, had a "significant amount of insight regarding the project", with approximately 10,000 person days' experience,[298] had "more visibility of program issues" than IBM,[299] and generally "knew the project program better than any of [its] competition".[300] As a result of this, it had "far more insight" than its competitors.[301]

(e) Mr. Burns' was, in fact "very generous" in the information he provided in discussions with Mr. Salouk.[302]

157. Logica too had about 80 employees seconded within CorpTech and other government agencies,[303] and its head, Mr. Duke would "hear rumours"[304] about different matters relating to the project.

Conclusions on interactions between IBM and Burns

158. For the reasons given above, it cannot sensibly be maintained that there was "inappropriate contact by Mr. Burns with IBM … which is in marked contrast to his

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294 PTB, Vol 26, p 1142.
295 PTB, Vol 24, p 1.
296 Ex 5 (statement of Marcus Salouk, paragraph [54]; T1-47, lines 45-57 (Salouk).
297 PTB, Vol 26, p 1146.
298 T1-34, lines 17-25 (Salouk); and at least about 50 to 60 employees working on the Department of Housing rollout: T2-41, lines 12-15 (Bond).
299 T1-34, lines 25-29 (Salouk).
300 T1-36, lines 40-41 (Salouk).
301 T1-102, line 7 (Salouk).
302 Ex 5 (statement of Marcus Salouk), paragraph [68].
303 T2-13, lines 45-49 (Duke).
304 T2-15, line 13 (Duke).

treatment of other companies";[305] or "disparity … in the information … made available to IBM, or … to which IBM had access when compared [to] the other tenderers".[306]

159. Similarly, no finding that either the Program Review Process or the Procurement Process unfairly favoured IBM is open.

160. To the contrary, it would be grossly unfair to suggest that IBM should have appreciated that the level of contact and the content of the communications between Mr. Burns and IBM was improper. IBM is a commercial organization, which was trying to increase its share of government work. It was playing catch up. There ought be no criticism of it, or Mr. Bloomfield personally, for fostering a working relationship with Mr. Burns. Mr. Bloomfield had no reason to doubt that IBM's competitors were receiving like treatment,[307] which in fact they were, moreover it appears they were receiving at least some direct or indirect preferential treatment based on their incumbency.

CONFIDENTIAL INFORMATION

161. Both Counsel Assisting and the State assert that IBM obtained and misused confidential information.[308] Those submissions were made by reference to:

(a) An email from Mr. Porter which was forwarded to Mr. Bloomfield (the **Porter Email**);

(b) An internal email from Ms. Jensen to IBM staff relating to the results of the Second Informal RFI (the **Jensen Email**);

(c) An internal email relating to the non-accessibility of vendor proposals on the CorpTech LAN or G: Drive (the **G: Drive Email**);

(d) Interactions between Mr. Atzeni and Mr. Cameron (the **Queensland Health interactions**).

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305 Submissions of Counsel Assisting, 26 April 2013, [7].
306 Submissions of Counsel Assisting, 26 April 2013, [60].
307 T12-101, line 1 to T12-102, line 51 (Bloomfield).
308 Submissions of Counsel Assisting, 26 April 2013, [31], [32], [56]; Submissions of the State of Queensland, 26 April 2013, [44].

162. All of these matters occurred during the Program Review Process, before the Procurement Decision was made.

163. No legal analysis was relied upon to support the contention that any information obtained by IBM was in fact confidential. Rather, Counsel Assisting were content to pronounce that the issue of confidentiality was "self-evident".[309]

164. For the reasons which follow, this conclusion is quite wrong.

The Simon Porter Email

165. The email from Simon Porter which appears in Exhibit 32 (**the Porter Email**) provoked much interest in the course of the Commission's hearings.

166. Incredibly, the primary focus was not upon what the email revealed about its author's state of mind and the conduct of his employer, Accenture. The email is at least suggestive of improper conduct which may have been in breach of law.[310]

167. No effort has been made to establish how an equitable duty of confidence could arise in these circumstances.

168. Instead of a forensic examination of the actions of those involved in the email, the overwhelming focus was on a third-party recipient, Mr. Bloomfield.

169. Below we set out why:

(a) The information in the email was not confidential to Accenture;

(b) IBM did not improperly use the content of the email;

(c) The email was of no significance in the scheme of the Procurement Process;

(d) Mr. Bloomfield has been unfairly criticized in relation to the email and his memory of it.

Confidentiality

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309 Submissions of Counsel Assisting, 26 April 2013, [32].

310 See, e.g. *Trade Practices Act 1974 (Cth)* s 45; Queensland Criminal Code, s 408C. IBM does not contend for a positive finding of breach of law. It contends that a finding of breach of confidence cannot be sustained in the absence of an investigation of a breach of law.

170. An enforceable obligation of confidence requires the existence of "an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained".[311]

171. There are three relevant requirements to establish a breach of confidence.[312]

(a) ***First***, the information must have the necessary quality of confidence.

(b) ***Secondly***, the information must be imparted in circumstances importing an obligation of confidence. The recipient must know that the information is confidential or the circumstances must be such that a reasonable person in the position of the recipient would have understood this.[313]

(c) ***Thirdly***, there must be an unauthorised use of that information to the detriment of the party communicating it. This requires a real disadvantage beyond the loss of confidentiality itself.[314]

172. There are some circumstances in which third parties may be obliged to preserve the confidentiality of information once they become aware of its confidential nature.[315] But more scrutiny is required before imposing obligations of confidence on third parties.[316] Ultimately, the question is "*whether, in all the circumstances, it would be unconscientious for the recipient of the information to decline to respect the confidentiality of the information*".[317]

173. For commercial information, a Court will consider a number of factors to assist in determining whether the information is confidential, including:[318]

(a) the extent to which information is known outside the business;

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311 *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (No 2) (1984) 156 CLR 414, 438.

312 *Del Casale v Artedomus (Aust) Pty Limited* [2007] NSWCA 172, [36]; *Coco v AN Clark (Engineers) Limited* [1969] RPC 41, 47. These three considerations relate to the requirements for an action for breach of confidence.

313 *Del Casale v Artedomus (Aust) Pty Limited* [2007] NSWCA 172, [36]; *Vestergaard Frandsen A/S (now called MVF 3 ApS) v Bestnet Europe Limited* [2013] UKSC 31, [23].

314 *Attorney-General for the United Kingdom v Heinemann Publishers Pty Ltd* (1987) 8 NSWLR 341, 376.

315 *Wheatley v Bell* [1982] 2 NSWLR 544, 550; *Retractable Technologies v Occupational and Medical Innovations* [2007] FCA 545, [81].

316 *Retractable Technologies v Occupational and Medical Innovations* [2007] FCA 545, [70].

317 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWCA 430, [101].

318 See the factors listed in *Del Casale v Artedomus (Aust) Pty Limited* [2007] NSWCA 172, [40]. See also *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* (2009) 261 ALR 501, [633].

(b) the extent of measures taken to guard the secrecy of information;

(c) whether the usages and practices of the industry support the assertions of confidentiality; and

(d) the value of the information to the plaintiffs and their competitors.

174. The stronger these factors in any particular case, the more likely it is that the information is confidential.[319]

175. The contents of the Porter Email were not confidential, because they did not have the necessary quality of confidence, the information was not given to Mr. Bloomfield in circumstances of confidence and the information was not used to the detriment of Accenture or SAP.

I. Information lacked the hallmarks of confidentiality

176. The information did not have the hallmarks of confidentiality. Leaving aside the potential impropriety of the content for a moment (which of itself would extinguish any purported confidentiality):-

(a) **Knowledge outside business**: The information was broadcast outside the business, not just to Mr. Pedler, but others to whom he thought it appropriate to forward the message.[320] The information in the email was deliberately sent to a competitor and rival for the very work Accenture was chasing, without any restriction on further dissemination. Whatever Accenture considered the chances of SAP winning the bid, disclosing details to the competition indicates the information contained in the email was not secret in a relevant sense.

(b) **Effort to guard secrecy**: The evidence indicated that there was no effort taken to guard the secrecy of the information. Mr. Porter didn't ask for the information to be kept confidential.[321] He did not separately call Mr. Pedler to indicate its nature as confidential. That no steps whatsoever were taken by a senior partner at a savvy, commercial, IT oriented organisation to protect confidentiality suggests there was none.

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319 *Del Casale v Artedomus (Aust) Pty Limited* [2007] NSWCA 172, [41].
320 T16-44, line 38 to T16-45, line 31 (Porter).
321 T16-44 lines 51-52 (Porter).

(c) **Industry Usage and Practice**: No evidence was heard as to the usages and practices of the IT industry, save that it was an information-sharing and gossip-ridden industry,[322] at least within Brisbane. This cannot support a usage or practice of confidentiality that could be presumed in another industry: such as health (patient records) or banking (personal financial information). That Mr. Porter sent this email at all supports this.

(d) **Value of Information to Competitors**: the knowledge that Accenture would offer a "Not To Exceed bid" was of no value to IBM. IBM did not mimic the offering. Nor was the transition period relevant. Whilst Counsel Assisting referred on a number of occasions to IBM's proposal being "exactly half"[323] of Accenture's transition period, the fundamentally different nature of what IBM proposed does not bear out such a simplistic analysis. In fact, Accenture complained that *CorpTech* disclosed its transition period.[324] Despite this, IBM stuck to its own transition period.

II. Circumstance of Confidence

177. Even assuming the message to be confidential – it was not imparted in a circumstance of confidence.

178. The information in the email had been provided by Accenture to a competitor, SAP. In the course of evidence, Mr. Porter sought to downplay this by suggesting that SAP was not really a competitor,[325] yet they were rival bidders. SAP had every interest in the Prime Contractor role, as Mr. Pedler made plain:[326]

> *But at the time that you were responding to the RFI and the RFP, SAP was interested in the position of prime contractor. Yes?---Absolutely.*

179. Mr. Porter's claim ought not be accepted. That disclosure alone justifies the conclusion that no obligation of confidence arises.

180. Moreover, as set out above, the information was sent by email and no attempt was made by Mr. Porter to prevent its disclosure to other parties. Despite the fact that

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322 T15-49, lines 50-51 (Jensen); T15-50, lines 21-22 (Jensen); T15-122, lines 42-46 (Pedler).
323 See, e.g. T11-34, line 55 to T11-35, line 2 (Cameron); T12-49, lines 1-5 (Bloomfield).
324 PTB, Vol 6, p152; Ex 52; T16-45, line 39 to T16-47, line 50 (Porter).
325 T16-44, lines 22-49 (Porter).
326 T15-65, lines 21-27 (Pedler).

Mr. Porter sent the information to a rival bidder with competing commercial interests, he did not seek to clarify who could receive the information or otherwise request that the information not be disclosed, and indeed, his evidence on the point was confused and inconsistent.[327] This conduct was inconsistent with the maintenance of confidentiality, especially in relation to third parties in the position of Mr. Bloomfield.

181. Further, as a third party, the assertion of confidence against Mr. Bloomfield is necessarily weak: third parties are free to pass on information provided to them. No equitable obligation of confidentiality ought devolve upon Mr. Bloomfield in circumstances where Mr. Porter has acted contrary to any intent of maintaining confidence.

III. No confidence arising from improper conduct

182. A court of equity will not assist a party to benefit from its own unconscionable conduct. Furthermore, or alternatively, the doctrine of clean hands would separately preclude any protection.[328]

183. In what follows, we do not urge substantive findings of impropriety against Accenture. Rather, our point is that substantive findings of improper use of confidential information against IBM, and Mr Bloomfield in particular, cannot be made without addressing and resolving the potential legal consequences for Accenture of the email. The process of addressing and resolving those issues has not been carried out. If it were to be, IBM would make further submissions on the topic.

184. It is sufficient to observe that:

a. Mr. Porter appears to have attempted to have Mr. Pedler obtain a benefit, or benefits, for Accenture. He offered the inducement of an expensive city lunch if Mr. Pedler could manage to persuade Ms. Perrott to divulge government information, and to influence her, it can be inferred, to contract with Accenture. The lunch offers was apparently contingent on "how good" an outcome Mr Pedler could obtain. That is, "good" meaning the quality of the information obtained by Mr. Pedler from Ms. Perrott and his ability to persuade her to

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327 T16-45, lines 10-31 (Porter).

328 See *Meyers v Casey* (1913) 17 CLR 90, 124 (Isaac J); see generally *Black Uhlans Incorporated v New South Wales Crime Commission* [2002] NSWSC 1060, [158]-[159], [161], [181].

Accenture's view. A serious question arises about whether this conduct involved the possible commission of an offence.[329]

b. Further or alternatively, the email may have involved anti-competitive conduct of the kind prohibited by then section 45 of the *Trade Practices Act 1974* (Cth) (**TPA**). Section 45 applies to agreements, and also to informal arrangements and understandings.[330] This is important, because if the Commission were to accept that the information in the email *was* of commercial value to competitors of Accenture, it follows that the deliberate sharing of that information by Accenture with SAP would be likely to lessen competition in the context of a tender process, in prima facie contravention of the TPA.

c. The content and circumstances of the sending of the Porter Email suggest broadly unconscionable behaviour on the part of Accenture, such that no equitable obligation of confidence would be enforced by the courts. Mr. Porter inappropriately sought to enlist the cooperation of Mr. Pedler to persuade CorpTech, in the guise of independent advice and help:

   (i) That CorpTech would be abandoned by industry, with people "walking away" unless they appointed a full Systems Integrator. On the evidence of Accenture witnesses, at the time, the only firm that could have been appointed Systems Integrator/Prime Contractor was Accenture.[331]

   (ii) That the project could not be implemented for a price below the current program budget.

   (iii) That any competitor offering a lower price was actually incapable of delivering, so as to 'salt the Earth' for others: particularly others like IBM, who have a low cost, India-based 'Global Delivery' capacity (and who can therefore provide lower prices), all the while seeking information about IBM.

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329 *Criminal Code:* ss. 7, 408C, 535.

330 See *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286.

331 T1-36, lines 35-42, T1-49, lines 35-39, T1-59, lines 16-17 and T1-101, line 1 to T1-102, line 11 (Salouk); T16-8, lines 30-56 and T16-13, lines 1-29 (Porter); Ex 5 (statement of Marcus Salouk), paragraphs [50] and [60].

185. The apparent object of this communication was to maintain Accenture's position as incumbent and its price by questionable means. The conduct was unconscionable, and equity would not enforce a confidence in the email. That it was the "kind of conversation" Mr. Pedler expected to have with Mr. Porter[332] points to what must, on Mr. Pedler's own evidence, be an extraordinary course of conduct.

No "use" of the Information

186. Finally, to make good a claim in confidence, there must be an unauthorised *use* of the confidential information to the *detriment* of the party communicating it. There was no evidence before the Commission that demonstrates any detriment or disadvantage suffered by Accenture.

187. The State asserts that the "use" put to this "confidential information" was that IBM "investigat[ed] a risk as part of a strategy",[333] and that as IBM knew so much less than Accenture, it must have coloured IBM's approach, and that to assert the contrary is implausible.[334] Counsel Assisting make reference to Mr. Bloomfield accepting that Mr. Porter's email was used to identify a risk that IBM would be asked for an NTE price, to support the submission that this constitutes "use" in the sense of a claim in equity. It was not.

188. IBM did not change its proposal or pricing.[335] IBM did not offer a "not to exceed" price. IBM was never asked for a NTE price. That IBM was ready to answer a question it was never asked is not a detriment to Accenture and is not a "real disadvantage" in the relevant sense.[336]

189. Counsel Assisting make some point that IBM became aware that Accenture was providing for a 6-month transition,[337] whilst IBM ultimately provided for a 3-month transition. There is no evidence to support the suggestion that IBM's planning of

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332 Ex 49 (statement of Robert Pedler), paragraph [30].
333 Submissions of the State of Queensland, 26 April 2013, [48].
334 Submissions of the State of Queensland, 26 April 2013, [48], [52].
335 T13-13, line 1 to T13-14, line 21 (Bloomfield).
336 *Attorney-General for the United Kingdom v Heinemann Publishers Pty Ltd* (1987) 8 NSWLR 341, 376.
337 Submissions of Counsel Assisting, 26 April 2013, [42].

transition periods had anything to do with the Porter email. At any rate, the State itself revealed the idea of a 6 month transition period in the Invitation to Offer.[338]

190. The transcript reference given in Counsel Assisting's submissions (T12-49, line 15) on the point only serves to indicate that under intense cross-examination, Mr. Bloomfield identified that: such information wasn't important or vital, and that IBM took an entirely different approach to transition than did Accenture. That much is obvious from the vast disparity in pricing.[339] Mr. Bloomfield also identifies that it did not colour IBM's response,[340] and was not used in any way.[341] The need for a transition period would be self-evident in any move to a prime contractor model.[342] That a shorter period is better than a longer period in a time-intensive project was hardly secret.

Mr. Bloomfield's Memory

191. Both the State,[343] and Counsel Assisting,[344] put great weight in the Porter email, and allege dishonesty and disbelief that something so 'seminal … sent by a mutual friend'[345] or otherwise momentous could be readily forgotten. Such a view is misconceived. It does not 'cast a cloud over [Mr. Bloomfield's] credibility' as the State urges.[346] Nor is Mr. Bloomfield's recollection 'simply not believeable'.[347]

192. ***First***, as Counsel Assisting rightly recognised elsewhere, given the events concerning the procurement issues occurred about six years ago, witnesses' memories were "understandably incomplete".[348] That realistic concession needs also to be made in Mr. Bloomfield's favour.

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338 Ex 52 (pre-ITO); PTB, Vol 12, p20; PTB, Vol 32 (Attachments on USB), Attachment 6 (separately tendered as Ex 23).
339 For IBM's transition pricing, see PTB, Vol 15, p616.
For Accenture's transition pricing, see PTB, Vol 18, p653 and 658-9.
340 T12-58, lines 18-22 (Bloomfield).
341 T13-13, lines 1-30 (Bloomfield).
342 T13-12, lines 30-42 (Bloomfield); T15-120, lines 20-25 (Pedler); T16-16, lines 3-12 and T16-53, lines 1-20 (Porter).
343 Submissions of the State of Queensland, 26 April 2013, [49].
344 Submissions of Counsel Assisting, 26 April 2013, [31]-[32], [41]-[44].
345 Submissions of the State of Queensland, 26 April 2013, [49].
346 Submissions of the State of Queensland, 26 April 2013, [49].
347 Submissions of the State of Queensland, 26 April 2013, [37], see also [48] and [49].
348 Submissions of Counsel Assisting, 26 April 2013, [5].

193. ***Secondly,*** it was speculated that an email suggesting a competitor may use an NTE price would be "of moment" to Mr. Bloomfield,[349] and that receiving the email would have caused Mr Bloomfield 'glee'.[350] The email needs to be put in context. IBM's revenues in 2007 were approximately $5bn within Australia, and $110bn globally. There were many far larger bids and far larger projects going on. For example, the e-Health project was far larger, as were many other projects IBM was undertaking domestically.

194. That Mr. Bloomfield does not recall the sender of a single email, sent on one project, six years ago, the only apparent use of which was to prepare to answer a question that was never asked, hardly defies belief.

195. As Counsel Assisting saw first-hand (when the Commission inspected Mr. Bloomfield's email spool):

(a) Mr. Bloomfield receives hundreds, if not thousands of emails a week;

(b) Mr. Bloomfield works on many, many government proposals at any given time;

(c) That those proposals are often worth many tens of millions of dollars, if not more.

196. To suggest a special relevance to this single email speaks to a misunderstanding, and an underestimation, of the breadth, depth and class of IBM's and Mr. Bloomfield's work.

197. The evidence presented to the Commission supports the conclusion that the recipient of the email of 3 August 2007 from Mr. Porter was Mr. Pedler.[351] Mr. Pedler could not recall receiving the email or sending the information directly to Mr. Bloomfield.[352] Neither of them is pilloried for their want of recollection.

198. Mr. Bloomfield was frank in his explanation of the email and of those likely to have sent it to him. Mr. Bloomfield identified, truthfully, that he did not remember who had

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349 Submissions of Counsel Assisting, 26 April 2013, [37].

350 Ex 37, Confidential Interview with Bloomfield (26 March 2013): T1-6, lines 25-30. The assertion was denied.

351 T15-79, line 45 (Pedler) and T15-80, line 1 (Pedler);T16-37 and T16-38 (Porter).

352 T15-79, line 45 (Pedler) and T15-93, line 27 (Pedler).

sent him the email, and given the context, was appreciably shy to hypothesize about professional colleagues without having a strong memory of who had sent it to him. This did not suggest a 'lack of candour' or 'discomfort'.[353]

199. When asked by the Commission, Mr. Bloomfield provided a list of possible senders of the email. That list included Mr. Pedler. Contrary to the position taken in the submissions of the State, Mr. Bloomfield did not express an "unwillingness to even hazard a guess", and as such the State's suggestion that such an approach "invites suspicion as to his credibility"[354] is wrong and ought to be rejected.

200. Beyond unwarranted attacks upon his character in the course of cross-examination,[355] an extraordinary series of allegations have been made in submissions about Mr. Bloomfield. These include that he acted "dishonestly in the process" of the tender (though without identifying what possible dishonesty there could have been),[356] that he "misused" what, Counsel Assisting asserts is the "confidential information"[357], though that is simply not so.

201. Mr. Bloomfield is an experienced professional. Adverse findings against him of the kind outlined by Counsel Assisting would cause incredible harm to his life and career:

(a) That alone suggests that it is inherently unlikely that Mr.Bloomfield engaged in conduct which meets the pejorative description urged; and

(b) Serious findings of this nature require cogent evidence. Speculation and assertion is not enough. Upon proper examination, no findings against Mr. Bloomfield of the kind set out above are justified for the reasons identified above and below.

<u>Effect upon tender process</u>

202. It was further suggested that the use of this information:

(a) "seriously jeopardised" the tender process; and

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353 Submissions of Counsel Assisting, 26 April 2013, [37].
354 Submissions of the State of Queensland, 26 April 2013, [49].
355 See, e.g. T12-77, lines 1-5, T12-79, lines 1-5, and T12-66, lines 32-40 (Bloomfield).
356 Submissions of the State of Queensland, 26 April 2013, [46].
357 Submissions of Counsel Assisting, 26 April 2013, [31]-[32] and [44].

(b) "the email evidences a departure from the integrity of the procurement process by both Accenture and IBM".

203. This is apparently on the basis of a response given by Mr. Swinson.[358] Just how this is suggested to have occurred is not made clear.

204. Seemingly, it is a reference to the Porter email,[359] and perhaps also to the Bennett email,[360] and also possibly the G: Drive email.[361] For the reasons given below, there was no departure by IBM from "the integrity of the procurement process" in respect of any of these matters.

Appropriate Conclusions

205. The Porter Email:

(a) whilst possibly commercial, is not properly characterized as confidential in nature;

(b) was not communicated in a circumstance of confidence;

(c) cannot be confidential given the immorality of concealing what is, at a minimum, unconscionable conduct, and possibly more;

(d) IBM made no use of it that would excite a claim in equity.

206. Mr. Bloomfield cannot be criticised for being the recipient of an email he did not invite, and for taking a commercial view and action about its contents. He was under no obligation to do anything else.

Email from Ms. Jensen

207. Ms. Jensen's email was also a focus of attention for Counsel Assisting. Whilst the most obvious and appropriate conclusion is that Ms. Jensen, in the course of her duties, heard gossip and reported it to her colleagues, great focus has been given to asserting impropriety. That is not a reasonably open finding in the circumstances.

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358 Submissions of Counsel Assisting, 26 April 2013, [41].
359 As that is what Perrott was asked about at T16-107, lines 20-24.
360 As that is what Bradley was asked about at T17-86, lines 39-51.
361 T19-84, lines 33-38 (Swinson).

208. It was also completely inconsistent with the approach taken when representatives of other vendors spoke of rumours, gossip and intelligence which they received.[362] This disparity of approach remains unexplained.

209. As Ms. Jensen herself identified:

(a) She was an account manager.[363] Her role was a sales role.[364]

(b) She was never seconded to Queensland Health or CorpTech.[365] She never worked on site at either location,[366] and she didn't have computer access to either CorpTech or Queensland Health government systems.[367]

(c) Everyone from Government she would come into contact with (of whom there were very many, possibly hundreds)[368] knew that she was a sales representative from IBM, whose role was to be a conduit of information to, and from, IBM.[369]

(d) She was not in the IBM services group. Her role was generally to sell hardware and software to her clients, which included Queensland Health.[370] She was not at CorpTech and had no clients there, her only relevant client contacts were at Queensland Health.[371]

210. There is no evidence to controvert these propositions.

211. Counsel Assisting urges that the Commissioner ought to:

(a) find that Ms. Jensen breached an equitable obligation of confidence;[372]

(b) infer that the (predominantly) incorrect information in Ms. Jensen's email was 'sourced by improper means or conduct';[373]

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362 See e.g. T1-48, lines 20-21 (Salouk); T1-60, Lines 45-50 (Salouk); T1-102, lines 54-57 (Salouk); T1-104, lines 27-38 (Salouk); T15-122, lines 42-46 (Pedler); T16-36, line 25 to T16-37, line 2 (Porter).
363 T15-53, lines 43-44 (Jensen).
364 T15-54, lines 11-12 (Jensen).
365 T15-55, lines 11, 19-30 (Jensen).
366 T15-39, lines 11-13 (Jensen).
367 T15-40, lines 20-25 and T15-56 (Jensen).
368 T15-38, lines 3-6 (Jensen).
369 T15-15, lines 30, 46-55.
370 Ex 47 (statement of Cheryl Jensen), paragraph [2]; T15-36, lines 1-6, T15-54, lines 1-12 and T15-55, lines 13-17 (Jensen).
371 T15-56, lines 1-22 (Jensen).
372 Submissions of Counsel Assisting, 26 April 2013, [47].

(c) find that Ms. Jensen evinced a lack of candour, because she had forwarded the information on yet could not remember who, six years later, she had spoken to before passing it on;

(d) find that by "intel" meant "intelligence" rather than "information", as if something turned upon the distinction. By way of contrast, nothing improper was suggested to turn on the use by Accenture of the term "intel".[374]

Sources of Information, rumor and alleged lack of candour

212. Counsel Assisting invites an inference that Ms. Jensen must have sourced the information in the email by improper means or conduct.[375] The basis for this is that:

(a) Ms. Jensen said she could not recall exactly how she happened upon the information, beyond that she would have received it in the course of discussions with Queensland Health staff or other contractors;[376]

(b) The email from Ms. Jensen contained "precise data" which could only have been drawn directly from a document.

213. This reasoning is faulty.

214. In the first place, it reveals an inconsistency in the approach of Counsel Assisting. It is readily accepted that that other witnesses might have an incomplete recollection of events 6 years ago,[377] but Ms. Jensen's incomplete recollection is suggested to be evidence of something more sinister.

215. In the second place, Ms. Jensen's recollection is inherently likely. There is significant evidence that gossip and rumour were rife in relation to the Shared Services Program.[378] Accenture found out, from its sources, that it was rated higher than IBM. That rumours and gossip were also passed on to Ms. Jensen is not surprising.

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373 Submissions of Counsel Assisting, 26 April 2013, [49].
374 PTB, Vol 26, p 1146.
375 Submissions of Counsel Assisting, 26 April 2013, [48]-[49]
376 See, e.g. T15-51, lines 30-46 and T15-56, lines 19-38 (Jensen).
377 See e.g. T1-40, lines 1-3 and T1-74, lines 4-6 (Salouk); T2-13, lines 1-3 (Duke); T3-86, lines 30-35 (Orange); T4-72, lines 36-40 and T4-77, lines 40-45 (Blakeney).
378 See e.g. T1-48, lines 20-21 (Salouk); T1-60, Lines 45-50 (Salouk); T1-102, lines 54-57 (Salouk); T1-104, lines 27-38 (Salouk); T15-122, lines 42-46 (Pedler); T16-36, line 25 to T16-37, line 2 (Porter).

216. Mr. Salouk, speaking about Accenture's concerns relating to responding to the July Request said:[379]

> *There's a lot of people involved in the process, and once we provide you the RFP people talk. It's very hard to contain information, we have to assume that information will get out.*

217. And later:[380]

> *there's a lot of people involved in this process, there's a lot of people working at CorpTech, they talk a lot – [information] will get out... There were many CorpTech employees currently involved in the Shared Services Initiative and they knew a lot. They talked a lot and they were talking to a lot of contractors, contractors were talking to vendors, you know, information was getting around the market.*

218. Ms. Perrott agreed that it was a "common feature" of the program that "people would talk" and might share evaluation information more broadly than they should.[381]

219. In fact, Accenture had, in substance, very similar information to the information contained in Ms. Jensen's email:

(c) It knew from market intelligence that IBM was likely to be using more offshore resources than Accenture.[382]

(d) Mr. Salouk[383] and Mr. Porter[384] both had received information, described as a "market rumour", that Accenture had beaten IBM in the assessment of the August Proposals. This is seen by Counsel Assisting as innocuous for Accenture, but identified as a foundation for a finding of impropriety against Ms. Jensen. In fact, Mr. Salouk volunteered that information came to Accenture because:

> *There were CorpTech staff that Accenture personnel knew exceptionally well. We worked there a long time. Our contractors knew very well, contractors that knew the CorpTech staff, so we did promote a few sources.*

And later:[385]

> *we heard from – via CorpTech staff and contractors that Accenture*

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379 T1-38, lines 33-35 (Salouk).
380 T1-41, lines 19-21, 25-29 (Salouk).
381 T17-36, lines 29-55 (Perrott).
382 T1-46, lines 21-24 (Salouk); see also the "rumours" in PTB, Vol 26, p 1142.
383 Ex 5 (statement of Marcus Salouk), paragraph [54]; T1-47 lines 45-55 (Salouk).
384 T16-36, lines 26-48 (Porter).
385 T1-103, lines 1-3 (Salouk); see further T1-104, lines 28-38 (Salouk).

had been evaluated the highest from the RFP stage.

220. In fact, following the ITO Accenture heard enough rumour, and placed enough store on it, to draw up a confidential list of "differentiators" between its proposal and IBM's.[386]

221. In the third place, the suggestion that Ms. Jensen's reference to "precise data" meant she must have looked at documents is misconceived and unlikely:

(a) ***First***, Ms. Jensen was confident that she had never seen the relevant scoring matrix.[387] There is no compelling reason to doubt her evidence.

(b) ***Secondly***, her "precise data" was wrong: no document shows the scores 76% and 71%. Indeed the documentary evidence is to the contrary: 76% to 68%.[388] Though one can speculate that there might be another document, no-one says so and none is identified anywhere. Happening upon one figure, with no other correct data, is hardly 'precise'.[389]

(c) ***Thirdly***, other information in her email – that Logica would not tender in the ITO – was wrong, but was consistent with a mistaken belief (gossip) in CorpTech that one might easily expect could be passed along as rumour. Ms. Blakeney at least held the belief.[390] There is no evidence of any document upon which this is based. Rather, it suggests gossip in CorpTech which made its way to Ms. Jensen, consistently with her evidence.

222. In the fourth place, there is no plausible means of Ms. Jensen having such access: her interactions were with Queensland Health, not CorpTech. She was not a technical person, rather she was in sales,[391] and she never had access to CorpTech's computer system.[392]

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386 PTB, Vol 26, p 1142.
387 T15-44, lines 49-50, T15-46, lines 24-25 and T15-56, lines 43-44 (Jensen).
388 PTB, Vol 6, p 142.
389 Submissions of Counsel Assisting, 26 April 2013, [48].
390 T15-47, lines 22-38 (Jensen); PTB, Vol 10, p 204-205. Ms. Blakeney was not questioned directly on this issue.
391 Ex 47 (statement of Cheryl Jensen), paragraph [2]; T15-36, lines 1-6, T15-54, lines 1-12 and T15-55, lines 13-17 (Jensen).
392 T15-40, lines 12-32 and T15-56, lines 6-18 (Jensen).

Equitable obligation of confidence

223. There is no foundation for the assertion that the information contained in the 22 August 2007 email was confidential, or that such a confidence was breached.

224. ***First***, as to a claim in equity for breach of confidence, Ms. Jensen did not actually regard the information as confidential. As stated by Ms. Jensen in evidence, she did not know whether the information was publicly available or not.[393] On the relevant factors:

(a) **Known outside the business**: the information was clearly well known outside of CorpTech, such that Queensland Health representatives or other contractors were freely discussing it with Ms. Jensen. This meant that people at CorpTech were either disclosing it (because it was not treated as confidential), or were otherwise broadcasting it to others. It also appeared to be information which Accenture knew (in substance).

(b) **Steps to guard the secrecy of the information**: as set out above, that the information was so freely available as to enable Queensland Health representatives to be discussing this information with Ms. Jensen, someone only ever identified as a sales representative of IBM (and whose role was to act as a conduit to IBM), hardly suggests genuine secrecy, or any attempt to truly protect this information. There is no suggestion that Ms. Jensen had access to relevant documents, and indeed, seeing the type of document that it is asserted Ms. Jensen may have seen, it does not bear that she would pick trivial details (use of off-shoring), when things of more likely value were available.

(c) **Industry usage and practice**: As set out above, the IT industry has much rumour, gossip and innuendo that is seemingly freely shared. Furthermore, feedback was often given to losing tenderers as to the reasons why they did not win a particular bid, or where they stood. Industry usage and practice would suggest that the information was not confidential.

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393 T15-43, line 8 (Jensen).

(d) **The value of the information to the plaintiffs and their competitors**: as was a consistent theme, scuttlebutt was attributed little weight, but even if it were, in the case of the material:

(i) that Logica were potentially not bidding was of limited use. It was wrong at any rate, and, regardless, IBM was still competing with SAP and Accenture;

(ii) that CorpTech had changed its direction on ancillary products didn't change any future question (or answer) in the ITO response;

(iii) CorpTech's remaining budget was a notorious fact, known to all parties;

(iv) Offshoring: This was of no value. In fact, IBM ultimately offshored *more* in its ITO response – the opposite result one would expect if the information on off-shoring and its effect on scoring was given any credence or weight by IBM.[394]

225. So, the content in the material was plainly not confidential.

226. ***Secondly***, even if it were confidential, the information was not provided in circumstances that would be regarded as confidential.

227. In particular, the information was provided to Ms. Jensen by persons outside of CorpTech who passed it on to her in circumstances in which they must have known her to be an IBM employee, and a conduit back to IBM.[395] In such circumstances, there is nothing unconscientious about her passing the information to other employees. Ms. Jensen did not believe that the information was confidential in the sense that it was secret and that she was not free to communicate it, and as set out above, third parties are, without more, free to communicate information that comes into their possession.

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394 Ex 57 (statement of Brooke Freeman), paragraph [24(c)] and "Quantifiable pricing differences" table, item 4, p10; see also T13-22, lines 38-47 (Bloomfield).

395 T15-56, line 33 and T15-54, line 51 (Jensen).

228. The information conveyed to her was in the nature of market gossip. Ms. Jensen's evidence is that she did not know whether the information was true and passed it on in case it might be of use.[396]

229. As stated by Megarry J in *Coco v AN Clark (Engineers) Limited*: [397]

> *I doubt whether equity would intervene unless the circumstances are of sufficient gravity; equity ought not be invoked merely to protect trivial tittle-tattle, however confidential.*

230. ***Finally***, as to 'use': the information contained in the email, including the precise scores, could be of no detriment or disadvantage to the Government or the tender process:

(a) the companies knew the relevant rankings;[398]

(b) the scores, of themselves, even if accurate, were meaningless and incapable of use;

(c) in fact the scores were inaccurate;

(d) the information about Logica's participation was wrong, but in any case Logica's participation (or not) was of no consequence, and could not be relevantly used;

(e) IBM obviously did not 'use' the offshoring information, as it raised its offshoring component in its ITO bid, contrary to what would be the natural approach had it been 'used';[399]

(f) how the government chose to implement its HR solution (with SABA or others) was a matter for them. This similarly was not used.

231. In any event, the wide disclosure of information is sufficient for confidentiality to be lost, regardless of whether it may be characterised as "public knowledge". In this

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396 T15-43 and T15-56, line 41 (Jensen).
397 [1969] RPC 41, 47-48.
398 T16-36, line 53 (Porter).
399 Ex 57 (statement of Brooke Freeman), paragraph [24(c)] and "Quantifiable pricing differences" table, item 4, p10; see also T13-22, lines 38-47 (Bloomfield).

case, it is questionable whether the information summarised in the 22 August 2007 email could continue to be confidential following its obviously broad dissemination beyond CorpTech.

Queensland Health and Mr. Atzeni

232. Some evidence was led that IBM had received some framework and other documents in the course of its employees performing work at CorpTech and Queensland Health. There seemed to be no equivalent investigation into such materials being shared with Accenture, Logica, SMS Management, SAP or other suppliers.

233. The evidence did show that:

(a) Such information sharing was common practice and acceptable;

(b) There was nothing strange about such information sharing, and rather, it was how things were done;

(c) There were blended teams, such that this was an unsurprising sharing of information both within the workspace and the contracting company.[400]

234. In any event, the framework documents were provided within the ITO process to all tenderers.

The G: Drive email

235. Some further attention was paid to an email sent from Mr. Joseph Sullivan to Mr. Bloomfield.

236. In the context of what were repeated expressions of concern about the security of documents by all parties, the document is innocuous. An employee, on his own initiative,[401] having been told the IBM proposals were on the G: Drive, checked to see if IBM's proposal had been put on the G: drive, where it would be accessible to hundreds of Accenture, Logica and SAP contractors and government staff.

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400 See, e.g. T1-41, lines 23-29 and T1-100, lines 39-45 (Salouk); T9-18, lines 41-49, T9-26, lines 20-32 and T9-101, lines 3-9 (Atzeni).

401 Ex 159 (statement of Joseph Sullivan), paragraph [13]; Ex 152, T1-11, lines 15-20; Ex 35 (statement of Lochlan Bloomfield), paragraph [109].

237. Nothing was accessible at that time.

238. An unfair and tortured focus was again put on what was plainly a short and casually typed email. The key phrases subjected to forensic analysis were:

(a) "Government Guys";

(b) "So looks like we were just a little bit too late"; and

(c) the use of a plural for "proposals".

239. Counsel Assisting press that "Government Guys" must mean an IBM employee.[402] No witness has given evidence of the use of the expression in that way.

240. Mr. Sullivan identified that there was only one other IBM employee present at CorpTech known to him.[403] The suggestion he would use the plural "guys" to mean a single, known IBM employee does not comport with reason. One of the "Government Guys" in context must mean a CorpTech or other public service employee, as Mr. Sullivan explained,[404] and indeed, as Mr. Cameron suggested.[405]

241. The word "proposals" and the phrase, "[s]o looks like we were just a little bit too late", were seized upon to call for an inference that there was an improper search conducted. Yet:

(a) There is no evidence that the material on the G: or other CorpTech drives were anything but public to all employees and contractors. If something were on the drive, it was, by definition, not secret or confidential to a subset of CorpTech – it was 'public' to all employees and contractors. Indeed, that was the problem;

(b) There is no evidence that accessing or looking on those drives was improper;

(c) There is no evidence to suggest that Mr. Sullivan or any other IBM employee located or saw any proposals. Indeed, quite the opposite, as evidenced in the email itself;

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402 Submissions of Counsel Assisting, 26 April 2013, [53(b)].
403 Ex 152, T1-4, lines 30-33 and T1-7, lines 3-5.
404 Ex 159 (statement of Joseph Sullivan), paragraph [9]; Ex 152, T1-6, lines 17-49.
405 T11-27, lines 49-60 (Cameron).

(d) The use of the word "proposals" hardly infers nefarious intent. If all of the proposals were on the drive, IBM's would be amongst them. That the plural was used meant that none of the proposals were there. Had Mr. Sullivan used the singular "proposal",[406] the meaning would be more ambiguous and could suggest that while IBM's proposal wasn't there, others were.

242. It defies logic that Mr. Sullivan, a person who didn't report to IBM Brisbane, who didn't know Mr. Bloomfield well,[407] who rarely spoke to Mr. Cameron in his job,[408] and was new to Brisbane,[409] would risk being terminated by engaging in the kind of conduct asserted by Counsel Assisting.

243. The evidence was consistent: contracting firms were all concerned about lax security arrangements at CorpTech in relation to their bid materials. The concern was so great, that when it came to the actual procurement, the ITO, CorpTech even delegated the task of receiving ITO responses to Mallesons. Even then, Accenture obtained a copy of IBM's material.[410]

244. Accenture's actual receipt of the IBM's material, a matter of greater probity concern, was not subject to any proper scrutiny, and the suggestion that no use was put to IBM's ITO Response was apparently accepted at face value without investigation. IBM was precluded from analysing whether Accenture's response or clarifications copied IBM's materials, unlike the opportunity that was afforded to Accenture witnesses to compare documents.

245. That an IBM employee, having plainly been made aware of a security issue relating to IBM's confidential bid materials by a public servant, then sought to confirm whether there was a problem on the CorpTech network, is not improper conduct. To find otherwise would require multiple findings of deceit, which are not reasonably open on the evidence.

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406 Or otherwise text to the effect of "our proposal".
407 Ex 152, T1-8, lines 14-16.
408 Ex 152, T1-6, lines 17-49.
409 Ex 159 (statement of Joseph Sullivan), paragraph [8].
410 PTB, Vol 6, p250-251; PTB, Vol 11, p768-775; T1-63, line 15 to T1-64, line 12 (Salouk); T8-79, lines 14-32 (Swinson); T16-56, lines 9-32 (Porter); and T17-33, lines 45-46 (Perrott).

IBM's Business Conduct Guidelines

246. As to the Porter email, the State and Counsel Assisting assert that IBM's Code requires it to be reported to Mr. Bloomfield's superiors. Indeed, Mr. Bloomfield said that when in doubt about the guidelines, employees are urged to speak to, amongst others, their supervisor. But the guideline does not require such an approach.[411] The Guidelines direct employees "... If you receive another party's proprietary information, you must proceed with caution to prevent any accusations that IBM misappropriated or misused the information".[412]

247. Whilst caution may dictate raising it with a superior, and Mr. Bloomfield indicated that he may have,[413] it didn't require it. Mr. Bloomfield was forwarded the email by its recipient. It wasn't misappropriated or misused.

248. Similarly, the email from Ms. Jensen included her superior, but was clearly in the nature of gossip and scuttlebutt, and not true 'proprietary information', though Mr. Bloomfield indicated he discussed the email with Mr. Pagura. That Mr. Pagura may not have taken any further action is hardly surprising, given its nature.

249. As to the G: Drive email, for the reasons set out above, no information was conveyed, and for the reasons cited above, it would not constitute an improper gathering of information under IBM's Guidelines.

Voluntary Production

250. At paragraph [36] of their submissions, Counsel Assisting assert that IBM was under a compulsion to produce the documents that ultimately became Exhibit 32. At the time they were produced, IBM was under no such compulsion.

251. As the statement of Mr. Innes (dated 14 June 2013) makes clear, Ms. Copley, Principal Solicitor for the Commission had indicated to IBM that there had been no prior RFI or RFP process, and that Request 3 (issued 19 February 2013) essentially

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411 And it is what the Guidelines themselves say which is of relevance.
412 Ex 84 (IBM Business Conduct Guidelines), page 10.
413 T12-62, lines 15-40 (Bloomfield).

meant the ITO, howsoever named. That position was never changed by the Commission prior to Ashurst raising the point: that in the course of hearings, the terms RFI and RFP had come to be associated with particular emails, though not a genuine RFI or RFP process – as to which see above.[414]

252. Whatever may be said of a later period, when the emails were produced, this was done voluntarily by IBM in, as Ashurst's letter indicated, a corporate intent to be as transparent and cooperative as possible with the Commission.

Counsel for IBM Australia Ltd

14 June 2013

414 Statement of Ian Innes dated 14 June 2013, paragraph [8] and annexure at pp 24-25.