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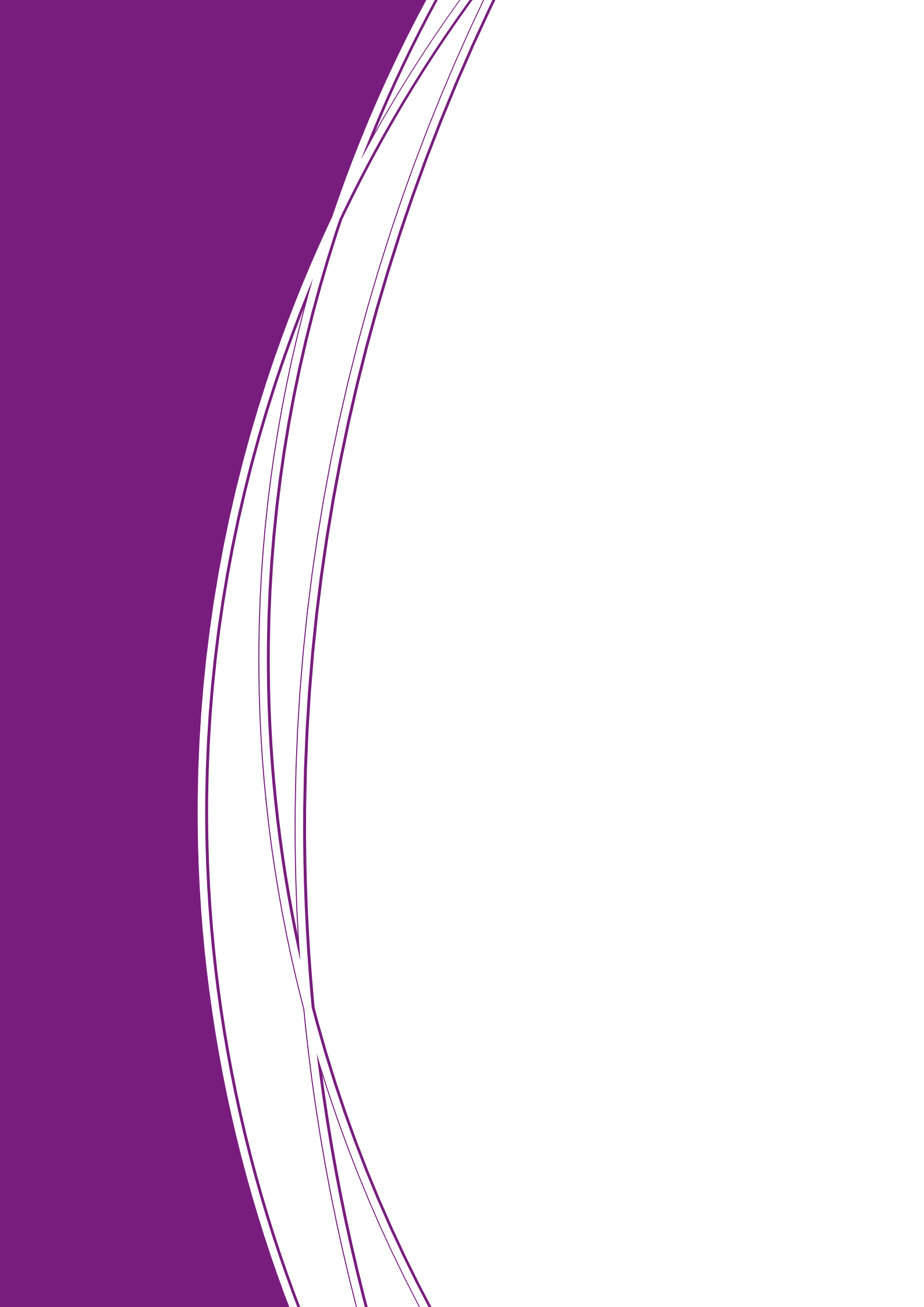
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# INVESTIGATION INTO THE AWARDING OF TRANSPORT FOR NSW AND INNER WEST COUNCIL CONTRACTS

## (OPERATION HECTOR)

ICAC REPORT  
APRIL 2024



**ICAC**

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INDEPENDENT COMMISSION  
AGAINST CORRUPTION  
NEW SOUTH WALES

**INVESTIGATION INTO THE  
AWARDING OF TRANSPORT  
FOR NSW AND INNER WEST  
COUNCIL CONTRACTS**

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AGAINST CORRUPTION  
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Legislative Council  
Parliament House  
Sydney NSW 2000

The Hon Greg Piper MP  
Speaker  
Legislative Assembly  
Parliament House  
Sydney NSW 2000

Mr President  
Mr Speaker

In accordance with s 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into the awarding of Transport for NSW and Inner West Council contracts (Operation Hector).

I presided at the public inquiry held in aid of this investigation.

I draw your attention to the recommendation that the report be made public forthwith pursuant to s 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours sincerely



The Hon John Hatzistergos AM  
Chief Commissioner

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## Summary of investigation and outcomes

This investigation by the NSW Independent Commission Against Corruption (“the Commission”) examined two principal aspects; first, the conduct of Tony Nguyen, an Inner West Council (IWC) property project manager, in relation to the procurement of a number of subcontractors to undertake building work and the conduct of those subcontractors with Mr Nguyen. The second aspect examined the procurement of subcontractors by the managing contractor, Downer EDI Works Pty Ltd (“Downer”), which was engaged by Transport for NSW (TfNSW) to undertake rail station upgrades as part of its Transport Access Program (TAP) and New Intercity Fleet (NIF) program.

In particular, the investigation examined seven allegations, that:

1. between 21 July 2015 and 3 October 2020, former Leichhardt Council and IWC employee, Mr Nguyen, partially and/or dishonestly exercised his official functions by awarding and/or recommending IWC contracts and tenders to companies with which he was associated
2. since 1 January 2017, TfNSW officer Benjamin Vardanega has dishonestly and partially exercised his public official functions by using information gained in the course of his official functions to assist certain contractors to tender for TfNSW work, or to tender for subcontracts from entities that have been awarded TfNSW work, to benefit himself and others
3. since 1 January 2014, TfNSW officer Nima Abdi has dishonestly and partially exercised his public official functions by using information gained in the course of his official functions to assist contractors, with which he had an undeclared association, to tender for TfNSW work, or to tender for subcontracts from entities that had been awarded TfNSW work, to benefit himself and others

4. since 1 January 2017, certain employees of Downer have dishonestly obtained a benefit for themselves by favouring certain subcontractors when awarding work arising from contracts that TfNSW has awarded to Downer
5. since 1 January 2014, TfNSW employee Raja Sanber has obtained a financial benefit for himself, and others, by undertaking contractor or subcontractor work for various entities on TfNSW projects, in circumstances where he failed to disclose his role in those entities to TfNSW
6. between 1 July 2019 and 31 March 2020, TfNSW employees, and a Downer employee, dishonestly benefitted from the payment or application of public funds for their own private advantage by submitting and approving timesheets and invoices for payment in circumstances where no work was carried out
7. between 1 January 2017 and 31 March 2021, a TfNSW employee misused material or information acquired in the course of his public official functions for his own benefit, or for the benefit of Mr Abdi or persons associated with him.

### Corrupt conduct findings

#### Mr Nguyen

The Commission found that Mr Nguyen engaged in serious corrupt conduct by:

- in 2014, colluding with Mr Abdi and Mr Sanber to manipulate the tender process for the Glenfield Junction car park defect rectification work, to ensure that the TfNSW contract for that work was awarded to ASN Contractors Pty Ltd, a company in which he was part owner with

Mr Abdi and Mr Sanber. Mr Nguyen received a benefit of approximately \$30,000 (chapter 3)

- between August 2016 and April 2017, knowingly misusing his public official position with IWC to arrange for the awarding of approximately \$306,914.83 (including GST) of IWC work to Innocon Pty Ltd, a company of which his friend, Monty Nguy, was a director, to benefit Mr Nguy, having agreed to receive a financial benefit from Innocon in return (chapter 4)
- between June 2017 and September 2020, knowingly misusing his public official position with IWC to arrange for the awarding of approximately \$1,071,168.42 (including GST) of IWC work to Constructicon Pty Ltd, a company of which his friend, Mr Nguy, was the sole director, for the purpose of benefitting Mr Nguy in return for receiving a financial benefit of \$3,752.89 (chapter 4)
- between October 2017 and July 2019, knowingly misusing his public official position with IWC to arrange for the awarding of approximately \$1,606,464.24 (including GST) worth of IWC work to SDL Project Solutions Pty Ltd (“SDL”) a company for which his friend, Mr Nguy, worked and of which Seng Du Laphai was sole director, for the purpose of improperly benefitting Mr Laphai and Mr Nguy, and in return for which he received about \$60,000 and a mobile telephone costing \$970 (chapter 4)
- between about April 2018 and September 2020, knowingly misusing his public official position with IWC to arrange for the awarding of approximately \$750,788.93 (including GST) worth of IWC work to Marble Arch Pty Ltd, a company of which his friend, Aidan Cox, was sole director, for the purpose of improperly benefitting Mr Cox, in exchange for which he

received from Mr Cox a mobile telephone costing \$1,960 (chapter 4)

- between about January 2019 and October 2019, knowingly misusing his public official position with IWC to arrange for the awarding of approximately \$24,619.60 (including GST) worth of IWC work to JTG Services Pty Ltd for the purpose of improperly benefitting Mr Abdi, including by authorising payment of JTG Services invoices to IWC dated 4 January 2019, 11 January 2019 and 11 October 2019, for which JTG Services was paid despite knowing JTG Services did not perform any work in relation to the first two invoices and that the work in relation to the third invoice was performed by Constructicon (chapter 4)
- between September 2016 and February 2017, knowingly misusing his public official position at IWC to arrange for the awarding of approximately \$24,992 (including GST) worth of IWC work to Sanber Group Pty Ltd, trading as RJS Civil, for which he created inflated quotes for the purpose of improperly benefitting Mr Sanber (chapter 4)
- between June 2019 and September 2019, engaging in collusive dealings with Abdal Aziz, to secure the TfNSW Central Station work for RJS Infrastructure Group Pty Ltd (“RJS Infrastructure”) (chapter 6)
- between 28 February 2019 and 10 September 2019, entering into an agreement with Mr Aziz that Mr Aziz would use his position as a Downer project manager on a TfNSW NIF Lithgow Station project to provide assistance to RJS Infrastructure and influence the tender process to award the civil works subcontract to RJS Infrastructure in exchange for a financial benefit of about \$350,000 (excluding GST).

The conduct also involved collusive tendering (chapter 7)

- between 2019 and 2020, colluding with Mr Abdi to manipulate the tender process for the building and landscaping subcontracts at the Kingswood Station upgrade. Mr Nguyen participated in manipulating the tender processes for those contracts to favour RJS Infrastructure, and used confidential Downer budget information obtained from Sairam Pilli and provided to him by Mr Abdi, so that the work was awarded to his company, RJS Infrastructure. In return, he split the \$331,000 profit derived by RJS Infrastructure with Mr Pilli and Mr Abdi. His conduct included submitting dummy bids to Downer; inflating the subcontract tender prices and cost of variations using confidential Downer budget information; and making corrupt payments to Mr Pilli and Mr Abdi for their assistance (chapter 8)
- in early-2020, in concert with Mr Cox, arranging for \$25,000 to be paid to Benjamin Vardanega as a reward for Mr Vardanega misusing his position at Sydney Trains to improperly assist RJS Infrastructure to obtain work at Macdonaldtown Station, which assistance involved Mr Vardanega providing a competitor's methodology document and confidential pricing information to Mr Cox and RJS Infrastructure (chapter 10).

### Mr Abdi

The Commission found that Mr Abdi engaged in serious corrupt conduct by:

- in 2014, misusing his public official position with TfNSW to manipulate the tender process for the Glenfield Junction car park defect rectification work, to ensure the contract was awarded to ASN Contractors, in return for which he received a benefit of approximately \$30,000 (chapter 3)
- in 2018, engaging in collusive dealings with Mr Sanber and Mr Aziz to secure the TfNSW Victoria Street Station work for Sanber Group, and receiving substantial secret payments in relation to that project. Mr Abdi also acted partially towards Sanber Group in the course of his duties as a TfNSW public official, in circumstances where he failed to disclose his financial interest in Sanber Group to TfNSW (chapter 5)
- between 2019 and 2020, colluding with Mr Nguyen and Mr Pilli to favour RJS Infrastructure in the awarding of building and

landscaping subcontracts at the Kingswood Station upgrade. He manipulated the tender process for those contracts to favour RJS Infrastructure, and provided confidential Downer budget information he received from Mr Pilli to Mr Nguyen, resulting in collusive tendering, so that work was awarded to RJS Infrastructure. In return, Mr Abdi received approximately \$109,000, being his share of the \$331,000 profit derived by RJS Infrastructure (chapter 8).

### Mr Sanber

The Commission found that Mr Sanber engaged in serious corrupt conduct by:

- in 2014, colluding with Mr Abdi and Mr Aziz to manipulate the tender process for the Glenfield Junction car park defect rectification work, to ensure that the TfNSW contract for that work was awarded to ASN Contractors, a company in which he was part owner with Mr Abdi and Mr Nguyen. As a result of engaging in this conduct, he received a benefit divided between them, totalling \$125,000, being profit derived by ASN Contractors (chapter 3)
- in 2018, engaging in collusive dealings with Mr Aziz, Mr Nguyen and Mr Abdi, to secure the TfNSW Victoria Street Station work for Sanber Group, and making substantial secret payments in relation to that project (chapter 5).

### Mr Pilli

The Commission found that Mr Pilli engaged in serious corrupt conduct by:

- between 2019 and 2020, colluding with Mr Abdi to favour RJS Infrastructure in the awarding of building and landscaping subcontracts at the Kingswood Station upgrade. He manipulated the tender processes for those contracts to favour RJS Infrastructure and provided confidential Downer budget information to Mr Abdi, which resulted in collusive tendering so that work was awarded to RJS Infrastructure. In return, Mr Pilli received approximately \$101,500, being his share of the \$331,000 profit derived by RJS Infrastructure (chapter 8).

### Mr Nguy

The Commission found that Mr Nguy engaged in serious corrupt conduct by:

- agreeing to provide a financial benefit to Mr Nguyen as a reward for Mr Nguyen misusing

his public official position with IWC to arrange for the awarding of approximately \$306,914.83 (including GST) of IWC work to Mr Nguyen's company, Innocon, between about August 2016 and April 2017 (chapter 4)

- providing a financial benefit to Mr Nguyen of \$3,752.89 as a reward for Mr Nguyen misusing his public official position with IWC to arrange for the awarding of approximately \$1,071,168.42 (including GST) of IWC work to Mr Nguyen's company, Constructicon, between about June 2017 and September 2020 (chapter 4).

### Mr Laphai

The Commission found that Mr Laphai engaged in serious corrupt conduct by:

- providing a financial benefit to Mr Nguyen of about \$60,000 and a mobile telephone costing \$970, as a reward for Mr Nguyen misusing his public official position with IWC to arrange for the awarding of approximately \$1,606,464.24 (including GST) of IWC work to Mr Laphai's company, SDL, between about October 2017 and July 2019 (chapter 4).

### Mr Cox

The Commission found that Mr Cox engaged in serious corrupt conduct by:

- in early-2020, in concert with Mr Nguyen, paying \$25,000 to Mr Vardanega as a reward for Mr Vardanega misusing his position at Sydney Trains to improperly assist RJS Infrastructure to obtain work at Macdonaldtown Station, which involved Mr Vardanega providing a competitor's methodology document and confidential pricing information to Mr Cox and RJS Infrastructure (chapter 10).

### Mr Vardanega

The Commission found that Mr Vardanega engaged in serious corrupt conduct by:

- in September 2019, misusing his position at Sydney Trains to improperly assist RJS Infrastructure to obtain work at Macdonaldtown Station by providing a competitor's methodology document and confidential pricing information to Mr Cox of RJS Infrastructure, for which he received \$25,000 from Mr Cox in 2020 (chapter 10).

### Mr Aziz

The Commission found that Mr Aziz engaged in serious corrupt conduct by:

- in 2018, engaging in collusive dealings with Mr Sanber, Mr Nguyen and Mr Abdi to secure the TfNSW Victoria Street Station work for Sanber Group, and receiving substantial secret payments in relation to that project (chapter 5)
- between July 2018 and September 2019, engaging in collusive dealings with Mr Nguyen to secure the TfNSW Central Station work for RJS Infrastructure, and receiving substantial secret payments in relation to that project (chapter 6)
- between 28 February 2019 and 31 March 2020, using his position as a Downer project manager on the Lithgow Station TfNSW NIF project to influence the awarding of the Lithgow Station civil works package to RJS Infrastructure, and approving inflated variations, in exchange for a financial benefit of around \$221,000 (excluding GST). His conduct also included collusive dealings with Mr Nguyen (chapter 7).

### George Panagakis

The Commission found that Mr Panagakis engaged in serious corrupt conduct by:

- between June and September 2020, misusing his position within TfNSW to disclose to his TfNSW colleague, Mr Abdi, the TfNSW bills of quantity and other confidential information relating to the Wollstonecraft, Birrong, Roseville and Banksia TAP station upgrades for the purpose of assisting RJS Infrastructure to obtain TfNSW work, knowing that Mr Abdi was a silent partner, or at least had a financial interest, in RJS Infrastructure (chapter 11).

## Section 74A(2) statements

Statements are made pursuant to s 74A(2) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the following persons.

### Tony Nguyen

- for a common law offence of wilful misconduct in public office (chapter 4)
- for offences of corruptly receiving or soliciting a benefit as an agent, contrary to s 249B(1) of the *Crimes ACT 1900* (NSW) (“the Crimes Act”) (chapter 4)
- for offences of forgery contrary to s 253 of the Crimes Act (chapter 4)
- for offences of intention to defraud by false or misleading statement contrary to s 192G(b) of the Crimes Act (chapter 4)
- for offences of corruptly giving a benefit pursuant to s 249B(2)(a) of the Crimes Act with regard to each of the Central Station (chapter 6), Lithgow Station (chapter 7) and Kingswood Station (chapter 8) matters.

### Seng Du Laphai

- for offences of corruptly giving benefits or rewards to Mr Nguyen, contrary to s 249B(2) of the Crimes Act (chapter 4).

### Monty Nguy

- for offences contrary to s 249B(2) of the Crimes Act of corruptly giving rewards to Mr Nguyen (chapter 4).

### Raja Sanber

- for offences of corruptly giving a benefit pursuant to s 249B(2) of the Crimes Act (chapter 5)
- for offences of giving false or misleading evidence at the public inquiry pursuant to s 87(1) of the ICAC Act (chapter 5).

### Sairam Pilli

- for an offence under s 249B(1) of the Crimes Act of corruptly receiving a benefit from Mr Abdi and Mr Nguyen in connection with manipulating the Downer tender process to ensure the building and landscaping subcontracts were awarded to RJS Infrastructure (chapter 8).

### Abdal Aziz

- for offences of receiving a corrupt benefit pursuant to s 249B(1) of the Crimes Act with regard to each of Victoria Street Station (chapter 5), Central Station (chapter 6) and Lithgow Station (Chapter 7)

- for offences of giving false or misleading evidence at the public inquiry pursuant to s 87(1) of the ICAC Act (chapter 5)
- for an offence under s 192E (fraud) of the Crimes Act in relation to the payments obtained from Downer by JTG Services for work that was never performed (chapter 12)
- for an offence under s 192E (fraud) of the Crimes Act (by way of joint criminal enterprise with Mr Abdi and Mr Panagakis) in relation to the payments obtained from Chandler Macleod for Jessica Tosh and Mr Panagakis for work that was never performed (chapter 12).

### Nima Abdi

- for an offence under s 249B(2)(a) of the Crimes Act of, between 18 August 2019 and 19 November 2019, corruptly giving a benefit to Mr Aziz for Mr Aziz showing favour to RJS Infrastructure in relation to Downer’s allocation of a Central Station subcontract on the TfNSW TAP project (chapter 6)
- for an offence under s 249B(2)(a) of the Crimes Act of, between 18 August 2019 and 19 November 2019, corruptly giving a benefit to Mr Aziz for Mr Aziz showing favour to RJS Infrastructure in relation to Downer’s allocation of the Lithgow Station civil works package subcontract (chapter 7)
- for an offence under s 249B(1) of the Crimes Act (receiving corrupt commissions and rewards) in relation to the payment he received in connection with manipulating the Downer tender process on the building and landscaping subcontracts to ensure RJS Infrastructure was successful (chapter 8)
- for an offence under s 249B(2) of the Crimes Act (giving corrupt commissions and rewards) in relation to the payments he made to Mr Pilli in connection with manipulating the Downer tender process on the building and landscaping subcontracts to ensure RJS Infrastructure was successful (chapter 8)
- for an offence under s 192E of the Crimes Act in relation to the payments obtained from Downer by JTG Services for work that was never performed (chapter 12)
- for an offence under s 192E of the Crimes Act (by way of joint criminal enterprise with Mr Aziz and Mr Panagakis) in relation to the payments by Chandler Macleod to Ms Tosh and Mr Panagakis for work that was never performed (chapter 12).

## George Panagakis

- for an offence under s 87(1) of the ICAC Act in relation to giving false evidence in relation to:
  - having performed actual work in exchange for the money paid to him on behalf of Downer by Chandler Macleod (chapter 12)
  - not having provided any of the money he received from Chandler Macleod to Mr Abdi and/or Mr Aziz (chapter 12).

## Andrew Gayed

- for an offence under s 192E of the Crimes Act (fraud) in relation to the \$13,200 payment made by Downer to Avco in respect of lighting hire for the Wollstonecraft Station project, proof of which is established to a *prima facie* level by the Access Hire Pty Ltd invoice records, the invoices presented to Downer and the statements of Leanne Curtis and Yan (Shirley) Huang (chapter 11)
- for an offence under s 87(1) of the ICAC Act in relation to Mr Gayed's compulsory examination evidence that he did not send Mr Vardanega the bill of quantities document for the Wollstonecraft Station project (chapter 11)
- for an offence under 87(1) of the ICAC Act in relation to Mr Gayed's evidence that \$6,000 of the amount included on Avco's invoice in relation to lighting hire related to the (undisclosed) reimbursement of expenses he incurred in paying cash to the owners of a small newsagency at Wollstonecraft Station for ice cream when the power was cut off to their store during a planned outage (chapter 11).

## Recommendations for corruption prevention

Chapters 13 and 14 of this report set out the corruption risks identified by the Commission during the investigation and its corruption prevention recommendations.

### Inner West Council

Chapter 13 examines IWC's failure to prevent or detect collusive bidding across several IWC building projects. The weaknesses in processes and oversight identified include poor enforcement of procurement rules, failure to identify conflicts of interest, and deficiencies in the management of building projects and project personnel. Repeated organisational change is identified as contributory to the ineffective control environment.

Seven recommendations are made with the aim of enhancing IWC's corruption prevention approach in these areas:

### Recommendation 1

That IWC reviews its management of supplier panels to ensure that:

- panels address business needs
- panelled suppliers are skilled and experienced
- the operation and membership of panels is periodically reviewed.

### Recommendation 2

That IWC ensures independent scrutiny of supplier bids for non-tendered procurements over a minimum threshold.

### Recommendation 3

That IWC introduces a risk-based framework in relation to supplier due diligence and verification of supplier claims.

### Recommendation 4

That IWC introduces, on a risk basis, screening of employees for directorships of external businesses, including potential associations with suppliers or other stakeholders.

### Recommendation 5

That IWC ensures appropriate scrutiny of variation requests to ensure they do not undermine procurement or project outcomes or processes.

### Recommendation 6

That IWC revises its cost-estimation and budgeting processes for projects to ensure that:

- robust cost estimates are developed prior to procurement processes commencing
- adequate market analysis is conducted where suppliers that are not on approved panels are being considered.

### Recommendation 7

That IWC conducts an audit(s) into changes made in response to this investigation to obtain assurance that these changes have appropriately enhanced IWC's ability to control corruption risks. This should include both changes that IWC has proactively made, and changes made in response to the Commission's recommendations.

## Transport for NSW

Chapter 14 examines the systemic factors that allowed corrupt conduct to occur in TfNSW infrastructure projects that used the managing contractor framework. A systemic weakness identified was the over-estimation of target budget estimates that left money on the table that could be used as part of the corrupt scheme. Other weaknesses identified included inadequate control over confidential procurement-related information and poor enforcement of contractual subcontracting requirements.

These issues arose from overarching weaknesses in project oversight at TfNSW, including inadequate consideration of corruption risk, insufficient project assurance activities and poor information flow to governance bodies. TfNSW also failed to adequately respond to false information contained in employment applications. Nine recommendations are made to enhance TfNSW's systems and processes in these areas:

### Recommendation 8

That TfNSW revises its processes for reviewing package breakdowns and price verification for projects conducted under the managing contractor framework, to ensure that the risk of inflated target budget estimates is adequately managed. This should include consideration of:

- the robustness of estimation processes
- the management of relevant risks associated with project variations.

### Recommendation 9

That TfNSW conducts a detailed risk assessment regarding information security related to projects utilising the managing contractor framework and identifies and implements controls to enhance the security of project information.

### Recommendation 10

That TfNSW ensures that suppliers engaged under the managing contractor framework abide by procurement-related contractual clauses by:

- assigning responsibilities and accountabilities
- adopting appropriate assurance mechanisms
- proportionately responding to compliance failures.

### Recommendation 11

That TfNSW's infrastructure and place division ensures that project risk registers reflect fraud and corruption risks, and that project risk workshops consider corruption risks.

## Recommendation 12

That TfNSW advises managing contractors of specific corruption risks that they should be managing, and updates the managing contractor framework to require:

- that these specific corruption risks be formally managed; this should be separate to any general requirements to manage corruption risk
- evidence of compliance.

## Recommendation 13

That TfNSW's infrastructure and place division develops a tailored corruption awareness course for its staff that addresses corruption risks in its projects. This course should:

- consist of tailored training to be undertaken by anyone making, or with oversight of, project commercial decisions
- use this investigation, Operation Hector, as an example
- include material that creates awareness of corruption risks and myths
- discuss the reporting obligations that apply to these staff.

## Recommendation 14

That, as part of program planning, TfNSW develops guidance for project teams and individuals involved in managing construction projects that:

- identifies key corruption risks and controls related to the adopted contracting model(s)
- identifies non-negotiable and other important corruption control requirements to be met
- requires responsibilities and accountabilities associated with these corruption control requirements be assigned.

## Recommendation 15

That TfNSW enhances its governance and assurance processes surrounding the managing contractor framework to ensure that:

- an appropriately diverse suite of assurance activities is conducted
- governance committees are informed of issues identified by frontline staff and/or assurance activities.



## Recommendation 16

That TfNSW reviews its mechanisms to prevent, detect and respond to false employment applications and résumé fraud to ensure that they adequately manage these risks.

## NSW Government

In addition, one whole-of-government recommendation has been made to reduce the risk that a supplier involved in corrupt conduct is subsequently engaged by a public authority:

## Recommendation 17

That the NSW Government considers a debarment scheme to assist public authorities to identify suppliers that have had previous issues with misconduct or breaches of relevant requirements.

These recommendations are made pursuant to s 13(3)(b) of the ICAC Act and, as required by s 111E of the ICAC Act, will be furnished to IWC, TfNSW, the minister for domestic manufacturing and government procurement and the other responsible ministers.

As required by s 111E(2) of the ICAC Act, IWC, TfNSW and the minister for domestic manufacturing and government procurement must inform the Commission in writing within three months (or such longer period as the Commission may agree to in writing) after receiving the recommendations whether they propose to implement any plan of action in response to the recommendations and, if so, details of the proposed plan of action.

In the event a plan of action is prepared, IWC, TfNSW and the minister for domestic manufacturing and government procurement are required to provide a written report to the Commission of their progress in implementing the plan 12 months after informing the Commission of the plan. If the plan has not been fully implemented by then, a further written report must be provided 12 months after the first report.

The Commission will publish the responses to its recommendations, any plan/s of action and progress reports on its/their implementation on the Commission's website at [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au).

## Recommendation this report be made public

Pursuant to s 78(2) of the ICAC Act, the Commission recommends that this report be made public forthwith. This recommendation allows either Presiding Officer of a House of Parliament to make the report public, whether or not Parliament is in session.

# Chapter 1: Background

This chapter sets out some background information concerning this investigation by the NSW Independent Commission Against Corruption (“the Commission”).

## How the investigation came about

On 15 October 2019, Inner West Council (IWC), notified the Commission that it had received an anonymous complaint that Tony Nguyen, a senior project engineer at IWC, had received financial benefits from Monty Nguy in return for Mr Nguyen using his council position to provide insider information to Mr Nguy to ensure that Mr Nguy’s company, Constructicon Pty Ltd, would be awarded IWC contracts. The notification was made under s 11 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”), which requires the principal officer of a public authority to report to the Commission any matter that the person suspects on reasonable grounds concerns, or may concern, corrupt conduct. IWC also indicated that it would conduct an internal investigation.

In December 2019 and January 2020, IWC reported to the Commission that Mr Nguyen and Mr Nguy had a business relationship and, possibly, a personal relationship. Additionally, an analysis of IWC’s internal records uncovered various anomalies in the business information of bidders for IWC projects, in particular, ones associated with Aidan Cox and his company, Marble Arch Pty Ltd, that suggested there may have been collusion in the tender process. IWC sought the Commission’s advice on how to proceed.

On 22 January 2020, after assessing the matter, the Commission determined to conduct a preliminary investigation.

## Why the Commission investigated

One of the Commission’s principal functions, as specified in s 13(1)(a) of the ICAC Act, is to investigate any

allegation or complaint that, or any circumstances which in the Commission’s opinion imply that:

- (i) corrupt conduct, or
  - (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
  - (iii) conduct connected with corrupt conduct,
- may have occurred, may be occurring or may be about to occur.

The role of the Commission is explained in more detail in Appendix 1. Appendix 2 sets out the approach taken by the Commission in determining whether corrupt conduct has occurred.

The conduct as reported to the Commission was serious and involved a senior public official and significant amounts of public money. If established, it would involve a systemic and ongoing corruption of the tender process. The apparent sophistication of the scheme meant that the Commission’s specialised resources and expertise would likely be necessary and appropriate to fully investigate the conduct.

## Conduct of the investigation

The preliminary investigation gave strong credence to allegations that Mr Nguyen had awarded IWC contracts to the benefit of his undisclosed business relationships. The Commission also obtained records of multiple transfers from Mr Nguy to bank accounts controlled by Mr Nguyen. On 8 April 2020, the Commission determined to escalate the matter to a full investigation in anticipation of the significant specialist forensic resources required.

On 28 May 2020, the Commission expanded the scope of the investigation to include Nima Abdi, a Transport for NSW (TfNSW) project manager. Telecommunication intercepts between Mr Nguyen and Mr Abdi had revealed that, while employed at TfNSW, Mr Abdi was assisting

Mr Nguyen to successfully tender for work on TfNSW infrastructure projects.

Financial analysis and IWC records also showed that Mr Nguyen had either approved, or recommended, that JTG Services Pty Ltd, a company associated with Mr Abdi, undertake paid building work for IWC.

On 6 November 2020, the Commission expanded the scope of the investigation to include Benjamin Vardanega, a Sydney Trains officer. There was evidence to suggest that Mr Vardanega supplied confidential tender information he had sourced from a former colleague, Downer EDI Works Pty Ltd (“Downer”) project manager Andrew Gayed, to Mr Cox during the leadup to RJS Infrastructure Group Pty Ltd (“RJS Infrastructure”) being awarded a Wollstonecraft Station Transport Access Program (TAP) upgrade (“Wollstonecraft Station”) tender package.

On 5 February 2021, the Commission expanded the scope of the investigation to include allegations that a senior project manager at TfNSW and a senior manager at Downer had misused their positions to secure TfNSW contract work for a business they jointly owned. After a detailed and thorough investigation, the Commission determined there was no evidence to substantiate this allegation. Accordingly, on 3 November 2022, the Commission discontinued its investigation of this allegation.

On 5 March 2021, the Commission expanded the scope of the investigation to include Raja Sanber, who at that time was employed as a TfNSW officer. Mr Sanber, through his company Sanber Group Pty Ltd trading as RJS Civil, was awarded work at IWC through Mr Nguyen. Evidence suggested that Mr Nguyen was also engaging in collusive tendering practices in order to award IWC contract work to Sanber Group.

On 20 September 2021, the Commission expanded the scope of the investigation to include ASN Contractors Pty Ltd. ASN Contractors had performed rectification

work for TfNSW on the Glenfield Transport Interchange multi-storey car park. Evidence suggested that ASN Contractors was a surreptitious business vehicle for Mr Nguyen, Mr Abdi and Mr Sanber.

On 21 March 2023, the Commission further expanded the scope of the investigation to include George Panagakis, a former TfNSW employee. Evidence suggested that Mr Panagakis had misused documents or information acquired during his TfNSW duties to benefit himself or persons associated with him. Evidence also suggested Mr Panagakis and Mr Abdi had submitted timesheets for payment of wages on a TfNSW project even though no work was done.

During the course of the investigation, the Commission:

- obtained documents from public authorities and other organisations by issuing 293 notices under s 22 of the ICAC Act (requiring production of documents or other things)
- obtained information and documents from public authorities by issuing six combined notices under s 21 and s 22 of the ICAC Act (requiring production of documents or other things and a statement of information)
- obtained one surveillance device warrant under s 17 of the *Surveillance Devices Act 2007*
- obtained warrants under s 46 of the *Telecommunications (Interception and Access) Act 1979* (Cth) and lawfully intercepted telecommunications sent to and from mobile telephones used by Mr Nguyen, Mr Cox and Mr Abdi
- executed 12 search warrants on premises and vehicles of relevant contractors
- forensically examined laptops, tablets and mobile telephones seized during search warrants and

extracted thousands of relevant messages and emails between the witnesses over the period under investigation

- interviewed and obtained statements from 16 witnesses
- conducted 14 compulsory examinations.

A number of persons of interest, when confronted with and asked to comment on documentary evidence and intercepted communications obtained by the Commission, made significant admissions regarding their involvement in the allegations.

## The public inquiry

The Commission reviewed the information obtained during its investigation and, after taking into account each of the matters set out in s 31(2) of the ICAC Act, determined that it was in the public interest to hold a public inquiry.

In making that determination, among the other matters specified in s 31(2) of the ICAC Act, the Commission had regard to the benefit of exposing to the public and making it aware of the alleged conduct, as well as the benefit of deterring future conduct by demonstrating that corruption does not escape detection. The alleged conduct was serious when considering the large amount of money at play; the number of senior public officials and others; significant planning by those persons; the protracted period over which the alleged conduct occurred; and the potential criminal conduct involved. The serious nature of the alleged conduct, if proven, could undermine the public's confidence in the delivery of public infrastructure projects.

The Commission also had regard to the significant corruption prevention issues raised by the investigation. The prevalence and recurrence of procurement and contract management processes in Commission investigations suggested that the related corruption prevention issues were still alive.

Chief Commissioner the Hon John Hatzistergos AM presided at the public inquiry. Phillip English and Joanna Davidson acted as Counsel Assisting the Commission. The public inquiry commenced on 20 March 2023 and took place over 25 days, with evidence concluding on 10 May 2023. A total of 16 witnesses gave evidence.

At the conclusion of the public inquiry, Counsel Assisting prepared written submissions setting out the evidence and the findings and recommendations they contended the Commission could make based on the evidence. The submissions were provided to all relevant parties on 24 July 2023 and parties given an opportunity to respond. Counsel Assisting prepared submissions in reply to the

responses, which were distributed to relevant parties on 3 November 2023 with another opportunity to respond. The last submissions in response were received on 26 November 2023. All submissions have been considered in preparing this report. Further information is provided in Appendix 3.

## Time within which this report was completed

Section 74E(3) of the ICAC Act requires the Commission, in each report prepared under s 74 of the Act, to:

- report on the Commission's performance against the time standards in relation to preparing the report and providing the report to the Presiding Officer of each House of Parliament, and
- give reasons for any failure to comply with the time standards in relation to the preparation of the report.

The Commission's time standard for preparing and providing its reports under s 74 of the ICAC Act to the Presiding Officers of Parliament is that at least 80 per cent of reports:

- for a public inquiry of five days or less, will be furnished to the Presiding Officers within 80 days of the receipt of final submissions, and
- for a public inquiry of more than five days, will be furnished to the Presiding Officers within 180 days of the receipt of final submissions.

At the time of writing, this report was scheduled to be furnished to the Presiding Officers on 30 April 2024. This is 156 days after 26 November 2023, the date of receipt of final substantive submissions. This falls within the timeframe of 180 days for a public inquiry of more than five days.

During the preparation of this report, the Commission wrote to a small number of affected persons to notify them of potential additional corrupt conduct findings and s 74A(2) statements being considered by the Commission, and to provide them with an opportunity to respond, to ensure procedural fairness has been afforded. The last response was received on 25 March 2024. The Commission has not relied upon this date in calculating the time taken to complete this report due to the discrete nature of the issues covered in those letters.

## Inner West Council

On 12 May 2016, Leichhardt Council was amalgamated with Ashfield and Marrickville councils to form IWC.

## IWC code of conduct

When IWC was formed on 12 May 2016, it did not have its own code of conduct for councillors and staff and instead used the Model Code of Conduct for Local Councils in NSW (“Model Code of Conduct”), made under s 440 of the *Local Government Act 1993* and the Local Government (General) Regulation 2005. The version of the Model Code of Conduct operating at the time was gazetted on 13 November 2015 and Part 1, the Introduction, warned that “[f]ailure by a member of staff to comply with council’s code of conduct may give rise to disciplinary action”. Part 2 of the Model Code stated that the purpose of the code was that it “sets the minimum requirements of conduct for council officials in carrying out their functions” and that it was “prescribed by regulation”.

Part 5 of the November 2015 Model Code dealt with personal benefits. Relevant to this investigation, clause 5.9 proscribed benefitting from improper and undue influence:

*You must not take advantage (or seek to take advantage) of your status or position with or of functions you perform for council in order to obtain a private benefit for yourself or for any other person or body.*

On 14 December 2018, an updated Model Code of Conduct was gazetted. The statement of the code’s purpose and the stipulation that breaching it could give rise to disciplinary action were rolled into Part 1, the Introduction. New parts and schedules regarding conflicts of interest were added, along with schedules regarding the regime for declaring pecuniary interests. Relevant to the Commission’s investigation, the part on personal benefits became what was now Part 6, and what was clause 5.9 in the 2015 Model Code of Conduct became what was now clause 6.15, with a minor syntactical change:

*You must not take advantage (or seek to take advantage) of your status or position with council, or of functions you perform for council, in order to obtain a private benefit for yourself or for any other person or body.*

On 12 March 2019, IWC adopted the Model Code of Conduct as its own code of conduct but continued to call it the Model Code of Conduct. The relevant provisions remained the same in all respects.

On 25 August 2020, IWC updated its code of conduct but, again, the provisions with which the Commission’s investigation is concerned were unchanged.

IWC’s procurement policy contained a subsection titled “code of conduct” under s 7.1.4 that required, as a general principle:

*all officers perform their duties at the highest standard and that there not be, nor or [sic] seem to be, any conflict between private interests and Council’s responsibilities to the community.*

Section 7.1.4 of IWC’s procurement policy also required staff to act according to IWC’s statement of business ethics. The statement of business ethics referred to IWC’s code of conduct and required staff to act honestly, make decisions solely on merit and never accept gifts for the discharge of duties.

## IWC’s procurement process

On 2 November 2017, IWC adopted a procurement procedures policy setting out the framework for procurement activities and obligations on staff undertaking procurement and a procurement procedures manual (“the procurement manual”) setting out the procurement process. These procedures, along with templates and standardised forms referenced in the procurement manual, were posted on IWC’s intranet page.

The procurement manual, in effect, provided four thresholds of purchase based on estimated value, with increasing procurement procedures for higher tiers:

**Table 1: Expenditure limit table**

Estimated value of purchase (including GST)	Procedure required
\$1 to \$5,000	Market rates
\$5,001 to \$10,000	One written quote
\$10,001 to \$149,999	Three written quotes
Greater than \$150,000	Unless the suppliers are from a prescribed approved panel, full public tender

An update to the procurement manual in September 2020 increased the value threshold over which a procurement required full public tender (“the tender threshold”) from \$150,000 to \$250,000.

The November 2017 procurement procedures manual required a “clear evaluation process” be established for selecting a preferred supplier for all procurements of an estimated value in the ranges of \$10,001 to \$149,999. Such procurements were to be evaluated by at least two IWC officers in accordance with the agreed criteria. Final sign-off was then required in accordance with relevant delegations. For procurements with an estimated value over \$150,000 additional tender panel processes applied, unless three quotes were obtained from suppliers

on a prescribed approved panel. Even when below the tender threshold, IWC staff were directed to use the approved suppliers “wherever practical and considering best value for money”.

The September 2020 procurement procedures manual retained the above procedures, increased the “tender threshold” to \$250,000 and required that a “Vendor Panel must be used to source all quote (sic) over \$10,000”.

IWC’s procurement policy specifically prohibited order splitting.

### Contractors awarded IWC projects

The Commission’s investigation into the conduct of Mr Nguyen while working at IWC involved a number of contractors that were awarded IWC building projects, as summarised in the following table:

**Table 2 : Contractors awarded IWC building projects, assisted by Mr Nguyen**

Time period	Contractor
2016-2017	Innocon Pty Ltd (Monty Nguy)
2017-2020	Constructicon (Monty Nguy)
2017-2019	SDL Project Solutions Pty Ltd (Seng Du Laphai, Monty Nguy)
2019	JTG Services (Nima Abdi)
2016-2017	Sanber Group (Raja Sanber, Nima Abdi, Tony Nguyen)
2018-2020	Marble Arch (Aidan Cox)

### TfNSW and Sydney Trains

TfNSW is the umbrella agency of all NSW transport authorities under the Department of Transport. It is a corporation constituted under the *Transport Administration Act 1988*. One of the functions of TfNSW is the planning, oversight and delivery of NSW transport infrastructure. TfNSW does not directly employ staff; instead, it acquires personnel services from the Transport Service of New South Wales, the service that employs the state government’s public transport sector. However, for convenience, TfNSW personnel will be referred to as TfNSW employees in this report. At all relevant times for the purposes of the matters investigated by the Commission, TfNSW was a public authority and its personnel were public officials for the purposes of the ICAC Act.

Sydney Trains is a corporation constituted by s 36 of the *Transport Administration Act 1988*. Under s 3G of

the *Transport Administration Act 1988*, TfNSW may, for the purpose of exercising its function, give directions to Sydney Trains. Sydney Trains is the operator of rail services in the metropolitan Sydney area and one of its functions is the management and maintenance of rail assets. At all relevant times for the purposes of the matters investigated by the Commission, Sydney Trains was a public authority and its employees were public officials for the purposes of the ICAC Act.

### TfNSW code of conduct

TfNSW’s code of conduct dated September 2013 set standards of professional conduct and obliged its staff to act in the public interest. Relevant to the Commission’s investigation, Part 3.7 of the September 2013 TfNSW code dealt with conflicts of interest and provided, among other things, that:

*Staff must identify any conflicts of interest that they have. They must declare any conflicts following the procedures in the Conflicts of Interest Policy. They must:*

- 1. Work out a method for managing the conflict with their manager*
- 2. Have this registered*
- 3. Monitor the conflict and comply with the method for managing it.*

*If a conflict of interest exists, the staff member must declare it in writing to their manager as soon as practical.*

Part 3.8 set out obligations of staff to manage, report and register gifts and benefits in the course of their duties. In particular, “[s]taff may not ask for gifts, benefits or hospitality” and “staff must report all offers of gifts which are more than token gifts and all attempts at bribery”.

Part 3.14 dealt with secondary employment. Relevantly:

*Staff must obtain written approval from their Deputy Director General or the Director General prior to accepting employment in addition to their Transport for NSW position. Similarly, written approval is required to operate a business or a private practice in any trade or profession, or obtain a public passenger vehicle accreditation or authority while employed by Transport for NSW.*

...

*Approval may be given for employment outside Transport for NSW when no conflict of interest is likely to occur and when the other employment is not likely to adversely impact on a staff member’s ability*

*to perform their duties with Transport for NSW. Staff must not use Transport for NSW equipment in their work for another employer or for their own business.*

Part 3.24 provided that “Breaches of the Code of Conduct may result in disciplinary action. All staff are required to formally acknowledge that they have accessed, read and understood the Code of Conduct and undertake to abide by its principles.” Additionally, Part 3.22 extended potential disciplinary action to breaches of TfNSW policies, including TfNSW’s conflicts of interest policy, the 11 September 2013 version of which provided additional detail to Parts 3.7, 3.8 and 3.14 of the code of conduct. In particular, the policy provided that:

*Staff should not seek or accept any payment, gift, benefit or hospitality intended or likely to influence, or that could be reasonably perceived by an impartial observer as intended to or likely to influence them:*

- *to act in a particular way (including making a particular decision);*
- *to fail to act in a particular circumstance; or*
- *to otherwise deviate from the proper exercise of their official duties.*

Specifically, staff were prohibited from accepting bribes, gifts of money and gifts and benefits exceeding \$100 in value. The policy warned that:

*TfNSW may commence applicable disciplinary action if a person to whom this Policy applies breaches this Policy, including and up to termination of employment.*

*Failure to declare conflicts of interest, gifts and benefits including hospitality (apart from token value) or secondary employment is a breach of the Code of Conduct which may result in disciplinary action up to and including termination.*

In November 2014, the TfNSW code of conduct was updated. It now covered all agencies under the TfNSW umbrella and incorporated more detail from TfNSW’s conflicts of interest policy.

Part 4 of the code set out responsibilities of TfNSW managers, including to “proactively identify situations that may lead to corrupt conduct, and ensure these are managed in accordance with relevant policies and procedures”.

Part 6 dealt with conflicts of interest generally. Like the 2013 code, staff were required to disclose and manage any conflicts of interests:

*Where a conflict of interest may compromise your ability to perform your role in an impartial manner,*

*the matter must be declared in accordance with the Transport Conflicts of Interest Policy – Personal Interests, Secondary Employment; Gifts and Benefits and agency procedures. You must also:*

- *identify methods for managing the conflicts with your manager;*
- *disclose the conflict and arrange for it to be registered on your agency’s Conflicts of Interest Register; and*
- *monitor the conflict and comply with the methods implemented to manage it.*

...

*Failure to disclose a conflict of interest may lead to disciplinary action and may also constitute corrupt conduct as defined in the Independent Commission Against Corruption Act 1988 (NSW).*

Staff were also directed that they “must not misuse [their] position or business information to which [they] have access to secure future employment advantages within and outside [their] agency, or to benefit any other person or organisation”.

Part 7 dealt with gifts and benefits. Relevantly, it directed staff that:

*If you are directly involved in procurement (for example, as a member of a procurement team or Tender Evaluation Panel, or engaged in low-end purchasing), you are prohibited from accepting any gift or benefit from a supplier or potential supplier of goods or services to any transport agency or yourself.*

*You must report attempts of bribery, and the offer and acceptance of certain gifts and benefits in accordance with the Transport Conflicts of Interest Policy – Personal Interests, Secondary Employment, Gifts and Benefits. You are also responsible for ensuring relevant gifts and benefits, including those that are declined, are declared in accordance with your agency procedures so they can be recorded on the agency’s Gifts and Benefits Register.*

Part 8 dealt with secondary employment. Relevantly, it directed staff that:

*When considering secondary employment, you must assess whether it may adversely affect the performance of your transport agency duties and responsibilities, or give rise to a conflict of interest. This applies regardless of whether you are working full time, part time or on a temporary basis. Staff involvement in unpaid Union activities or Union activities for which an honorarium is paid is not considered secondary employment.*

*You must obtain written approval from a delegated officer within your agency before engaging in any form of secondary employment outside of your transport role.*

Part 21 specified consequences for breaching the code:

*You are required to read and understand, to the best of your ability, the Code of Conduct, agency policies and procedures, and undertake to abide by them.*

...

*If you are found to be in breach of this Code of Conduct, you may be subject to disciplinary action, up to and including termination of your employment or contract in accordance with agency policies and procedures.*

*Breaches of the law may also lead to prosecution.*

When the TfNSW code of conduct was updated in September 2015, the above provisions remained the same, except that Part 21 additionally required staff to familiarise themselves with and abide by the Code of Ethics and Conduct for NSW government sector employees. This change and the above provisions carried over to the March 2018, July 2018 and April 2020 revisions of the code of conduct.

## TfNSW procurement process

Part of the Commission's investigation concerned two multimillion-dollar work programs under TfNSW, the Transport Access Program (TAP) and the New Intercity Fleet (NIF) Program. The TAP was aimed at modernising NSW public transport infrastructure and involved, among other things, accessibility upgrades at NSW train stations. The NIF program was intended to replace ageing trains servicing routes from Sydney to the Central Coast, Newcastle, Blue Mountains and South Coast, in preparation for which TfNSW had been commissioning rail corridor and platform modifications since 2016. TfNSW used the managing contractor framework for these infrastructure projects, due to their complexity and risk.

On 6 July 2016, TfNSW entered into a managing contractor framework agreement for the TAP upgrades with two proponents, one of which was Downer. The managing contractor framework agreement listed projects, some to be initiated at the time and more planned for the future, and provided a process for TfNSW to competitively select either of the proponents as managing contractor. The selected proponent for the projects relevant to the Commission's investigation was Downer.

Under the agreement, once TfNSW notified Downer to commence performance of contracted services in respect of a project, the project would undergo phases of design

and investigation through which Downer would, with some collaboration and negotiation with TfNSW, develop a proposal that would include, among other things, a delivery plan and target budget. TfNSW could then choose to notify Downer to proceed based on that proposal and enter into a managing contractor contract ("MCC"). The operative terms of the MCCs for each station upgrade under the TAP were essentially identical.

On 6 December 2017, TfNSW entered into an MCC with Downer for the NIF program. Unlike the TAP, there was only a single MCC for the NIF program. Nonetheless, the operative provisions of the NIF MCC of relevance to the investigation were essentially identical to those of the TAP MCCs.

Under the contractual arrangements for both the TAP and the NIF program, the emphasis was on transparency and collaboration in achieving program objectives. This, in part, was achieved through the formulation of an agreed target budget estimate. Financial risk was shared between the parties. In addition, Downer was entitled to performance incentives based on specified criteria in the contracts.

While Downer, as the managing contractor, was responsible for sourcing subcontractors it wished to engage for reimbursable work, each step of the procurement process had to be submitted to TfNSW for its approval. This included the method of procurement, the evaluation criteria and endorsement of the recommended subcontractor.

## Payments and reimbursements between TfNSW and Downer

Services provided by Downer to TfNSW under the MCCs were divided into three categories: "Design Work" was, as the name suggests, work for which TfNSW paid Downer a "Design Fee". "Preliminaries" included management, planning and quality control, for which TfNSW paid Downer a "Preliminaries Fee". All other work was "Reimbursable Work", which, in general, was to be performed by subcontractors engaged by Downer, with some scope for certain work to be performed by Downer itself and as agreed between the parties. For reimbursable work, Downer was entitled to "Reimbursable Costs" from TfNSW, as well as a "Management Fee", calculated as a capped percentage of reimbursable costs.

Should the total of the design fee, preliminaries, reimbursable costs and management fee (the "Contract Price") go over or under the pre-agreed budget, over-expenditure or savings would be allocated at a ratio of 75 per cent to TfNSW and 25 per cent to Downer. In addition, Downer was entitled, subject to meeting relevant criteria, to up to 2 per cent of the total budget estimate ("TBE") in performance incentives.



## Downer procurement process

The MCCs imposed probity, integrity and ethical requirements on Downer, including adherence with TfNSW's policies and procedures and, more generally, the state government's procurement guidelines and procurement code of practice. Downer was responsible for ensuring these requirements were also reflected in subcontracts to bind subcontractors to the same obligations.

Downer was required to develop a procurement management plan that included all intended subcontracts, and the estimated contract value and tendering method for each subcontract. Prior to approaching the market to procure reimbursable work, Downer was required to submit the procurement method, list of proposed tenderers, and selection methodology to TfNSW. After approaching the market and prior to awarding a subcontract, Downer was required to submit the tender evaluation documentation and make a recommendation to TfNSW for approval.

Any variations to subcontracts also required supporting documentation from Downer and TfNSW approval.

In 2020, Downer introduced an electronic tendering system known as ARCUS through which tenderers completed pre-qualification surveys and submitted documents. One of the required documents is a signed acknowledgement of the NSW Code of Practice for Procurement.

The corruption prevention issues that arise from the way the managing contractor framework agreement was implemented by TfNSW are discussed in chapter 14.

## Relevant TfNSW infrastructure projects

The Commission's investigation into the conduct of TfNSW, Sydney Trains and Downer employees concerned the infrastructure projects set out in Table 3 on page 24.

## Relevant persons and related entities

### Mr Nguyen (RJS Infrastructure, ASN Contractors, Sanber Group)

Mr Nguyen commenced work at Leichhardt Council in June 2015 as a senior project engineer. Prior to that, he worked as a site engineer for a project that was part of the Glenfield Junction Alliance, during which he met Mr Cox, Mr Abdi and, through Mr Abdi, Mr Sanber.

Following the amalgamation of Leichhardt Council with other councils to form IWC, Mr Nguyen was appointed to the position of property project manager in IWC's properties, major building, projects and facilities group. His role focused on project management for building works, in contrast to his previous role that focused on project management for civil works.

Mr Nguyen was a silent partner of Sanber Group. It was incorporated in 2015 to act as an IWC contractor (see chapter 4) and was also awarded work on the Victoria Street Station TAP upgrade project ("Victoria Street Station") (chapter 5).

While still in his IWC role, in June 2018, Mr Nguyen incorporated and became the sole director of RJS Infrastructure. The company was used to tender for Downer subcontracts, with its first being for the Central Station NIF upgrade works ("Central Station") in 2018 (see chapter 6). Mr Cox was registered as a 50 per cent shareholder on 27 June 2019.

Mr Nguyen was also one of the controllers of ASN Contractors, along with Mr Abdi and Mr Sanber, with Mr Nguyen's wife being recorded as the director on ASIC records. Mr Nguyen, Mr Abdi and Mr Sanber used ASN Contractors to bid for a TfNSW contract to rectify defects in a commuter car park at Glenfield Transport Interchange as part of the Glenfield Junction Alliance program, which is explored in chapter 2.

On 28 September 2020, Mr Nguyen resigned from his position at IWC following internal disciplinary action relating to his role in the irregular procurement of construction works.

### Monty Nguy (Innocon, Constructicon)

Mr Nguy was a friend of Mr Nguyen's from when they both attended the same university. In 2019, Mr Nguyen, Mr Nguy and others became partners in a café business in Liverpool.

Mr Nguyen first approached Mr Nguy for a quote for IWC work in around August 2016, when Mr Nguy was one of the directors of Innocon. Mr Nguyen awarded a total of \$174,343 (excluding GST) of IWC work to Innocon (see chapter 4).

After Mr Nguy left Innocon in April 2017, he created and was the sole director of Constructicon. Mr Nguyen then introduced Constructicon as a supplier to IWC, ultimately awarding to Constructicon \$1,071,168.42 (including GST) of IWC work (see chapter 4). Constructicon also subcontracted with RJS Infrastructure in connection with the TfNSW TAP upgrade project at Kingswood Station ("Kingswood Station") (see chapter 8).

**Table 3 : Relevant TfNSW projects**

Time period	Project	Relevant persons	Relevant contractor
2013 to 2015	Glenfield Transport Interchange multi-storey car park defect rectification (as part of the Glenfield Junction Alliance TAP)	TfNSW project manager: Nima Abdi	ASN Contractors
2015 to 2017	Victoria Street Station TAP upgrade	TfNSW project manager: Nima Abdi Downer project manager: Andrew Gayed	Sanber Group
2018	Central Station NIF upgrade	Downer project manager: Abdal Aziz	RJS Infrastructure
2019	Lithgow Station NIF upgrade	Downer project manager: Abdal Aziz	RJS Infrastructure
2019	Kingswood Station TAP upgrade	TfNSW project manager: Nima Abdi Downer project engineer: Sairam Pilli	RJS Infrastructure
2019	Sydney Trains Macdonaldtown Station stabling yard upgrade	Sydney Trains project manager: Benjamin Vardanega	RJS Infrastructure
2019	North Strathfield Station TAP upgrade	Downer project manager: Kevin Watters	RJS Infrastructure
2020	Wollstonecraft Station TAP upgrade	TfNSW representative: George Panagakis Downer project manager: Andrew Gayed Downer construction manager: Kevin Watters	RJS Infrastructure
2020	Banksia Station TAP works	Downer project manager: Vlad Stanculescu	Dalski Pty Ltd
2020	Birrong Station TAP works	Downer construction manager: Vlad Stanculescu	Dalski
2020	Glenbrook Station TAP upgrade	Downer project manager: Andrew Gayed Downer senior project engineer: Benjamin Vardanega	ProjectHQ Pty Ltd

### Seng Du Laphai (SDL Project Solutions)

After Mr Nguy left Innocon, he also worked for a period from about April 2017 at SDL Project Solutions Pty Ltd (“SDL”). The sole director of SDL at the time was Mr Laphai. With Mr Nguy, Mr Nguyen brought Mr Laphai into his IWC procurement scheme and ultimately awarded SDL a total of \$1,606,464.24 (including GST) worth of IWC work (see chapter 4).

SDL also subcontracted for work in connection with the TfNSW Victoria Street Station project (see chapter 5).

Mr Nguyen’s relationship with Mr Laphai deteriorated in 2019 and Mr Nguy left SDL at around the same time.

### Mr Cox (Marble Arch, RJS Infrastructure)

In 2017, Mr Cox created and was at all times the sole director of Marble Arch. Mr Nguyen ultimately awarded Marble Arch a total of \$750,788.93 (including GST) worth of IWC work (see chapter 4).

In 2019, Mr Nguyen sought Mr Cox’s expertise in assisting the delivery of the TfNSW Lithgow Station NIF

upgrade civil works (“Lithgow Station”) (see chapter 7), which RJS Infrastructure was subcontracted to deliver. After delivering the project, Mr Nguyen offered Mr Cox a 50 per cent shareholding in RJS Infrastructure. RJS Infrastructure went on to subcontract with Downer for work on the Kingswood Station project (chapter 8), North Strathfield Station TAP upgrade (“North Strathfield Station”) (chapter 9) and the Wollstonecraft Station project (chapter 11). RJS Infrastructure also was awarded the civil works subcontract on the Sydney Trains Macdonaldtown Station stabling yard upgrade (“Macdonaldtown Station”) by TCQ Construction (“TCQ”)(chapter 10).

### **Mr Abdi (ASN Contractors, Sanber Group, RJS Infrastructure, JTG Services)**

Mr Abdi commenced employment with TfNSW in October 2011. At the times relevant to the Commission’s investigation, Mr Abdi acted as a project manager. This included during the Glenfield Junction Alliance program, where he met Mr Sanber, who worked under him as project engineer, Mr Nguyen, and Mr Cox. As project manager, Mr Abdi could sit on tender committees, recommend tenderers and access internal TfNSW information.

In 2014, Mr Abdi, Mr Sanber and Mr Nguyen created a company to tender for TfNSW engineering and construction work. The company was initially named TRN Contractors Pty Ltd after the first letters of Tony, Raja and Nima, but, due to an intellectual property issue, was subsequently named “ASN Contractors Pty Ltd” after the first letters of Abdi, Sanber and Nguyen. Although ASIC records showed Mr Nguyen’s wife as the sole director and shareholder, Mr Abdi, Mr Sanber and Mr Nguyen acted as “shadow” directors and executed a partnership agreement to document their unregistered equal shares in the company.

ASN Contractors was deregistered in March 2016.

Mr Abdi was, along with Mr Nguyen, also a silent partner of Sanber Group, which was an IWC contractor (see chapter 4) and also was awarded work on the Victoria Street Station project (chapter 5).

After the Sanber Group relationship broke down in 2018, Mr Nguyen incorporated RJS Infrastructure, deliberately capitalising on the reputation of Sanber Group’s trading name, RJS Civil. Mr Abdi was, once again, a silent partner and, with the assistance of Mr Aziz, was able to win contracts for TfNSW work, starting with the Central Station project (chapter 6).

Mr Abdi was also a shadow director of JTG Services. Although Mr Abdi’s spouse was officially the sole

director and shareholder on public records, in practice, the company was treated as a shell company for Mr Abdi to receive funds from the TfNSW projects with which he was involved. Mr Abdi also used his spouse and JTG Services in two schemes, one with Mr Aziz and one with Mr Aziz and Mr Panagakis, to receive payments from Downer for no work (see chapter 12).

Mr Abdi’s employment with TfNSW was terminated on 17 August 2022 following an internal investigation.

### **Raja Sanber (ASN Contractors, Sanber Group)**

Mr Sanber was a project engineer and then a project manager at TfNSW. As has been discussed, Mr Sanber met Mr Abdi and Mr Nguyen during the Glenfield Junction Alliance program.

Mr Sanber incorporated Sanber Group in October 2015 and had sole control over its bank account. It was suspicion over his control and manipulation of this account that led to Mr Sanber falling out with Mr Abdi and Mr Nguyen.

Mr Sanber’s employment with TfNSW was terminated on 10 September 2021 following an internal investigation.

### **Abdal Aziz (Tresca Pty Ltd)**

Mr Aziz, also known as Abd Alaziz A-Aziz, was, until June 2020, a project manager at Downer. He was a close friend of Mr Abdi, having attended the same university, where they completed their engineering degrees. Their families are friendly with each other and, in 2015, the two contemplated purchasing land together. Mr Abdi assisted Mr Aziz to gain employment as a project manager at Downer by supplying a glowing but false reference.

Mr Aziz’s first job at Downer was on the Victoria Street Station project (chapter 5), and it was his cooperation and intervention at Downer that allowed Sanber Group to contract for those works. Mr Aziz was also involved with Mr Abdi and Mr Nguyen on the Central Station (chapter 6) and Lithgow Station (chapter 7) projects. He did this in part using his consultancy company, Tresca, which he had transferred to his wife to avoid declaring the association to his employers.

Mr Aziz also, in September 2019, registered Mr Abdi’s wife and Mr Panagakis with the recruitment agency Chandler Macleod, to enable them to be paid for work for Downer on TfNSW projects in the absence of any work being performed. In a separate scheme with Mr Abdi, Mr Aziz was also the delegated authority who approved invoices submitted by JTG Services despite no work being performed. These two schemes are detailed in chapter 12.

### Mr Vardanega (ProjectHQ)

Mr Vardanega commenced employment with Downer in October 2018 as a senior project engineer, working on a TAP project at Glenbrook Station (“Glenbrook Station”) (chapter 3). There, he met Mr Gayed, who was the project manager and his supervisor.

Between 8 April 2019 and 1 October 2019, Downer contracted ProjectHQ to supervise works in the Glenbrook Station project.

From 1 April 2019, ProjectHQ was contracted by a recruitment agency to act as a project manager for Sydney Trains, first in a full-time capacity to 1 June 2019, then in a part-time capacity from 3 June 2019 to 28 December 2019. While contracted part-time with Sydney Trains, ProjectHQ was also contracted by ARCH Artifex, which is where Mr Vardanega met Mr Cox. Mr Vardanega, in his Sydney Trains role, awarded contracts worth a total of \$64,133 (excluding GST) to Mr Gayed through Mansion Building Pty Ltd. Mr Vardanega’s conduct at Sydney Trains is detailed in chapter 10.

From 2 December 2019, Mr Vardanega was contracted through ProjectHQ with TfNSW. His involvement with Mr Cox in the Wollstonecraft Station project is detailed in chapter 11.

### Mr Gayed (Mansion Building, AVCO Construction, Consulting and Management Services Pty Ltd)

Mr Gayed was a project manager for Downer, including for the Wollstonecraft Station project (see chapter 11). From 12 December 2013 to 3 September 2018, Mr Gayed was the sole director of Mansion Building. Although public records show that Mr Gayed sold Mansion Building in September 2018 after his building licence was suspended by the NSW Civil and Administrative Tribunal, Mr Gayed still had access to his Mansion Building email address, through which he worked with Mr Vardanega to be awarded Sydney Trains contracts. This conduct is detailed in chapter 10.

The director of AVCO Construction, Consulting and Management Services Pty Ltd (“AVCO”) is Mr Gayed’s father. Mr Gayed is listed as an officeholder. Mr Gayed had access to the public-facing AVCO email account. Mr Gayed also included AVCO as a potential subcontractor for the Wollstonecraft Station project. This conduct is detailed in chapter 11.

Mr Gayed ceased employment with Downer on 12 April 2021.

### Sairam Pilli

Mr Pilli was the Downer project engineer for the Kingswood Station project. He assisted RJS Infrastructure to be awarded by Downer a total of \$892,490 (excluding GST) of work on the Kingswood Station project. This conduct is detailed in chapter 8.

### Kevin Watters

Mr Watters was the Downer project manager for the North Strathfield Station project. His conduct in relation to this TAP project is detailed in chapter 9.

### George Panagakis

Mr Panagakis was a project manager at TfNSW, including for the Wollstonecraft Station project. His conduct in relation to this TAP project is detailed in chapter 11.

Mr Panagakis also participated in a scheme with Mr Aziz and Mr Abdi to be registered with Chandler Macleod to be paid wages for TfNSW projects without any work being performed. This conduct is detailed in chapter 12.

### Vlad Stanculescu

Mr Stanculescu was the Downer project manager for the Banksia Station TAP project (“Banksia Station”) and the commissioning manager for the Birrong Station TAP project (“Birrong Station”). One of the contractors for those TAP projects was Dalski. Mr Stanculescu was close friends with Dalski’s business development manager. Mr Stanculescu’s conduct in relation to the Banksia Station project, the Birrong Station project and Dalski is detailed in chapter 11.

Mr Stanculescu resigned from Downer on 17 November 2021. He is currently employed as a project manager at Dalski.

## Witness credibility

During the course of this investigation, the Commission heard evidence from a large number of witnesses, many of whom gave evidence on more than one occasion. In determining the credibility of a witness and the evidence they gave, the Commission has had regard to independent or objective evidence against which the credibility of witnesses may be assessed, including contemporaneous notes or other records, such as emails and text messages, telephone intercepts, evidence given by disinterested witnesses, the incontrovertible facts and the probabilities involved. In addition, the Commission considered other factors, including the responsiveness or otherwise of answers, a reluctance or otherwise to make appropriate concessions; whether the evidence given was directly or

in an obfuscatory manner; and whether the witness was cooperative or argumentative.

Assessments as to witness credibility and reliability are important factors for the Commission to consider in properly weighing the evidence and making findings of fact that are available on that evidence. Witness assessments are included in the relevant chapters of this report.

## Non-publication direction

On 20 March 2023, the Commission made a direction on an interim basis pursuant to s 112 of the ICAC Act. This direction prohibited the publication or other communication of the name of George Panagakis, a witness in the public inquiry, subject to specified exceptions.

Following the receipt of evidence and more detailed submissions, the Commission made a further direction on 11 April 2023 in the following terms:

*Being satisfied that it is in the public interest to do so, the Commission hereby directs pursuant to s 112 of the Independent Commission Against Corruption Act 1988 that all references to George Panagakis in relation to Operation Hector shall not be published or otherwise communicated to anyone, until further order of the Commission, except by Commission officers for statutory purposes and between witnesses, their legal representatives and other parties who have sufficient interest in the subject matter of the investigation for the purpose of receiving or providing legal advice and representation in relation to the appearance, or reasonably anticipated appearance of the witness at the public inquiry in Operation Hector, or pursuant to further order of the Commission.*

*This direction does not apply to:*

- *the making of a complaint to the Inspector of the Commission or disclosure of information, documents or other things to the Inspector; or*
- *the publication of any evidence, contents of a document or information to a registered medical practitioner or registered psychologist for the purposes of that health practitioner providing medical or psychiatric care, treatment or counselling, including but not limited to psychological counselling, to a person who has given or may be about to give evidence at public inquiry*

In making this direction, the Commission acknowledged that there was force in Counsel Assistings' earlier submission that the non-publication direction does not extend to the report to Parliament under s 74 of the

ICAC Act ("the report"). However, as the witness had not specifically sought a direction in respect of the report, the Commission declined to address the issue, leaving the matter for final submissions in the event that a further direction was sought.

On 4 July 2023, a further direction under s 112 of the ICAC Act was made, prohibiting publication or other communication of all submissions in Operation Hector, again subject to some specified exceptions.

It suffices to state that the issue of extending the non-publication of the witness' name in the report was not addressed in final submissions. However, the witness' solicitor did subsequently make such an application and the Commission granted leave, directing that any application and written submissions not exceeding four pages in length be submitted by 18 December 2023.

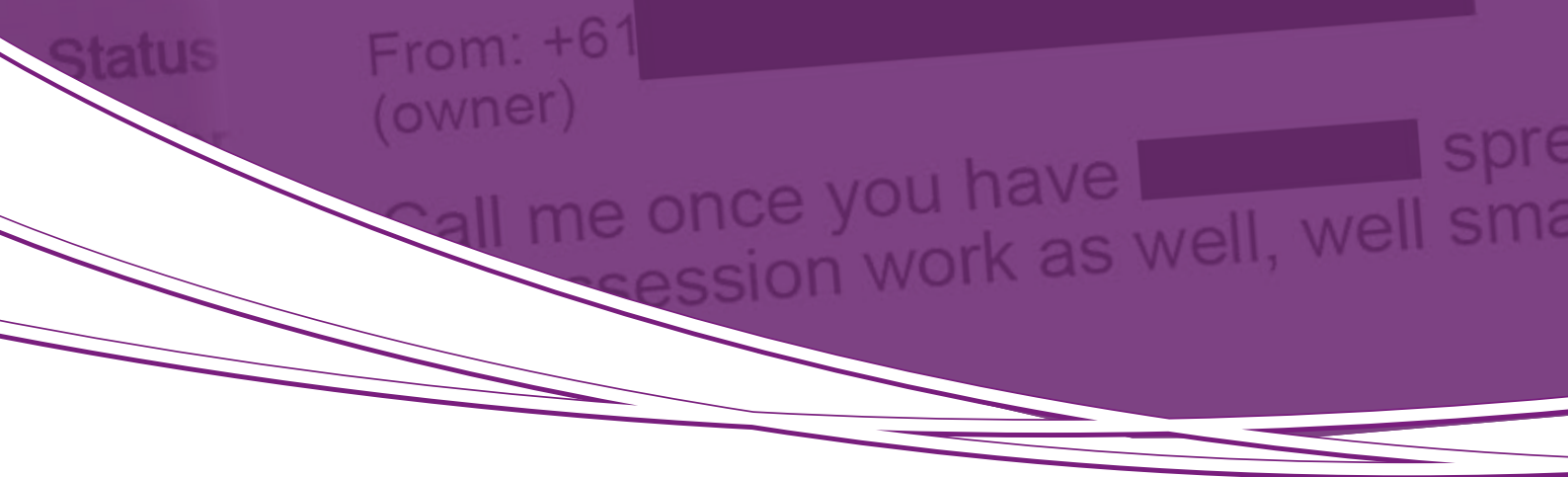
The submissions argue that, in light of the previously considered information, the inclusion of the witness' identity within the report could have severe and serious consequences. It was further argued that this needs to be evaluated in the context of the broader matters of public interest as stipulated under s 31(2) of the ICAC Act and that, while the allegations investigated in the public inquiry were of some importance, they were not of central importance.

Counsel Assisting previously submitted that, if at the close of the public inquiry and submissions the witness was found to have engaged in corrupt or potentially criminal conduct, then he would need to be named in accordance with s 74 and 74A of the ICAC Act.

It is now evident that, with respect to the witness, one finding of corrupt conduct is made (detailed in chapter 11) as well as a determination to obtain the advice of the Director of Public Prosecutions (DPP) as to potential prosecution for offences under s 192E of the *Crimes Act 1900* ("the Crimes Act") and s 87(3) of the ICAC Act (detailed in chapter 12).

There may be doubt as to the capacity of the Commission to make a direction of the kind sought where a person is subject to a finding of corrupt conduct and is an affected person to which a statement under s 74A(2) of the ICAC Act is required. In its terms, s 112 of the ICAC Act does not appear to extend to such circumstances. Further, s 13(5)(a) of the ICAC Act states that corrupt conduct findings are made in respect of the conduct of "particular persons". Section 74BA of the ICAC Act states that a corrupt conduct finding is made in respect of a "specified person".

Assuming that a discretion nonetheless exists, s 112(1A) of the ICAC Act provides that a direction is not to be given unless the Commission is satisfied that it is necessary or desirable in the public interest.



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As the Commission foreshadowed when making its direction on 11 April 2023, the public interest considerations may well change at the point when the report is presented to Parliament. In this instance, the witness has concluded his evidence and made submissions, and the Commission has made its findings and expressed its opinion. No case of “undue prejudice” has been advanced. Moreover, the Commission must remain mindful of the principal objects as expressed in s 2A of the ICAC Act, its principal functions as expressed in s 13 of the ICAC Act and the requirement of s 12 of the ICAC Act that, in exercising its functions, the public interest and prevention of breaches of public trust is of paramount concern.

The Commission acknowledges the witness’ circumstances that led the Commission to make the earlier directions. While it accepts the matters advanced on the witness’ behalf, it is not satisfied that, on a broad evaluation of public interest including the matters referred to, it has been demonstrated that it is necessary or desirable to make the further direction sought.

## Chapter 2: A question of jurisdiction

One issue requiring resolution is whether, and, if so, in what circumstances, the conduct of Downer employees may come within the Commission's jurisdiction. In particular, it was submitted on behalf of one of those employees, Mr Watters, that his conduct in receiving money from a contractor whom he arranged to be engaged by Downer to undertake work for TfNSW could not amount to corrupt conduct under s 8(2A) of the ICAC Act. The conduct in question is detailed in chapter 9.

The issue is of significance more broadly as Counsel Assisting has sought to rely on s 8(2A) of the ICAC Act to provide jurisdiction for the Commission to make findings of corrupt conduct in circumstances where Downer subcontracted with third parties. It is for this reason that the matter raised is dealt with at this stage of the Commission's report.

### The status of Downer

For the purposes of s 3 of the ICAC Act, Downer is not a "public authority" because it does not come within any of the defined categories set out in that section of the ICAC Act.

Further, the Commission accepts that, in relation to the matters dealt with in this investigation, Downer employees or position holders are not "public officials" because they are not "an individual having public official functions or acting in a public capacity" as defined in s 3 of the ICAC Act, nor are they captured by the non-exhaustive list of those individuals who fall within that definition in s 3 of the ICAC Act.

### Can Downer employees come within the Commission's jurisdiction?

Even though Downer's employees are not "public officials", their conduct may, in certain circumstances,

come within the Commission's jurisdiction. Conduct that comes within s 8(1)(a), s 8(2) and s 8(2A) can be conduct of a person who is not a public official and may be corrupt conduct if it also could constitute or involve any of the matters set out in s 9(1) of the ICAC Act.

Section 8(2A) provides:

*Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters –*

- (a) *collusive tendering,*
- (b) *fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,*
- (b) *dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,*
- (b) *defrauding the public revenue,*
- (b) *fraudulently obtaining or retaining employment or appointment as a public official.*

Section 8(2A) of the ICAC Act was inserted into the ICAC Act in 2015 by the *Independent Commission Against Corruption Amendment Act 2015* (NSW). This was the legislative response to the recommendations contained in the 30 July 2015 *Report of the Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*, which was authored by the Hon Murray Gleeson AC and Bruce McClintock SC ("the Independent Panel Report"). That report was commissioned in response to the High Court decision in *ICAC v Cunneen* (2015) 256 CLR 1.

The second reading speech of Premier Mike Baird that accompanied the passing of the *Independent Commission Against Corruption Bill 2015* (NSW) contained the following information as to the expanded purpose of s 8(2A) of the ICAC Act (emphasis added):

*The new subsection will enable the ICAC to investigate those specified matters even if they involve no wrongdoing or potential wrongdoing on the part of any public official but could nevertheless seriously undermine confidence in public administration.*

**As the [independent] panel noted in its report, the nature of the matters listed “should be sufficient to indicate that the confidence referred to is not confined to faith in the probity of individual public officials”....**

The Independent Panel Report stated that it considered that, following the High Court’s decision in *Cunneen*:

*...consistently with the reasons advanced for the establishment of the ICAC and the conferral of its extraordinary powers of investigation, the scope of the jurisdiction of the ICAC could be extended beyond that as defined by Cunneen by taking a fresh approach to the identification of that kind of corrupt conduct that does not involve wrongdoing on the part of a public official. This approach could be based on the concept of conduct that undermines or could undermine confidence in public administration.*

## Mr Watters’ submissions

Mr Watters submitted that the conduct in question was between him, his employer (Downer) and a third party (RJS Infrastructure). In those circumstances, it was contended that Mr Watters’ conduct was not conduct that “impairs” or “could impair” the “confidence in public administration”, nor was it conduct where Mr Watters “obtained”, “assisted in obtaining” or “benefitted from” any “payment or application of public funds” or any “disposition of public assets” because:

- Mr Watters was employed by Downer, to whom he owed fiduciary obligations. His employment contract and fiduciary obligation would have prohibited him from obtaining any fee in breach of that obligation. It was only Downer that would have any right of recourse against him for the \$8,000.
- The contract under which Downer had to perform certain works for TfNSW was a contract that legally entitled Downer to funds pursuant to a contract. What Downer sought to do with those funds, including using them to pay employees or contractors, was a matter for Downer. They were not “public funds”.

These submissions, and the issue more broadly, require consideration of the terms “impairs”, “public administration” and “public funds” as they appear in s 8(2A).

According to the *Macquarie Dictionary* 5th edition, the definition of “impair” is to “make worse” or “damage” or “to alter for the worse”.

In relation to “impairing public confidence”, the Independent Panel Report stated the following:

*The expression “could impair public confidence” is intended as a reference to the tendency of the conduct arising from its nature or the circumstances in which it occurs, and not as a factual prediction of its likely consequence. The Panel takes this to be consistent with the use of the expression “could adversely affect” in section 8(1)(a) [of the ICAC Act].*

The Commission accepts that whether conduct could “impair public confidence” involves an assessment of the capacity of the particular conduct to adversely influence the public’s perception of “public administration”.

“Public administration” is referred to in s 2A and s 13 of the ICAC Act. The contextual references contained in those sections suggest that the concept of “public administration” is linked to the probity, integrity or accountability of public authorities and public officials and their conduct in administering the mechanisms of government. However, as noted by the Independent Panel Report above, s 8(2A) of the ICAC Act was intended to extend the Commission’s jurisdiction to cover certain conduct that “does not involve wrongdoing on the part of a public official”. In those circumstances, it would not be appropriate to construe “public administration” as only relating to the “probity, integrity or accountability of public authorities and public officials” because that would unnecessarily restrict the intended ambit of s 8(2A). A clearer definition of “public administration” can be inferred from the Independent Panel Report, which cited “the justification that has always been advanced for the creation of a body with the extraordinary powers given to the ICAC: it is there to protect and maintain the integrity and reputation of the *apparatus of government*” (emphasis added).

The Commission accepts Counsel Assistings’ characterisation that the relevant public administration for the purposes of this investigation is the oversight of the tender processes and contract administration by TfNSW; the administration and oversight of procurement processes by Sydney Trains; and the oversight of contract administration by Sydney Trains.

In general, the Commission does not accept that the conduct of a Downer employee agreeing to ensure a contractor engaged by Downer was recommended to TfNSW for a TfNSW public infrastructure project,



in return for the employee being provided with a benefit by that contractor, could not impair public confidence in public administration.

Peter Church, Head of Rail Delivery for TfNSW, gave evidence at the public inquiry. He said that TfNSW relied on Downer to perform due diligence in relation to subcontractors. Within the framework of the MCC, Mr Church did not know how TfNSW monitored Downer's compliance with its probity requirements, beyond the review and acceptance of the procurement management plans (or the tendering probity plans) by TfNSW's representative. Mr Church conceded that TfNSW's probity monitoring procedures in respect of the MCC were limited and effectively reliant on self-reporting by Downer.

Downer employees who are engaged in arranging the appointment of contractors hold a position of trust within Downer. Any dishonest agreement Downer employees made with such contractors involves a significant breach of that trust, given the obligations imposed on Downer under the MCC to ensure that its dealings with subcontractors demonstrated probity, integrity and accountability. It follows that such conduct has the capacity to impair the public's confidence of the probity, integrity or accountability of TfNSW's dealings with Downer under the MCC.

Section 8(2A)(c), however, also requires the involvement of "public funds" or "public assets".

The term "public funds" appears in s 8(2A)(c) of the ICAC Act but does not appear elsewhere in the Act. Construction of the term has not attracted judicial consideration. The Commission considers that the natural and ordinary meaning of the term, having regard to its context and the principal objects of the ICAC Act, refers to money, being from public sources, held or dispensed in the course of public administration.

Pursuant to clause 1.1 of the MCC, "Reimbursable Work" is defined as the entirety of the contractor's (that is, Downer's) activities other than the "Design Work" and the "Preliminaries". Unless otherwise agreed, "Reimbursable Work" must be performed by subcontractors under "approved subcontract agreements" that will be made between Downer and the subcontractors in accordance with the procedure in clause 7: clause 7.1(a).

"Reimbursable Costs" is defined by clause 1.1 of the MCC to mean the aggregate of various costs and/or liabilities incurred by Downer, including relevantly in respect of "Reimbursable Work other than Self-Performed Reimbursable Work, all amounts properly and actually incurred and payable by the Contractor to Subcontractors for the performance of Reimbursable Work in accordance with the Approved Subcontract Agreement".

"Subcontractor" means any person (including a supplier) engaged by Downer to perform any part of the reimbursable work. "Subcontract" includes an agreement for supply of goods or services (including professional services and plant hire) or both: clause 1.1. In clause 1.2(v), unless the context otherwise requires, the word "Subcontractor" will include subcontractors, suppliers, and consultants and subcontractors, and the word "Subcontract" will include a contract with a subcontractor (including an approved subcontract agreement).

"Approved Subcontract Agreement" means an agreement that is entered into by Downer with a "Subcontractor" on the terms that have been approved in writing by TfNSW's representative under clause 7.7(a)(i).

By clause 2.1(a)(vi) of the MCC, Downer warrants that it will exercise a duty of utmost good faith to TfNSW in performing the following obligations:

- (a) *the preparation of the Subcontract Tender Documentation for the Reimbursable Work and in all post-tender communications (verbal or otherwise) with tenderers prior to the entry of an Approved Subcontract Agreement (where applicable);*
- (b) *the administration of Approved Subcontract Agreements including all negotiations concerning Variations and extensions of time; and*
- (c) *in making payment claims under clause 11.2.*

"Subcontract Tender Documentation" in relation to a subcontract proposal means:

- (a) *the Design Documentation, which Downer is entitled to use for tendering purposes under clause 9.8(e), relevant to the part of the Reimbursable Work to be subcontracted;*
- (b) *the conditions of the subcontract agreement which must, unless otherwise expressly directed in writing by TfNSW's representative, be on the terms approved by TfNSW's representative;*
- (c) *if TfNSW's representative so directs, a request for tender; and*
- (d) *any other documentation necessary for that part of the Reimbursable Work to be subcontracted.*

"Subcontractor Proposal" means a document issued by Downer under clause 7.2.

Clause 7 of the MCC contains terms relating to reimbursable work. This includes a requirement for Downer to ensure all subcontract tender documentation is prepared and all tender processes for reimbursable work are conducted (i) on terms which maximise value for money for TfNSW, and (ii) with the highest standards of

probity, fairness and equal opportunity in accordance with the tendering probity plan: clause 7.1(d).

“Tendering Probity Plan” is defined by clause 1.1 of the MCC to mean the tendering probity plan prepared by Downer and finalised under clause 9.8. The tendering probity plan must set out in adequate detail all procedures Downer will implement to ensure the probity and competitiveness of the tender process for reimbursable work is maintained including: (a) the matters specified in Schedule 1; and (b) any other matters required by TfNSW’s representative.

The matters specified in Schedule 1 of the MCC to be included in the tendering probity plan are set out below:

*The appointment of a Contractor’s probity auditor.*

*Procedures to ensure that:*

- (a) *none of the tenderers for any of the Reimbursable Work has any arrangement or arrives at any understanding with any of the other tenderers or with any employee of an association of which any of the tenderers is a member about the work the subject of tender; and*
- (b) *without limitation, no tenderer for any of the Reimbursable Work engages in:*
  - (i) *any discussion or correspondence with any such persons concerning the sum of money it is going to tender as its tender sum; or*
  - (ii) *any collusive tendering with any of the other tenderers or any conduct or any arrangement or arrives at any understanding with any of the other tenderers which in any way could have the effect of reducing the competitiveness of the tender process for the work and increasing the price.*

By clause 7.5 of the MCC, Downer must relevantly:

- (a) *examine and analyse all tenders received;*
- (b) *recommend to TfNSW’s representative which tenderer, if any, should be accepted by Downer (which recommendation will be deemed to include a warranty by Downer that the recommended tenderer has the necessary suitability, reliability, expertise and financial standing to execute the work being subcontracted, that Downer knows of no reason why that tenderer’s tender should not be accepted and that the tenderer’s tender will provide value for money for TfNSW); and*
- (c) *submit together with any such recommendation:*
  - (i) *an evaluation report detailing the Contractor’s assessment of the tenders against the evaluation criteria. ...*

Clause 7.7 contains the terms relating to subcontracts. Clause 7.7(a) provides, *inter alia*, that if TfNSW’s representative approves the Downer’s recommended tenderer, Downer must promptly enter into an agreement with the approved tenderer on the basis of ... the subcontract price approved by TfNSW’s representative.

Clause 7.15(b) requires Downer to carry out the tender process for reimbursable work “so as to ensure the probity and effectiveness of the tender process; and in accordance with the Tendering Probity Plan”.

Payment under the MCC is dealt with under clause 11. Significantly, by clause 11.1(a), subject to clause 17.12 (set off) and to any other right to set-off that Downer may have, TfNSW will pay Downer in progressive payments the reimbursable costs in monthly instalments based on the contract value of the reimbursable work which has been carried out and any applicable reimbursable cost adjustments in the relevant month.

When making payment claims, each claim by Downer must show separately the amounts (if any) claimed on account of the reimbursable costs payable to (relevantly) subcontractors, and set out or attach sufficient details, calculations, supporting documentation and other information in respect of all amounts claimed by Downer to enable TfNSW’s representative to fully and accurately determine (without needing to refer to any other documentation or information) the amounts then payable by TfNSW to Downer under the contract: clause 11.2.

Clause 11.5 of the MCC is titled “Payment on Account”, and provides as follows:

*A payment of moneys under clause 11.4(a) is not:*

- (a) *an admission or evidence of the value of work or that work has been satisfactorily carried out in accordance with this Contract;*
- (b) *an admission of liability; or*
- (c) *approval by the Principal or the Principal’s Representative of the Contractor’s performance or compliance with this Contract, but is only to be taken as payment on account*

When submitting claims for payment under the MCC, Downer must give TfNSW’s representative a statutory declaration in accordance with clause 11.6(c)(i), which requires the inclusion of information confirming payments made to employees and subcontractors: clause 11.8(a) and Schedule 11, Annexure A. The statutory declaration must also include an attachment being a “Schedule of subcontractors paid all amounts due and payable”. If any money is shown as unpaid in the statutory declaration under clause 11.6(c)(i), TfNSW may withhold the money so shown until Downer provides evidence to the

satisfaction of TfNSW's representative that the money has been paid to the relevant persons: clause 11.8(b).

As to the funds used by Downer to pay subcontractor invoices (a form of reimbursable cost), Counsel Assisting submitted that these originated from TfNSW, having been paid "on account" for that specific purpose (clause 11.5), after Downer had shown to TfNSW's satisfaction the separate amounts claimed on account of the reimbursable costs payable to subcontractors (clause 11.2(b)). By clause 2.1(a)(vi)(B) of the MCC, Downer further warranted to TfNSW that it would exercise a duty of utmost good faith in administering approved subcontractor agreements. Downer was also contractually obligated to supply a statutory declaration to TfNSW confirming that all payments that had been made to employees and subcontractors (clause 11.8(a) and Schedule 11, Annexure A). By way of attachment to that statutory declaration, Downer also had to inform TfNSW of all amounts that were due but unpaid to subcontractors, and of any disputed payments claimed by subcontractors (Schedule 11, Annexure A [clause 11.6(c)(i)]).

Counsel Assisting submitted that, within this framework, the money paid by TfNSW to Downer in respect of reimbursable costs, and particularly subcontractor invoices, is analogous to a Quistclose trust, whereby money is paid over for a specific purpose so that it can be said that there is a trust for that purpose and, if that purpose is not fulfilled, there is a trust in favour of the payer.

Counsel Assisting also contended that, within the terms of the MCC, it is evident that the "mutual intention" of TfNSW and Downer and "the essence of their bargain" in relation to reimbursable costs (other than in respect of self-performed reimbursable work) was that the sums advanced should not become part of the assets of Downer but should be used exclusively for payment of subcontractors, namely those with an Approved Subcontract Agreement: *Re Elizabethan Theatre Trust* (1991) 5 ACSR 587 at 595 per Gummow J.

Within terms of the MCC referred to above, the Commission is satisfied that the money paid by TfNSW to Downer in respect of reimbursable costs falls within the descriptor "public money" in s 8(2A)(c) of the ICAC Act. The Commission does not accept that the character of that money changed once received by Downer, particularly in light of the terms of clause 11.5. Apart from Mr Watters, no other party to the public inquiry suggested otherwise.

However, the MCC envisaged that, with some exceptions, reimbursable costs would already have been paid by Downer. Pursuant to the MCC, TfNSW had a discretion to pay Downer if the reimbursable costs

had not been prepaid or, alternatively, could insist on prepayment by Downer.

The Commission does not consider that the Quistclose analogy (described in *Barclays Bank Ltd v Quistclose Investments* [1970] AC 567; [1968] UKHL 4.) is apt in circumstances where the actual funds do not commence from TfNSW. The Commission considers that, in such a case, the question of whether any funds advanced by Downer can be characterised as public funds is less clear. While the issue has been raised in Mr Watters' submissions, the impact extends to other subcontractor arrangements discussed in this report where s 8(2A)(c) has been relied upon. The Commission is conscious that affected parties in these cases have not had the opportunity to make submissions. Accordingly, the Commission is not placed to come to a concluded position on the issue. For the most part, the Commission has been able to rely on other sections of the ICAC Act to make its findings. However, in some circumstances outlined where Counsel Assisting have sought to rely exclusively on s 8(2A)(c) and the source of the payment to subcontractors cannot be determined, the Commission has declined to make a finding of corrupt conduct.

## Non-reimbursable work

A further question arose during the submissions process querying whether the Commission's jurisdiction pursuant to s 8(2A)(c) of the ICAC Act extended to some other payments made by Downer to third parties.

Counsel for Downer submitted that it should not be assumed that all payments made by Downer to third parties were reimbursed by TfNSW, for those amounts may have been paid out of Downer's lump sum "Design Fee" or "Preliminaries Fee", not "Reimbursable Costs". In those circumstances, the money would have come out of the lump sums already required to be paid by TfNSW to Downer under the MCC. It was contended that this "assumption" was arguably evident in the course of the evidence relating to, first, the invoices issued by JTG Services for NIF work (which were approved by Mr Aziz) and, secondly, payments to Chandler Macleod in respect of payments made to Mr Panagakis and Jessica Tosh.

The Commission is not satisfied that it has jurisdiction pursuant to s 8(2A)(c) of the ICAC Act to make any corrupt conduct findings in relation to:

- invoices issued by JTG Services for NIF work, which were approved by Mr Aziz, and
- payments to Chandler Macleod in respect of payments made to Mr Panagakis and Ms Tosh

because the relevant funds as paid by Downer would not constitute "public funds".

The background to these payments is as follows.

As set out in chapter 12, the three invoices that JTG Services submitted to Downer purportedly related to design documents for car markers. The car-marking design documentation referred to in JTG Services' invoices to Downer would, if in fact created, comprise design work or preliminaries under the NIF MCC.

As set out in chapter 12, Chandler Macleod purportedly employed on behalf of Downer both Ms Tosh as a design coordinator and Mr Panagakis as a design manager in respect of the NIF MCC at Hexham.

It is clear from the terms of the relevant MCC that "Design Work" and "Preliminaries" were not part of the "Reimbursable Work" or "Reimbursable Costs" Downer was able to seek from TfNSW.

"Design Work" under the NIF MCC means the design work to be carried out by Downer in designing the works, including the completion of any of the initial design documents and (if applicable) the development of the preliminary design: clause 1.1.

"Preliminaries" means that part of Downer's activities other than the design work or the reimbursable work, including those tasks or matters specified in Schedule 18, which relevantly includes "providing the Contractor's ... site survey staff...".

Contrary to the arrangement that applied in respect of reimbursable costs, it seems the objective intention of the parties in relation to the design fee and the preliminaries fee was that, if Downer was able complete these works within their lump sum budgets, it was able to keep any remaining money. Alternatively, if Downer had to expend more money than was allocated by way of the lump sum payment to complete the design work and preliminaries (other than in respect of variations for design work or design fee adjustments), it would have to bear that additional cost.

Since the payments referred to above relate to non-reimbursable costs, the Commission is not satisfied that s 8(2A)(c) provides a basis for it to make any corrupt conduct findings in relation to those people engaged by Downer to undertake "design work" or work relating to "preliminaries" on TfNSW projects because those funds as paid by Downer would also not constitute "public funds" for this reason.

## Chapter 3: Glenfield Transport Interchange car park rectification work

This chapter examines the involvement of Mr Nguyen, Mr Abdi and Mr Sanber in tendering for the Glenfield Transport Interchange multi-storey car park, which was associated with the South West Rail Link (SWRL) project. In particular, the chapter examines whether they colluded in relation to the tendering for that work, which was awarded to ASN Contractors, a company effectively controlled by them.

The rectification work was carried out as part of TfNSW's TAP, which involved accessibility upgrades at various railway stations, including the provision of car-parking facilities.

### Mr Nguyen, Mr Abdi and Mr Sanber – background

Mr Nguyen obtained a Bachelor of Engineering degree and a Diploma in Engineering Practice, graduating in 2009 from the University of Technology, Sydney. He was employed at Macmahon Constructions from June 2009 to February 2013. During that period, he worked as part of the Glenfield Junction Alliance program, which was a partnership between what is now TfNSW and a number of companies for the design and construction of the Glenfield Junction project.

Macmahon was acquired by the John Holland Group in 2013. Thereafter, Mr Nguyen re-signed as a site engineer with John Holland Group while still working at the Glenfield Junction Alliance program. There, Mr Nguyen also met individuals who worked with Ballyhooly Civil Pty Ltd ("BH Civil").

Mr Abdi obtained a degree in civil engineering from the University of Technology Sydney in 2009. Following graduation, he obtained a job with NSW Public Works, based in Coffs Harbour, before working for engineering company UGL. He commenced employment with the then Transport Construction Authority (TCA) in 2011

as a project engineer and later progressed to the position of project manager. The functions of the TCA were assumed by TfNSW on 1 November 2011.

Mr Abdi received his letter of offer of employment with the TCA around 13 September 2011. During the public inquiry, he asserted that he did not read the employment terms contained in the letter but would have signed the acceptance and dated it in order to start the job. The letter contained clauses noting the need to protect the confidentiality of TCA material and that failure to do so could result in immediate termination. Mr Abdi accepted that, had he read these clauses, he would have understood them.

The letter also contained information about conflicts of interest. Clause 11(a) provided:

- (a) *As an employee of TCA, you will have the benefit of having access to information about our businesses. This means that you are in a position of trust, and this requires you to act in good faith towards us. For instance:*
  - (i) *you must act in TCA's best interests;*
  - (ii) *you must not engage in any business or activity for any competitor, whether as an employee or otherwise, without TCA's prior written approval; and*
  - (iii) *you must use your best endeavours to promote and enhance the business interest of TCA and you must not do anything that may harm TCA's business.*
- (b) *In performing your duties, you:*
  - (i) *Must not, without TCA's prior written consent, act in conflict with our interests*

...

During the public inquiry, Mr Abdi's attention was drawn to this clause. When asked if this was a clause that he

didn't think mattered, he stated, "At the time just, yeah, like, it didn't cross my mind to, like-like, because ... when you're getting the job, you're excited about the job."

Mr Abdi was also required to sign a confidentiality deed poll that required him to warrant and covenant that he would treat and keep confidential information "in the strictest of secrecy and confidentiality", while acknowledging that such information "is of a secret and confidential nature". When pressed, Mr Abdi accepted that, had he read this, he would have understood it. He rejected the suggestion that he didn't want to pay attention to this because he knew it might conflict with his ambitions to engage in activities that were contrary to law.

Although Mr Abdi claimed he did not recall doing so, on 24 October 2011, he signed a declaration including:

*If I become aware of any actual or potential conflict of interest, I will disclose it to the Chief Executive and/or the Probity Auditor at the first reasonable opportunity.*

During his employment, Mr Abdi had undertaken code of conduct online training on 26 September 2017, and fraud and corruption training on 26 April 2018. He did not remember how he participated in online training, but, with face-to-face training, said he would try and pay attention to what was delivered.

In Mr Abdi's senior service declaration with TfNSW, no private interests were recorded. Mr Abdi described these declarations as very confusing, claiming that "if you declared anything police would be at your house, or you would be terminated". He could not identify anyone who had told him this or any instance where this had occurred. He stated that he could not remember completing the form but did not disclose his corporate interests, including in two entities discussed below, being TRN Contractors and ASN Contractors. He accepted that he was doing something wrong by not disclosing these interests to TfNSW.

The Commission is satisfied that, at all relevant times, Mr Abdi understood the requirement to avoid or declare any conflict of interest affecting his work at TfNSW and the importance of maintaining the confidentiality of information to which he became privy as part of his public official duties.

Mr Sanber held a Bachelor of Environmental Engineering as well a certificate IV in Construction Management. Following various positions in the private sector, he commenced work with RailCorp in 2011 as a project engineer. This involved quality management work and the tracking and management of track possessions. While at RailCorp, Mr Sanber was seconded to the Novo Rail Alliance, which was an alliance between RailCorp, Laing O'Rourke and other smaller companies. In this

position, he worked as a quality manager. From July 2013, RailCorp's operation and maintenance function was incorporated into Sydney Trains. From about August 2013, Mr Sanber was employed with TfNSW and worked on the SWRL project.

When transferring to TfNSW, Mr Sanber agreed to its code of conduct and applicable policies and procedures.

Around 2016-17, Mr Sanber became a project manager for the Sydney Light Rail project. In August 2019, he became a project manager within the Parramatta Light Rail project. In these roles with TfNSW, he regularly signed documents acknowledging codes of conduct and codes of ethics. He also completed annual declarations indicating that he had no private interests. In evidence were his declarations completed in December 2016 and November 2017. He stated that, at that time, although a business in which he was involved was contracted to Downer in relation to TfNSW work being undertaken by Downer, he did not perceive any conflict of interest, as he stated there was no ability for him to "have any visibility or undertake any, anything other than the fact that I was working... as a subcontractor". He did not consider that he had to declare perceived conflicts of interest, but only actual conflicts. He accepted that, while working for TfNSW, he was required to undertake training, and that conflicts of interest would have been covered. He also acknowledged that declaration of secondary employment was required not only when he was a member of the Transport Senior Service but also previously in more junior positions.

## Mr Nguyen, Mr Abdi and Mr Sanber meet

Mr Nguyen told the Commission that, towards the end of the Glenfield Junction Alliance program, he met Mr Abdi and, through him, Mr Sanber. Mr Nguyen recalled Mr Abdi as a project engineer from TfNSW and Mr Sanber as working for RailCorp. Based on his observations, Mr Nguyen described Mr Abdi and Mr Sanber as "close and chummy".

Mr Abdi recalled meeting Mr Nguyen at the SWRL project. He said they shared an office at a compound while working on the Glenfield Junction Alliance program. During the project, Mr Abdi also met Mr Sanber (then working for RailCorp). He described that, towards the end of the project, Mr Nguyen, Mr Sanber and himself were very close.

Mr Sanber stated that he first met Mr Abdi when he was working at Novo Rail in around 2012. Gradually, the acquaintance developed into a friendship, which continued until about 2018. He recalled first meeting Mr Nguyen

in about 2014, when he was introduced by Mr Abdi while they were both working at the Glenfield Junction Alliance program.

## Establishment of TRN Contractors/ASN Contractors

TRN Contractors was formed on 11 April 2014, with Mr Nguyen's wife Susan To as the sole director and shareholder. The company's name was changed on 11 August 2014 to ASN Contractors due to what was accepted was an intellectual property issue. As outlined earlier, the new company name aligned with the first initials for Abdi, Sanber and Nguyen.

Mr Nguyen told the Commission that he, Mr Abdi and Mr Sanber were equal partners in the company. He said the "sole purpose" of the company was to get TfNSW work from Mr Abdi. Mr Nguyen believed that Mr Abdi and Mr Sanber had discussed setting up a company and then came to him and said, "Oh how about you run it because you're obviously onsite." Mr Nguyen considered that it was useful to the others for him to be onsite "because it, it doesn't link them (Mr Abdi and Mr Sanber)... cause there would be a conflict of interest to the workplace".

Mr Nguyen described an understanding that the profit in the proposed venture would be evenly split between the three of them. He stated that they each put in \$100 as a share and recalled all three signing a document at an accountant's office, although he did not know where the document now was. They also caused to be created business cards in false names. He used the alias "Anthony Lee", Mr Abdi used "Nick Sandrusi" and Mr Sanber used the aliases "Roger Smith", "Roger Sandy" and "Raj Sandy". The business cards contained contact telephone numbers for each of them.

According to Mr Abdi, it was a collective idea between the three of them to establish the company to bid for TfNSW work. Mr Abdi accepted that he could not be a director of the company because he was working with TfNSW and there was a "conflict or secondary employment" issue.

In his evidence at the public inquiry, Mr Sanber sought to downplay his involvement in the company.

Mr Sanber's evidence was that, about the time Mr Abdi introduced him to Mr Nguyen in 2014, Mr Abdi asked him to assist Mr Nguyen set up a business. He agreed to do so, despite acknowledging that he did not know Mr Nguyen well. He said he did so because he was "a nice guy" and he wanted to prove to himself and others that he had "capacity" to do other things.

He said that TRN was chosen as part of the name of the business because "it was supposed to be similar to our names." He said he was told to change the name to ASN Contractors. He said he was not going to refute the proposition put to him by Counsel Assisting that his initial was part of both acronyms but "I'm not going to say that was the case".

He told the Commission he assisted with setting up the business by organising "logos, templates, policy papers, documentation, project management documentation". He arranged for his wife to design logos for the company, which, on 4 May 2014, he sent to an email address for Ms Tosh (being Mr Abdi's wife), understanding that it was connected to Mr Abdi.

On 4 June 2014, Mr Sanber's wife emailed Mr Sanber artwork for three business cards for TRN Contractors being in respect of "Anthony Lee", "Nick Sandrusi" and "Roger Smith". Mr Sanber said either Mr Abdi or Mr Nguyen requested the cards. He stated that his telephone number appeared on the "Roger Smith" card to give the impression the company comprised more than one person and so that:

*... if someone called, it was, there is another person on the other end answering the call...*

In late 2014, Mr Sanber requested his wife prepare artwork for business cards for ASN Contractors. One of those cards was for "Raj Sandy". He told the Commission that either Mr Abdi or Mr Nguyen asked him to use that name and that he agreed to do so.

While maintaining his position of limited involvement, Mr Sanber's attention was drawn to a letter from Marsdens solicitors, dated February 2015, complaining about the use of a website for TRN Contractors following a change of registration with ASIC to ASN Contractors. This correspondence had been forwarded by Joseph Felice to the email address that Mr Sanber indicated was for himself as well as "Raj Sandy". Mr Sanber acknowledged Mr Felice as a lawyer friend to whom he had referred Mr Abdi for an unrelated matter. Mr Sanber claimed that he did not recall receiving the letter from Marsdens and could not elaborate as to why it would be forwarded or copied to him if he was not involved with the change of name.

There is evidence of an email dated 17 February 2015 from "Raja Sanber" and "Raj Sandy" requesting that the attachment be resent. Mr Felice responded by sending an attachment comprising a draft letter, which Mr Felice advised should be placed on ASN Contractors letterhead and sent to Marsdens, to address the issues raised regarding the TRN Contractors website. Despite this, Mr Sanber maintained that he had no recollection of receiving the emails from Mr Felice. Nor could he explain

why there would be such correspondence with him. He denied giving any instructions to Mr Felice.

Mr Sanber's attention was drawn to an email dated 8 August 2014, sent from his Gmail account to a Mr Di Giulio of Paynter Dixon Constructions, providing an email address, rogersmith@trncontractors, and a password. He acknowledged that he knew Mr Di Giulio but claimed he had no recollection of the matter or the purpose of the email.

Mr Sanber's attention was also drawn to messages extracted from his telephone in which Mr Nguyen asked for the logo for the website to be sent to him. Mr Sanber accepted that he replied sending the logo and that Mr Nguyen forwarded him the password and email address for Raj.Sandy@asncontractors.com.au. He also accepted that Mr Nguyen did so in order that they could potentially be used by him.

Mr Sanber asserted that, although he had no recollection of it, he assumed that he would have helped with drafting the wording for the company website.

Mr Sanber was shown a safe work method statement for ASN Contractors described as being prepared by "Anthony Lee" in consultation with "Raj Sandy" as project engineer. He agreed that he prepared the template for the document, having first done the TRN Contractors ones. He did not recall ever doing an ASN Contractors-specific one but accepted that he did have a template for TRN Contractors that he then tailored to make job-specific. He understood that they would be used by the company to gain work.

It was next put to Mr Sanber that the number and extent of the activities, along with the time that he devoted, would logically indicate that he was a partner in the business. He rejected that proposition.

During the public inquiry, Mr Sanber was taken to the following question and answer from his compulsory examination:

*[Counsel Assisting] Did you have an expectation at the time of providing him with an alias and your phone number that you would at some point receive a financial benefit?*

*[Raja Sanber] At some point yes. But there was no dollar figure expected.*

In the public inquiry, Mr Sanber sought to explain this as follows:

*My recollection of that, that question and the answer was in terms of, I haven't had a chance to read the*

*entirety of it but it was, my response was more in terms of did you, did you expect to get a benefit from, from doing this work not specifically in terms of allowing him to use my phone number and receiving, it was, the, the non-dollar figure was in terms of actually getting a quid pro quo potentially in future...*

Mr Sanber maintained that there was no financial benefit and the way he answered at the compulsory examination wasn't appropriate to the words used.

For reasons that appear below, the Commission is satisfied that TRN Contractors, which became ASN Contractors, was jointly established by Mr Nguyen, Mr Abdi and Mr Sanber for the purpose of bidding for TfNSW work, with the intention they would each benefit financially from that work.

## The car park rectification work tender

As part of the Glenfield Junction Alliance program, a car park for commuters was built adjacent to the station. Following its completion, several defects were identified. These predominantly related to drainage issues and cracks in the lift wall.

Mr Sanber stated that he knew Mr Abdi's work at Glenfield was coming to an end. Consistent with that, he knew that defect rectification work was something that Mr Abdi would be responsible for managing.

On 20 August 2014, Mr Abdi, as "project manager", sent two emails to John Dabit, who was a director of Dabcorp NSW Pty Ltd ("Dabcorp") and Daval Group Pty Ltd. The emails were sent to Mr Dabit's email addresses at those businesses, along with a third email addressed to tony@croungroupaust.com.au, seeking a quotation for the car park defect rectification work. Mr Abdi did not remember the addressee of the third email but acknowledged that it was possibly a fake email address for Mr Nguyen.

Mr Sanber was friends with Mr Dabit. At first, Mr Sanber stated that he introduced Mr Dabit to Mr Abdi in the context of him undertaking the work at the Glenfield Transport Interchange that ASN Contractors was trying to do. Subsequently, he stated he could not recall the time or purpose for which he supplied Mr Dabit's name to Mr Abdi and whether it was specific to the Glenfield Transport Interchange project or any other job.

Despite no evidence of a request to quote sent to TRN Contractors, Mr Abdi received an email dated 22 August 2014 from "Rodger Smith" of TRN Contractors, stating "Hi Nima. Thank you for the opportunity to price this work for Transport Project Division. Before I can submit



a price, can we organise a site inspection on Monday 25/08/14? I am free in the morning.”

During the public inquiry, Mr Abdi accepted that Mr Sanber was using a false name to email him about submitting a quote and organising a site inspection. Mr Abdi did not recall if anyone from TRN Contractors came out for the site inspection but thought they could have inspected the site themselves on another day.

Mr Sanber stated that he had no idea who sent the email of 22 August 2014 and said that “Rodger Smith” did not exist. He hypothesised that either Mr Nguyen or Mr Abdi sent the email. He said he did not receive any telephone call about arranging a site inspection. He also denied involvement in following up the invitation to prepare a quote.

The original quote on ASN Contractors letterhead, dated 27 August 2014, was for \$148,083.50. The quote, which was purportedly from “Rodger Smith”, stated:

*Our quotation is based on the “Glenfield Multi Storey car park scope of works” document provided by Transport Project Division (via email on 20th August 2014).*

*“Section 2. Scope of Work*

*2.1–Drainage to Lift Pit*

*2.2–Lift walls cracks rectification*

*2.3–Surface drainage rectification*

*2.4–Grated drainage pit installation”*

Two other quotes were received. A quote from BH Civil, dated 27 August 2014, was for \$160,764. The quote from Dabcorp, also dated 27 August 2014, was for \$155,800. Both were higher than the ASN Contractors quote dated 27 August 2014 of \$148,083.

On 15 September 2014, Mr Abdi prepared and signed a TfNSW “Issue Paper” number IP25362 for the rectification work. The paper noted tender submissions had been made by BH Civil, Dabcorp and ASN Contractors for the above amounts and that the latter had submitted “the most competitive price for the scope of work”. The paper recommended that the acting senior project manager approve the commitment of \$148,083 for the scope of works and the procurement of a contractor under a minor works contract.

Mr Abdi accepted that the three tenderers were linked either to himself, Mr Nguyen or Mr Sanber and that this was an example of collusive tendering whereby an agreement had been reached to submit two dummy quotes so that ASN Contractors would get the work. He accepted that he never disclosed to any of his TfNSW

work colleagues that he was a silent partner in ASN Contractors. The involvement of BH Civil and Dabcorp is discussed later in this chapter.

A subsequent issue paper concerning the rectification work, dated 12 November 2014, referred to “Issue Paper 27107” as approving the invitation to tender to a preselected list of companies on 4 November 2014, to close on 10 November 2014. It noted that tenders were received from ASN Contractors, BH Civil and Dabcorp, and that a tender assessment committee, comprising Mr Abdi and another person, assessed the tenders in accordance with the approved tender evaluation methodology, and recommended ASN Contractors as the preferred tenderer. The paper also noted the tender review panel had endorsed that recommendation.

That issue paper recorded a budget commitment of \$234,186 and recommended the contract be awarded to ASN Contractors for \$218,000. Mr Abdi told the Commission he could not recall how the revised quote came about. That recommendation was approved by the principal manager of procurement and the project director on 19 and 20 November 2014 respectively. The project procurement tender assessment committee report noted the prices submitted by other tenderers were, from BH Civil, \$250,255.75 and, from Dabcorp, \$252,350. Mr Abdi agreed he was involved in ranking each of the companies for that committee. He further agreed that he was involved in a collusive arrangement for the bid and that he was, at the time, a silent partner in ASN Contractors. He agreed it was a “rigged” tender, involving the submission of dummy quotes so that ASN Contractors would get the work.

Mr Abdi signed off on the committee report on 18 November 2014. In doing so, he asserted that he:

- was not aware of any breach of confidentiality
- was not aware of any conflict of interest
- had followed the evaluation methodology
- was not aware of any unresolved probity issues.

During his evidence in the public inquiry, Mr Abdi accepted that each of the above assertions was false.

Mr Abdi was taken to the minutes of the meeting titled “TPD-14-4101- TAC Meeting No.1 – Glenfield Transport Interchange – Multi Storey Car Park Defect Rectifications”. The meeting was attended by Mr Abdi along with two others. The minutes record that “No conflict of Interest had arisen subsequent to this meeting”. Section 9 of the minutes records that consensus non-price scores were reached as follows:

**Table 4: Subcontractor non-price scores**

Tenderer	1. Expertise and experience	2. Methodology
ASN	7	9
BH	9	6
DAB	8	7

Noting that this was ASN Contractors' first job and that it used Daval to perform the work, Mr Abdi could not explain how, on the committee, he came to score ASN Contractors a seven out of 10 for expertise and experience, nor nine out of 10 for methodology. He acknowledged that he had had input into the score and that it was in his interests to have ASN Contractors scored highly in all classes. He confirmed that he did not advise other members of the committee of his relationship with ASN Contractors. He could not explain why the minutes recorded that referee checks and interviews were not required, except in terms of the job being low-risk.

Mr Abdi could also not explain how the agreement with TfNSW came to be signed by "Raj Sandy" and "Susan Po" (sic, should be "To") on behalf of ASN Contractors. Mr Abdi would not rule out that he had signed these names, claiming that he could not remember. While he suggested that Mr Nguyen also could have signed them, had that been the case, Mr Nguyen would have known that his wife's name was "To", not "Po." Mr Sanber denied that it was his signature on the agreement. The said agreement was recorded as having been executed on 27 November 2014.

Mr Nguyen stated that it was intended ASN Contractors would be the successful tenderer and, to that end, he used BH Civil to manipulate the tender process by arranging for the BH Civil quote to be higher than the ASN Contractors quote. He did this by telling BH Civil what price to quote to ensure its quote was higher than the ASN Contractors quote. He said Mr Abdi knew the TfNSW budget for the work and told him what price to submit on behalf of ASN Contractors.

Mr Nguyen said it was agreed between he, Mr Abdi and Mr Sanber that ASN Contractors would use Dabcorp to do the actual work. In fact, Mr Dabit's other company, Daval Group, was used.

On 10 November 2014, before the close of tenders, Mr Dabit sent an email to Mr Sanber, attaching the Dabcorp quote of the same date for the rectification work in the amount of \$252,350. The quote was marked to the attention of Mr Abdi. Mr Sanber recalled reviewing and talking to Mr Dabit about a proposed tender submission for \$255,350 from Dabcorp for the rectification works.

Mr Sanber conceded that he understood that the purpose for which it was sent to him was to "look and see that it was up to scratch." Having received the Dabcorp quote, he acknowledged that he spoke with Mr Dabit about it.

Mr Sanber acknowledged that one tenderer should not have access to another tender prior to the closing of tenders and that if he had an interest in ASN Contractors, he should not have had access to the Dabcorp tender, as that would have involved collusive tendering. As noted above, the Commission is satisfied that Mr Sanber had an interest in ASN Contractors at the time he received the proposed Dabcorp tender. At first, Mr Sanber acknowledged knowing that ASN Contractors was the successful tenderer. He subsequently withdrew that. The transcript records:

[Counsel Assisting]: *Well, I think you gave an answer a few moments ago saying that you were aware that ASN Contractors won this tender?*

[Raja Sanber]: *Well, I was, I wasn't aware that they'd actually won the tender, so maybe I'll withdraw that. What, I was aware that they were doing the work after. So I, I did not know about this tender is what I'm trying to say to you and my –*

[Q]: *But you knew they – were contracted to – the work? –*

[A]: *Well, that's where my recollection, I was not sure whether Dabcorp was doing the work for Transport or Dabcorp was, Dabcorp was doing work for ASN but I know that Dabcorp was doing work because John asked me to help review the method statements and stuff like that and the program, not for a tender submission but –*

[Q]: *But in relation to actually doing the work? – in, in relation to actually doing the work. You'd reviewed the tender submission earlier, hadn't you?*

[A]: *Correct.*

[Q]: *And then he was providing you with an – ?*

[A]: *Yeah.*

- [Q]: – instruction methodology and program of work –
- [A]: Yeah.
- [Q]: – I suggest to you in relation to ASN Contractors who you knew were the company who – ?
- [A]: Yeah. Well, that's what I was trying to say to you. No, that's that, and, again, I'm trying to tell you the truth of it and what I recall. I did not know when, when Dabcorp asked me to, when John asked me to review to help, I did not know whether that was to go to Transport for NSW directly or whether it was to go to ASN Contractors and through ASN to do the work. I, I did not know that layering of, of contracts.

Mr Abdi agreed with Counsel Assisting that the tender process was “cooked” from the start to ensure ASN Contractors got the job.

The Commission is satisfied the bids by Dabcorp and BH Civil were used by Mr Nguyen, Mr Sanber and Mr Abdi as dummy bids to secure the work for ASN Contractors. The Commission accepts that the bids were manipulated by Mr Nguyen telling BH Civil the price to quote and Mr Sanber discussing with Mr Dabit the Dabcorp quote and seeing that quote before its submission. The Commission notes that the Dabcorp quote was for \$252,350 but, when, as discussed below, Daval Group came to do the actual work under contract to ASN Contractors, it only charged \$110,000. However, the Commission cannot conclude that Mr Dabit, Dabcorp or BH Civil knew of the proposal to use their bids as dummies to facilitate the awarding of the work to ASN Contractors. There is no evidence that either company knew the other was submitting a quote. Nor was there evidence that either company was aware, at the time of submission of their quotes to TfNSW, of the ASN Contractors proposal to submit a quote for the work, let alone for a lesser amount. There was no evidence either company was advised of the TfNSW budget for the project.

On 28 November 2014, “Raj Sandy”, purportedly on behalf of ASN Contractors, forwarded an email to Mr Abdi, enclosing a safe work method statement (SWMS) for the Glenfield car park rectification works, and seeking approval to commence work on-site. Despite the fact that the email carried his mobile telephone number, Mr Sanber denied that it was from him and could not confirm that the SWMS attached was one he worked on.

Mr Sanber accepted that he sent Mr Dabit the ASN Contractors work method documents. He said he did so as Mr Dabit had not done any previous work in a rail corridor or for government, and he needed assistance. Mr Sanber stated that nobody gave him authority to do anything, but the documents were templates that he had saved on his hard drive, and he passed them to Mr Nguyen. He also claimed he had sent other companies work method statements or documents but could not recall which ones.

Mr Sanber accepted that, on 23 November 2014, Mr Dabit sent him an email to his Gmail address, attaching a construction methodology and program of works. On 25 November 2014, Mr Sanber responded to Mr Dabit's email, attaching templates for an SWMS prepared for ASN Contractors. Mr Sanber stated that he could not recall at what stage of the procurement process he provided these documents to Mr Dabit, but that Mr Dabit had asked Mr Sanber to provide them to assist him because he had not done any work in a rail corridor or for government before. It was put to Mr Sanber that he knew that the SWMS related to the Glenfield Transport Interchange car park defect rectification work. At first, he responded that he didn't recall, although he knew of the project through discussion with Mr Dabit. Mr Sanber later acknowledged that the subject title of the email was “Glenfield” but denied that he was sending the documents because he was involved in ASN Contractors. He nonetheless accepted that, in working on an SWRL project, it was collocated with Glenfield Junction Alliance.

An ASN Contractors invoice for works carried out in respect of the Glenfield Transport Interchange car park was dated 12 December 2014. It contained the contact details of Raj Sandy with Mr Sanber's mobile telephone number. Mr Sanber stated that he had never seen that invoice before and that it was not on his system. He stated that he had not been contacted in respect of the invoice and acknowledged that it was risky using his telephone number in that he could be contacted by the recipient of the invoice and would not know what to say. Mr Sanber rejected the suggestion that his telephone number was listed because he was involved in ASN Contractors. He maintained that he had no idea this was happening.

On 18 December 2014, a quotation for variations was sent by ASN Contractors, again using “Raj Sandy” as the contact and Mr Sanber's mobile telephone number. Mr Sanber denied knowledge of the document and suggested that his contact number was used as the invoice was directed to Mr Abdi at TfNSW, and the person preparing it would know Mr Abdi would not make contact. He accepted that it was still risky to include his number, as someone else from TfNSW might contact the person named.

## ASN Contractors' profit

As noted above, the actual rectification work was carried out by Daval Group, which was subcontracted by ASN Contractors. It charged ASN Contractors \$110,000. This meant a substantial profit went to ASN Contractors. The rectification works were also subject to a budget variation of \$28,000, which Mr Abdi prepared and was supported by others. Daval Group charged ASN Contractors \$15,000 for work associated with the variation. This brought the total amount paid by TfNSW to \$246,000 and ASN Contractors' profit to \$125,000. Mr Abdi accepted that ASN Contractors did nothing for this amount.

Mr Nguyen stated that it sounded "about right" that Dabcorp/Daval Group was paid \$121,000 and the total figure received by ASN Contractors from TfNSW was \$246,000, representing a profit of \$125,000. He acknowledged receiving a split of the profits in an amount estimated at between \$40,000 and \$35,000, arranged through an accountant that Mr Sanber nominated. Mr Nguyen spent the money on his wedding and investing in a fig farm that Mr Abdi was running at his property.

Mr Nguyen stated that he did not pursue any other projects as part of ASN Contractors and that they ceased the business. He could not recall the reason.

Mr Abdi stated that Mr Nguyen wanted to wind up the business and, consequently, the profit was split in what he believed were thirds. To that end, they went to the accountant, who proceeded to close the business and the money was withdrawn in cash, less the accountant's fees. Mr Abdi stated that it was Mr Sanber who introduced the accountant and that he himself had been kept in the dark.

Mr Abdi accepted that it appeared that the arrangement with the accountant was to have companies' invoice ASN Contractors for the entirety of the profits. Nonetheless, he said that it was not to avoid tax but to close the business down. To that end, he asserted that the accountant was paid a "big fee", described as around \$30,000. Mr Abdi did not declare any of the approximately \$30,000 in profits that he received. He also stated that he did not know why the business was wound up, but he was displeased as they had built up a reputation and could have gone on to actually tender for jobs.

Mr Sanber denied any knowledge of profit by ASN Contractors and did not recall any discussions with either Mr Abdi or Mr Nguyen in relation to profits from the Glenfield Transport Interchange car park rectification works. He also denied receiving any payment.

He could not shed light on why he would have received an invoice template from Sydney Haulage to ASN Contractors on 10 February 2015 for payments totalling

\$95,700. Mr Sanber's attention was also drawn to an invoice that he appears to have sent to Sydney Haulage, still made out for the same amount but with considerably more detail and using the same Sydney Haulage template. Mr Sanber stated that he did not remember any of this but did not think that anybody had access to his emails. He accepted that it was a logical conclusion that he sent the email and, to the extent that there were changes, they were made by him. However, he could not recall and could not respond to the suggestion that he was seeking to make the invoice more credible.

Mr Sanber was also shown an email dated 10 February 2015 with the subject line "Invoice template." The invoice attached was addressed to TRN Contractors from GSP Projects Pty Ltd and dated 27 June 2014 for \$12,000 for traffic haulage. Mr Sanber denied any recollection of ever dealing with GSP Projects or knowledge of any relevance to the business.

Mr Sanber acknowledged that he knew Peter Aboud, who worked at an accounting firm. There is evidence of Mr Sanber forwarding Mr Aboud a template invoice addressed to ASN Contractors for \$31,185 (including GST) on 28 April 2015. The relevant email added "See attached. Modify company and numbers to suit." Mr Sanber stated that he had no idea why he would make such a request and had no recollection.

It was put to him that he facilitated these invoices to be sent as false invoices to ASN Contractors. He responded that, while he could see how that conclusion could be drawn, he had no recollection of this.

Mr Sanber said he did not recall going to Mr Aboud's offices but recalled that he did introduce him to Mr Nguyen. He denied receiving cash from Mr Aboud or visiting him to receive cash. He was not sure if Mr Nguyen went to withdraw cash in conjunction with closing the business.

## Assessing Mr Sanber's involvement

On behalf of Mr Sanber, it was submitted that, if the Commission comes to the view that it does not accept his version of events, it must ensure that disbelief in his evidence does not amount to positive evidence to the contrary as per *Hobbs v Tinling* (1929) 2 KB 1 per Scrutton LJ at [21]. Acceptance of this principle, however, does not preclude the Commission considering rejection as a factor in determining whether to accept other evidence as reliable as per *Chen v Zhang and Ors* [2009] NSWCA 202 at [50].

Mr Nguyen gave evidence that, when introduced by Mr Abdi to Mr Sanber, he observed the other two to be

“close and chummy”. Despite failing to challenge this evidence, Mr Sanber submitted that the description would be found to be false based on his own negative description of Mr Abdi’s abilities.

The Commission accepts Mr Nguyen’s evidence as an accurate observation. Whatever view Mr Sanber may have held of Mr Abdi’s abilities, he acknowledged that his relationship with Mr Abdi developed into a friendship that lasted to 2018. Mr Abdi also acknowledged that all three of them became close at the end of the project they were working on.

Counsel Assisting submitted that Mr Sanber downplayed, to a significant degree, the extent of his assistance to TRN Contractors and ASN Contractors, and the Commission would not accept his evidence on this issue. The Commission concurs. It is satisfied that, contrary to his evidence, Mr Sanber was a party to an agreement with Mr Abdi and Mr Nguyen to establish TRN Contractors and ASN Contractors as a vehicle to bid for TfNSW work and share the profits.

The Commission is further satisfied that Mr Sanber was directly involved in the establishment of the company. This involvement included him spending time to arrange for business cards in false names, assisting in establishing an email address in a false name, assisting with wording for the company website, dealing with a lawyer with respect to an issue involving the company website, and preparing the template for an SWMS. This level of involvement is consistent with the evidence of Mr Nguyen and Mr Abdi that it was a collective decision involving them and Mr Sanber to establish the company. Mr Sanber’s use of aliases to disguise his involvement is consistent with the evidence of Mr Nguyen and Mr Abdi that the purpose of the company was to get TfNSW work. The Commission accepts the evidence of Mr Abdi and Mr Nguyen that Raj Sandy and Roger Smith were alias names for Mr Sanber. Communications in these names are attributable to Mr Sanber. The Commission rejects Mr Sanber’s contrary evidence. He clearly had access to the relevant email account. The contents of the documents (including his telephone number) and his involvement in ASN Contractors supports his authorship.

Mr Sanber’s evidence during the public inquiry was also at variance with his evidence in his earlier compulsory examination. His attempts to explain those variations were implausible, dissembling and had the appearance of being manufactured. Mr Sanber’s denials were also inconsistent with his involvement evidenced from:

- a) the level of his active involvement in the tendering arrangements at the Glenfield Transport Interchange car park, including the provision of his telephone number in connection with the project

- b) his creation of ASN Contractors’ SWMS template
- c) his communications with a solicitor (who he knew) in relation to the company’s name change
- d) the involvement of his wife to assist in designing the fictitious business cards, including adding his telephone number to one,
- e) his dealing with Mr Dabit.

While Mr Sanber submitted that he only assisted in the formation of ASN Contractors, there was no explanation or submission as to the circumstances in which his own email address came to be involved in correspondence with his lawyer friend, Mr Felice, regarding the use of the name TRN Contractors. Although Mr Sanber claimed that he never used the email address belonging to Raj Sandy, Mr Felice communicated using that email address and responded to Mr Sanber’s substantive email in relation to the name change issue. Bearing in mind that Mr Nguyen and Mr Abdi used their own alias names, it is unlikely that they would have used an alias that was connected to Mr Sanber’s mobile telephone number.

Furthermore, there was also no explanation or submission as to Mr Sanber’s involvement in ASN Contractors’ SWMS template.

Mr Sanber submitted that that he did not know who Dabcorp worked for and that Mr Dabit’s request that he look at the tender submission was the extent of his dealings. However, Mr Sanber’s evidence on the subject was again dissembling and cannot be accepted. It was he who introduced Mr Dabit and his corporations to the other two. Further, Mr Sanber provided no explanation for his involvement in a tender submission by Dabcorp, which, though not successful, nevertheless, was followed by another of Mr Dabit’s companies, Daval Group, being subcontracted by ASN Contractors.

Whilst Mr Sanber submitted that Mr Nguyen and Mr Abdi’s involvement in corrupt conduct put their reliability and credibility into question, both made significant admissions against interest. To the extent their evidence implicated Mr Sanber, the latter did not seek to challenge that evidence.

The Commission accepts the evidence of Mr Nguyen and Mr Abdi and is satisfied that, together with Mr Sanber, all three were involved in collusive tendering for the Glenfield car park defects rectification work so as to secure the awarding of that work to ASN Contractors. The collusion also involved dummy bidding by BH Civil, arranged by Mr Nguyen and Mr Sanber, ensuring that the ASN Contractors quote was lower than the Dabcorp quote, with no declaration of a conflict of interest by either Mr Abdi or Mr Sanber.

The Commission is satisfied the bids by Dabcorp and BH Civil were used by Mr Nguyen, Mr Sanber and Mr Abdi as dummy bids to secure the work for ASN Contractors. The Commission accepts that the bids were manipulated by Mr Nguyen telling BH Civil the price to charge and by Mr Sanber discussing with Mr Dabit the Dabcorp quotation in advance of its submission. In the latter context, the Commission notes that the Dabcorp quote was for \$252,350 but, when the related Daval Group came to do the actual work under contract to ASN Contractors, it charged only \$110,000. However, the Commission cannot conclude that either Mr Dabit/Dabcorp or BH Civil knew of the proposal to use their bids as dummies to facilitate awarding the contract to ASN Contractors. There is no evidence that either company knew the other was submitting a tender. Nor is there evidence that either company was aware at the time of submission of their bids of ASN Contractors' proposal to submit a tender, let alone for a lesser price. There is also no evidence that either company was advised of the TfNSW budgets.

The contract between TfNSW and ASN Contractors for the rectification of the defects at Glenfield Transport Interchange car park was executed on behalf of ASN Contractors in the name of "Raj Sandy" and witnessed by "Susan Po", which appears to be a misspelling of Mr Nguyen's wife's last name. Counsel Assisting did not submit that this was Mr Sanber's doing, and the matter was not put to Mr Nguyen. Mr Abdi could not recall whether it was he. It is unnecessary to resolve this matter.

Furthermore, the documentary evidence also supports that it was Mr Sanber who facilitated false invoicing to ASN Contractors in relation to the profit amount. Mr Sanber's inability to recall his involvement with both the accountant and the invoicing is implausible in the face of his introduction of the accountant and the evidence that Mr Sanber corresponded with him.

Counsel Assisting submitted that, following completion of the Glenfield Transport Interchange car park defect rectification work, the remaining profit made by ASN Contractors was evenly split between the three partners and that it was distributed in cash (less the accountant's fees) to each of Mr Nguyen, Mr Abdi and Mr Sanber through an irregular invoicing arrangement. The Commission accepts that this is so. In so finding, the Commission rejects the evidence of Mr Sanber that he received no profits and was not involved.

The Commission accepts that the profit of \$125,000 was derived by ASN Contractors and was distributed in cash to each of the three partners after a payment to the accountant.

## Corrupt conduct

The Commission approaches making findings of corrupt conduct in the manner set out in Appendix 2 to this report.

First, the Commission makes findings of relevant facts based on the balance of probabilities. The Commission determines whether those facts come within the terms of s 8(1), s 8(2) or s 8(2A) of the ICAC Act. If they do, the Commission then considers s 9 of the ICAC Act and the jurisdictional requirements of s 13(3A).

The Commission then considers whether, for the purpose of s 74BA of the ICAC Act, the conduct is sufficiently serious to warrant a finding of corrupt conduct.

### Mr Abdi

The Commission is satisfied that, in 2014, TfNSW employee Mr Abdi colluded with Mr Nguyen and Mr Sanber to manipulate the tender process for the Glenfield Transport Interchange car park defect rectification work. This was done to ensure that the TfNSW contract for that work was awarded to ASN Contractors (a company in which Mr Abdi was part-owner with Mr Nguyen and Mr Sanber). As a result of engaging in this conduct, Mr Abdi obtained a benefit of approximately \$30,000, being one third of the \$125,000 profit derived by ASN Contractors after payment of accountancy fees. Mr Abdi knowingly made false statements in the 18 November 2014 tender assessment report.

Mr Abdi's conduct was corrupt conduct as it was conduct that adversely affected the honest or impartial exercise of his official functions as a public official, and, therefore, comes within s 8(1)(a) of the ICAC Act. It was also conduct that impairs, or that could impair, public confidence in public administration and which could involve collusive tendering and dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage, and, therefore, comes within s 8(2A)(a) and s 8(2A)(c) of the ICAC Act.

The relevant public administration is the administration and oversight of tender processes by TfNSW.

For the purpose of s 9(1)(a) of the ICAC Act, it is relevant to consider s 249B(1) and s 192G of the Crimes Act.

Section 249B(1) of the Crimes Act provides:

*If any agent corruptly receives or solicits (or corruptly agrees to receive or solicit) from another person for the agent or for anyone else any benefit:*

- (a) as an inducement or reward for or otherwise on account of:
- (i) doing or not doing something, or having done or not having done something, or
- (ii) showing or not showing, or having shown or not having shown, favour or disfavour to any person, in relation to the affairs or business of the agent's principal, or
- (b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent's principal,
- the agent is liable to imprisonment for 7 years.

Relevantly, the elements of an offence under s 249B(1)(a)(ii) of the Crimes Act are:

1. an agent
2. corruptly solicits or receives
3. from another person
4. any benefit
5. as an inducement or reward
6. on account of showing favour to any person
7. in relation to the affairs or business of the agent's principal.

On the facts as found by the Commission, Mr Abdi was an employee of TfNSW and, therefore, an agent of TfNSW (s 249A(a) of the Crimes Act). As agent, he received payment from Mr Nguyen and ASN Contractors as a reward to favour that company to obtain TfNSW work. That payment was received corruptly as it was not disclosed to Mr Abdi's principal.

Section 192G of the Crimes Act provides:

*A person who dishonestly makes or publishes, or concurs in making or publishing, any statement (whether or not in writing) that is false or misleading in a material particular with the intention of-*

- (a) obtaining property belonging to another, or
- (b) obtaining a financial advantage or causing a financial disadvantage,
- is guilty of an offence.*

The Commission finds that Mr Abdi worked to ensure the Glenfield Transport Interchange car park defect rectification work was awarded to ASN Contractors. In doing so, he falsely stated when on the tender assessment committee that he:

- was not aware of any breach of confidentiality
- was not aware of any conflict of interest
- had followed the evaluation methodology
- was not aware of any unresolved probity issues.

In making these statements, Mr Abdi acted dishonestly and intended to obtain a financial advantage by way of a profit from ASN Contractors becoming the successful tenderer.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Abdi committed an offence under s 249B(1)(a)(ii) of the Crimes Act of receiving a corrupt benefit as an inducement or reward in relation to the affairs or business of TfNSW.

The Commission is also satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Abdi committed an offence under s 192G(b) of the Crimes Act of making a false statement in a material particular with the intention of obtaining a financial advantage. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 9(1)(c) of the ICAC Act, it is relevant to consider the September 2013 and November 2014 TfNSW codes of conduct, which were in force when the relevant conduct took place. As outlined in chapter 1, the September 2013 code in Parts 3.7–3.8, 3.14 and 3.23 dealt with manager responsibilities, conflicts of interest, secondary employment and prohibitions on the acceptance of gifts and benefits in relation to the discharge of official duties, and provided that a breach of the code might result in disciplinary action. The equivalent relevant parts of the TfNSW November 2014 code of conduct are Parts 4 and 6–8.

The Commission is satisfied for the purpose of s 9(1)(c) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Abdi had breached the applicable TfNSW code of conduct such as to give rise to reasonable grounds for dismissal, dispensing with his services or otherwise terminating his employment with TfNSW. His conduct, therefore, comes within s 9(1)(c) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Abdi had committed offences under s 249B(1) of the Crimes Act and s 192G of the Crimes Act.

The Commission is also satisfied that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Abdi had breached the applicable TfNSW code of conduct outlined above such as to give rise to reasonable grounds for dismissal, dispensing with his services or otherwise terminating his employment with TfNSW. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that the conduct is serious corrupt conduct. This is because it involved significant planning on the part of Mr Abdi and his partners, the making of false and misleading statements to TfNSW and a sophisticated manipulation of the tender process for the award of work of a substantial value. It was a very serious departure from his responsibilities on the tender assessment committee for the project.

## Mr Nguyen

The Commission is satisfied that, in 2014, Mr Nguyen colluded with Mr Abdi and Mr Sanber to manipulate the tender process for the Glenfield Junction car park defect rectification work. This was done to ensure that the TfNSW contract for that work was awarded to ASN Contractors (a company in which he was part owner with Mr Abdi and Mr Sanber). As a result of engaging in this conduct, he received a benefit of approximately \$30,000, being one third of the \$125,000 profit derived by ASN Contractors after payment of accountancy fees.

This was corrupt conduct for the purpose of s 8 of the ICAC Act as it adversely affected the honest and impartial exercise of Mr Abdi's official functions, in favouring ASN Contractors in the awarding of the work and, therefore, comes within s 8(1)(a) of the ICAC Act.

Mr Nguyen's conduct was also corrupt as it was conduct that impairs, or that could impair, public confidence in public administration and which could involve collusive tendering (s 8(2A)(a)) or dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage (s 8(2A)(c)).

For the purpose of s 8(2A) of the ICAC Act, the relevant public administration was the administration and oversight of contract administration by TfNSW.

For the purpose of s 9(1)(a) of the ICAC Act, it is relevant to consider s 249B(2) of the Crimes Act. That section provides:

*If any person corruptly gives or offers to give to any agent, or to any other person with the consent or at the request of any agent, any benefit:*

(a) *as an inducement or reward for or otherwise on account of the agent's:*

(i) *doing or not doing something, or having done or not having done something, or*

(ii) *showing or not showing, or having shown or not having shown, favour or disfavour to any person,*

*in relation to the affairs or business of the agent's principal, or*

(b) *the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent's principal,*

*the first mentioned person is liable to imprisonment for 7 years.*

On the facts as found by the Commission, Mr Nguyen corruptly gave or offered a benefit to Mr Abdi as an agent of TfNSW. The benefit was not disclosed to TfNSW, being Mr Abdi's principal. The benefit was as an inducement or reward for Mr Abdi showing favour to ASN Contractors in relation to the award of works being in the business TfNSW.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen committed an offence under s 249B(2)(a)(ii) of the Crimes Act of providing a corrupt benefit to Mr Abdi as an inducement or reward in relation to Mr Abdi showing favour to ASN Contractors in relation to the affairs or business of TfNSW. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed an offence under s 249B(2) of the Crimes Act.



Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that the conduct is serious corrupt conduct. This is because it involved significant planning and the manipulation of the TfNSW tender process for the award of work to a substantial value. In addition, it involved the receipt of approximately \$30,000, being one third of the profit made by ASN Contractors of \$125,000 less accountancy fees.

### Mr Sanber

The Commission is satisfied that, in 2014, TfNSW employee Mr Sanber colluded with Mr Abdi and Mr Nguyen to manipulate the tender process for the Glenfield Junction car park defect rectification work. This was done to ensure that the TfNSW contract for that work was awarded to ASN Contractors (a company in which he was part owner with Mr Abdi and Mr Nguyen). As a result of engaging in this conduct, he received approximately one third of the total benefit derived by ASN Contractors being \$125,000, less accountancy fees.

This was corrupt conduct for the purpose of s 8(2A) of the ICAC Act as it was conduct that impairs, or that could impair, public confidence in public administration and which could involve collusive tendering (s 8(2A)(a)) or dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage (s 8(2A)(c)).

The relevant public administration is the administration and oversight of tender processes by TfNSW.

For the purpose of s 9(1)(c) of the ICAC Act, it is appropriate to consider the September 2013 and November 2014 TfNSW codes of conduct, by which Mr Sanber was bound as a TfNSW employee. As outlined in chapter 1, the September 2013 code in Parts 3.703.8, 3.14 and 3.23 dealt with manager responsibilities, conflicts of interest, secondary employment and prohibitions on the acceptance of gifts and benefits in relation to the discharge of official duties, and provided that a breach of the code might result in disciplinary action. The equivalent relevant parts of the TfNSW November 2013 code of conduct are Part 4 and 6–8.

The Commission is satisfied for the purpose of s 9(1)(c) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Sanber had breached the aforementioned provisions of the TfNSW code of conduct

such as to give rise to reasonable grounds for dismissal, dispensing with his services or otherwise terminating his employment with TfNSW. His conduct, therefore, comes within s 9(1)(c) of the ICAC Act.

The Commission is also satisfied that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Sanber had breached the applicable TfNSW code of conduct such as to give rise to reasonable grounds for dismissal, dispensing with his services or otherwise terminating his employment with TfNSW. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that the conduct is serious corrupt conduct. This is because it involved significant planning and the manipulation of the TfNSW tender process for the award of work for a substantial value. In addition, it involved the receipt of approximately \$30,000, being one third of the profit made by ASN Contractors of \$125,000, less accountancy fees.

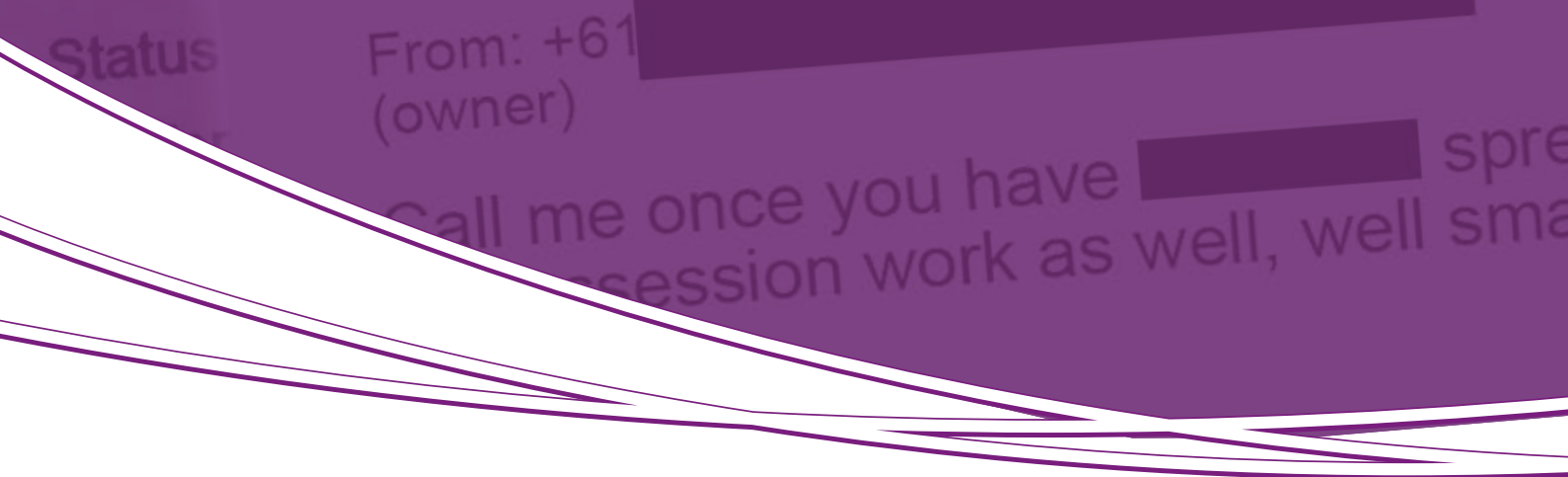
### Section 74A(2) statements

In making a public report, the Commission is required by s 74A(2) of the ICAC Act to include, in respect of each “affected” person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

- obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the person for a specified criminal offence
- the taking of action against the person for a specified disciplinary offence
- the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

An “affected person” is defined in s 74A(3) of the ICAC Act as a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of, or in connection with, the investigation. The Commission is satisfied that, in respect of the matters dealt with in this chapter, Mr Nguyen, Mr Abdi, and Mr Sanber are affected persons.

Each of Mr Nguyen, Mr Abdi and Mr Sanber gave evidence subject to a declaration under s 38 of the ICAC Act. This means that their evidence cannot be used



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against them in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act.

Counsel Assisting did not submit that there should be any statement that the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of any of the three for any criminal offence in relation to the matters dealt with in this chapter. In these circumstances, the Commission declines to seek the advice of the DPP.

Mr Abdi and Mr Sanber are no longer working for TfNSW and, accordingly, the Commission does not recommend that consideration be given to the taking of any disciplinary action or other action with a view to dispensing with their services.

## Chapter 4: Inner West Council

This chapter examines the allocation of work at Leichhardt Council and Inner West Council by Mr Nguyen to Innocon (of which Mr Nguy was a director), Constructicon (Mr Nguy's company), SDL (Mr Laphai's company), Marble Arch (Mr Cox's company), JTG Services (owned by Ms Tosh, Mr Abdi's wife) and Sanber Group (owned by Mr Sanber).

### Mr Nguyen's role

Mr Nguyen commenced employment with Leichhardt Council on 21 July 2015 as a senior project engineer. On 12 May 2016, Leichhardt Council was merged with other councils to form the Inner West Council. Mr Nguyen then became property manager, major building projects and facilities. From 23 June 2017, he was property project manager capital projects. He resigned from IWC in early October 2020.

The terms and conditions under which Mr Nguyen was offered the position of property project manager capital projects required him to: comply with IWC policies and the code of conduct; to complete and update, at least annually, a pecuniary interest declaration; and to declare anything that may create a conflict of interest between his obligations to IWC as an employee and his interests or those of a third party.

Mr Nguyen told the Commission he understood these requirements were part of the terms and conditions of his employment, but conceded he did not comply with them. The Commission is satisfied that, at all relevant times, Mr Nguyen understood the terms and conditions of his employment and his obligations as an employee at IWC.

The property project manager position description required that Mr Nguyen:

*Deliver well planned and coordinated projects including capital renewal, upgrades and new, staff [sic] relocations and maintenance to ensure that all*

*Council property is managed to maximise the benefit to Council, the community and facility users.*

Mr Nguyen's role included procurement management. He described being provided with a budget, determining the scope for the relevant project and then engaging with the architects and consultants to undertake design and planning before construction. He said he understood that, where the value of the project was between \$10,000 and \$250,000, he was required to obtain three quotes. He also understood that, if the value of the project was over \$250,000, it needed to go to open tender.

Mr Nguyen told the Commission that he reported to a project coordinator. Between 2016 and 2019, that position was held by Patrick Ceran. Mr Nguyen told the Commission that Mr Ceran always followed his recommendations for the engagement of contractors. Mr Nguyen said that the person who provided the second sign-off did not involve him in discussions relating to the procurement process and he simply got a paper saying, "signed off, go do your thing."

In 2020, Mr Nguyen had a new supervisor who required more detailed recommendation documents and reasons for preferring one company over the other. He told the Commission this did not cause him to alter his methods for running procurement, nor cause him real difficulties in terms of breaking down projects into stages or smaller projects so that he could simply approach one bidder and remain under the threshold which would otherwise require that he obtain three quotes.

### Knowledge of the code of conduct

The applicable IWC codes of conduct relevant to this investigation came into effect on 12 May 2016 (when IWC was formed), 14 December 2018, 12 March 2019 and 25 August 2020. They contained provisions requiring disclosure of conflicts of interest. The codes are referred to in greater detail in chapter 1. As the relevant provisions

of these codes were materially identical, the codes will be collectively referenced as the IWC code of conduct and the applicable dates should be implied.

As discussed in more detail below, Mr Nguyen was associated with a number of companies that he introduced as suppliers to Leichhardt Council and, later, IWC. Those companies included Innocon, Constructicon, SDL, Marble Arch, JTG Services and Sanber Group.

Mr Nguyen gave evidence that he did not declare any conflict of interest to anyone in relation to any of those companies or his associates, either when he arranged for them to be added to Leichhardt Council or, later, IWC systems as suppliers, or at any time afterwards. He admitted he was aware of having conflicts of interest with those companies at the time he was awarding them work.

Mr Nguyen told the Commission that he was aware of the IWC code of conduct, but he never read it. The Commission is satisfied that Mr Nguyen's failure to read the IWC code of conduct did not detract from his understanding that he had an obligation to declare and manage pecuniary conflicts of interest. The Commission is satisfied that, at all relevant times, he understood his obligations in relation to conflicts of interest and that he had a duty to disclose such conflicts.

Clause 6.15 of the 14 December 2018, 12 March 2019 and 25 August 2020 codes of conduct provided that council officials:

*...must not take advantage (or seek to take advantage) of your status or position with council, or of functions you perform for council, in order to obtain a private benefit for yourself or for any other person or body.*

Clause 5.9 of the code of conduct operating from 12 May 2016 to 13 December 2018 is substantially the same.

Despite this clear requirement, Mr Nguyen accepted that he took advantage of his position at IWC to obtain a private benefit for himself and other persons.

### Knowledge of the procurement procedures policy

IWC adopted a procurement procedures policy on 2 November 2017, which included a procurement procedures manual. The four thresholds of purchase based on estimated value (including the procurement procedure required for each threshold) are set out in chapter 1.

Mr Nguyen told the Commission that, following the amalgamation, he continued to apply the Leichhardt Council procurement policies except in respect of an alteration in the upper threshold for projects (between

\$10,000 and \$150,000) going to \$250,000. He said he did not recall reading the IWC procurement policy, nor did he recall attending any training in relation to the policy.

The IWC procurement policy included the following statements:

*The procurement process must be able to withstand public scrutiny. All persons invited to quote or tender for Council business shall be given equal information, and the information they provide to Council shall be treated as confidential and restricted to persons specifically involved in the purchase.*

*Council staff should behave with strong moral principles, demonstrating honesty and decency in all dealings.*

It also required IWC staff to disclose potential or actual conflicts of interest. Any declared potential, actual or perceived conflict of interest was to be reviewed by the appropriate group manager, with provision for staff to be removed from involvement in the relevant procurement process or management of the contract. The policy also directed staff to IWC's statement of business ethics.

In his evidence to the Commission, Mr Nguyen accepted he did not comply with those sections of the policy relating to procurement and conflicts of interest. He said he was aware that IWC had a statement of business ethics but was not aware of its contents.

Even if Mr Nguyen did not read the policy, the Commission is satisfied he understood at all relevant times that he had an obligation to declare any conflict of interest.

### IWC's vendor panel

IWC's procurement procedures manual provided that, for projects valued between \$10,001 and \$149,999 (including GST), staff were encouraged to use suppliers on IWC's vendor panel portal. The portal could also be used to receive quotes and tenders.

In his evidence to the Commission, Mr Nguyen claimed that he received bad feedback on the portal and, therefore, he kept using the people he had worked with as, in his view, they kept performing. He accepted that he was aware that use of the vendor portal enabled the procurement team at IWC to manage quotations so as to avoid conflicts of interest. Mr Nguyen also did not use the alternative method, involving a centralised council return point email for quotations.

Where the value of a project was over the threshold of \$150,000 (including GST) (and subsequently \$250,000), the process involved sending the contract to the procurement team who would upload it to onto a platform and then the contract would go to open tender.

The tender evaluation committee included a minimum of three people, one of whom was an external procurement member. Mr Nguyen recalled sitting with two members from his team and one from the procurement team. When doing so, he attempted to favour companies he was associated with, to the extent that that was possible. He stated that he built up a reputation with IWC and they would usually follow his recommendations.

## Innocon

It was common ground that Mr Nguy and Mr Nguyen were friends from their time at university. Mr Nguy established Innocon with two other directors on 16 March 2015. Mr Nguy recalled receiving a message from Mr Nguyen indicating that he had work at IWC as he was looking after a few building jobs. Having started Innocon relatively recently, Mr Nguy was enthusiastic about tendering.

Mr Nguyen told the Commission that Innocon was the first company with which he had an association that he introduced to IWC projects. This occurred in about August 2016, when he sought a quote for the Hannaford Community Centre kitchen refurbishment. He told the Commission he did so because Mr Nguy worked at Innocon. He said he did not declare any conflicts of interest when he arranged for it to be added to the IWC systems as suppliers, or at any other time.

It was Mr Nguyen's evidence that, at the time he first approached Innocon, it was his intention to ultimately seek a financial benefit from the company in return for it being awarded IWC work. He explained that he intended to seek payment after Innocon had completed a couple of jobs and had become "comfortable" with how IWC worked. This evidence is consistent with WhatsApp messages Mr Nguyen sent to Mr Nguy on 2 August 2016, stating, "First few jobs I don't want anything," "Just want you to get comfortable with the system first," "And how council works," "So don't feel you are in debt, yeah" and "know the system first".

Mr Nguy told the Commission he understood these messages to mean that Mr Nguyen was seeking to have him put into the system. While he had no discussions beyond that point, he did think he might become indebted to Mr Nguyen. The Commission is satisfied there was an understanding between Mr Nguyen and Mr Nguy that, in return for Mr Nguyen arranging for IWC work to be allocated to Innocon, Mr Nguy would, at some future time, provide a financial benefit to Mr Nguyen. That understanding is confirmed by the evidence set out below relating to the Leichhardt Park Aquatic Centre and Glover Street baseball cages upgrade projects.

Innocon was awarded the Hannaford Community Centre

work. Mr Nguyen told the Commission he assisted Innocon by providing it with the lowest quote received prior to receiving the Innocon quote and advising, "If you can beat this, then the job's yours."

On 4 August 2016, Mr Nguyen sent a WhatsApp message to Mr Nguy stating, "I'm prepping another tender now, I'll send it out to you late next week." Further WhatsApp messages followed. Included among these was a message, on 15 August 2016, in which Mr Nguy stated, "we are coming out to around 90k + gst". Mr Nguyen responded, "Only got one price in at 101k." During the public inquiry, Mr Nguyen conceded that his compulsory examination evidence of 6 April 2022, where he denied disclosing confidential budgetary information or a competitor's quote, was untrue but asserted that his recollection was prompted by sighting a memorandum of 19 August 2016 (discussed below).

Mr Nguy ultimately accepted that Mr Nguyen provided the IWC budget figure of \$70,000 for this project. This assisted Mr Nguy in preparing the Innocon quote, which he said was based on what Mr Nguyen told him about the IWC budget. Ultimately, the quote submitted by Innocon was for \$99,000, which was just under the competitor's price of \$101,000.

Innocon proceeded to do other work for IWC. A table was shown to Mr Nguyen, to which he gave evidence. A summary of the table shown to the witness, outlining IWC contracts awarded to Innocon, is provided at Figure 1 on page 52.

Mr Nguyen agreed that he provided competitors' pricing in relation to the listed projects. Mr Nguy agreed that Mr Nguyen assisted in relation to information concerning the pricing of work by Innocon.

The projects included the Leichhardt Park Aquatic Centre astroturf refurbishment. On 22 February 2017, shortly after the astroturf was laid, Mr Nguyen received a WhatsApp message from Mr Nguy stating, "I'm moving on mate 30 March 2017." Mr Nguy was moving on to Constructicon and wanted IWC work allocated to that company.

On 30 March 2017, Mr Nguy texted Mr Nguyen that Innocon would "still pay you for the [Leichhardt Park Aquatic Centre] astroturf, you've got my word". Mr Nguyen could not recall receiving any payment in relation to Innocon work but agreed that his messages with Mr Nguy suggested an agreement for payment and that his understanding was that he would receive one. Mr Nguy gave evidence that this message referred to an agreement he and Mr Nguyen had discussed about Mr Nguyen receiving payment in relation to this project. The Commission is satisfied Mr Nguyen had agreed to receive a financial benefit from Innocon for the Leichhardt Park Aquatic Centre astroturf refurbishment.

**Figure 1: Council contracts awarded to Innocon**

Project	Date	Contract Value (inc GST)	Competitors Tenders	Recommended / Approved by Nguyen	Total Variations (inc GST)	Total Paid (inc GST)
1 Hannaford Community Centre - Kitchen refurbishment	19-Aug-2016	\$ 109,259.70	<ul style="list-style-type: none"> <li>Hyper Constructions Pty Ltd (late submission)</li> <li>Fabric Interiors Exterior Pty Ltd</li> <li>State Development Pty Ltd</li> <li>Forefront Commercial Industrial Pty Ltd</li> </ul>	Recommended by Nguyen	\$ 5,878.13	\$ 115,137.83
2 Jimmy Little Community Centre - Cleaning	05-Jan-2017	\$ 2,090.00	No quote required, under \$5,000.	Purchase order requested by Nguyen	\$ -	\$ 2,090.00
3 Jimmy Little Community Centre - Storage Room Cleaning	23-Jan-2017	\$ 264.00	No quote required, under \$5,000.	Unknown	\$ -	\$ 264.00
4 Leichhardt Park Aquatic Centre - Astroturf	22-Feb-2017	\$ 48,400.00	<ul style="list-style-type: none"> <li>Furnass Landscaping Pty Ltd</li> <li>Safe Rubber Surfacing Pty Ltd</li> <li>Moylebig Pty Ltd</li> </ul>	Recommended by Nguyen	\$ -	\$ 48,400.00
5 Glover St Baseball Cages Upgrade	21-Apr-2017	\$ 140,363.00	<ul style="list-style-type: none"> <li>Fencing Logistics Pty Ltd</li> <li>Fabric Interior Exterior</li> </ul>	Recommended by Tim Brown and Rick Jarvis	\$ 660.00	\$ 141,023.00
<b>Totals</b>		<b>\$ 300,376.70</b>			<b>\$ 6,538.13</b>	<b>\$ 306,914.83</b>

There is, however, no evidence that such a benefit was actually received by Mr Nguyen.

One more project was allocated by IWC to Innocon after Mr Nguy informed Mr Nguyen that he was leaving Innocon. This was the upgrade to the Glover Street baseball cages. Mr Nguyen prepared part of Innocon’s quotation. For this purpose, he went to another company to get a price and suggested to Mr Nguy that he seek an extension of time to submit Innocon’s quotation. Mr Nguyen acknowledged that he probably obtained a budget figure from the parks officer and supplied it to Mr Nguy, this being information that other bidders would not have. Both Mr Nguyen and Mr Nguy told the Commission they understood Mr Nguyen was to receive a benefit from Innocon for providing this assistance. There is no evidence that Mr Nguyen did receive a payment from Innocon; however, the Commission is satisfied that Mr Nguyen had agreed to receive a financial benefit for the Glover Street baseball cages upgrade.

Mr Nguyen did, however, receive a benefit from Innocon, in the form of work that was done installing floorboards in his sister’s apartment (arranged by him), for which Innocon charged for material but not labour. Mr Nguyen accepted that this was a quid pro quo for giving Innocon IWC work. He did not discuss this with his sister.

Although Innocon did not submit any bids for IWC work after Mr Nguy left the company, Mr Nguyen used the company’s quote template to submit dummy quotes. He accepted that, after the Glover Street baseball cages upgrade, all of the quotes purportedly submitted on behalf of Innocon were most likely dummy quotes and no one at Innocon was aware he was using the company’s name and documentation for the purposes of preparing quotations to IWC. He acknowledged that, had the vendor portal system been used, it would not have been possible to engage in dummy bidding. By engaging in dummy bidding, Mr Nguyen stated that he could help a friend, to a certain extent, and they could make it easier so that he did not need to babysit them and could look after private needs.

The Commission’s investigation revealed that a total of \$306,914.83 (including GST) was paid to Innocon for IWC projects facilitated by Mr Nguyen.

## Constructicon

Constructicon was incorporated on 4 April 2017 and owned by Mr Nguy, who was a director. Between June 2017 and September 2020, Constructicon received IWC work to the value of \$1,071,168.42 (including GST) through Mr Nguyen’s involvement.

Mr Nguyen introduced Constructicon as a supplier to IWC by completing a setup form. He did not declare any

conflict of interest. Mr Nguy gave Mr Nguyen access to a Constructicon email address, being admin@constructicon.com.au. This was associated with an alias, Anthony Bryne, described as a project officer. No such person existed. Mr Nguyen used the email address to communicate with himself, copying in Mr Nguy, to send requests and then reply to himself using the Anthony Bryne alias. In this way, Mr Nguyen was able to control what Constructicon was submitting to IWC.

Mr Nguyen told the Commission he drafted the Constructicon quotes for IWC work and used his knowledge of project budgets and competitors' quotes to make sure that its quotes were the cheapest. He told the Commission he was unaware of any instance in which a Constructicon quote was prepared independently of his involvement. In addition, he engaged in project splitting to keep projects under \$10,000 and \$150,000.

Mr Nguyen told the Commission that Mr Nguy would get a trade quote for the proposed project, to which Mr Nguyen would add 20 to 25 per cent. He said he did this to help Mr Nguy make more profit. His attention was drawn to WhatsApp messages to Mr Nguy on 19 April 2017, where he advised, "Job will cost about 6 k to do", "Put it for 9k" and "Pocket 3k". He accepted that this was an example of the process he used to increase the Constructicon quote. Mr Nguy also accepted that Mr Nguyen told him the amount by which to inflate the Constructicon quote.

Mr Nguyen admitted to receiving a second-hand mobile telephone from Mr Nguy. Mr Nguy agreed that he provided a telephone to Mr Nguyen in return for the IWC work Mr Nguyen had awarded to Constructicon.

Mr Nguyen gave evidence that he recalled Mr Nguy kept a tally of the payments to be made to Mr Nguyen with respect to the awarding of IWC work to Constructicon. This was recorded in a document created by Mr Nguy titled "Innerwest Council Progress Claim Tracker". It listed seven projects and contained columns headed "TN Kickback" and "TN Status". The total in the former column was \$4,372.89. The latter column contained dates on which payments were made with respect to six of the projects. The document recorded payments totalling \$2,813.49 for the first four projects, made on 17 August 2017, and payments totalling \$939.40 for the next two projects, made on 11 November 2017.

Mr Nguyen accepted that he must have been shown the document and at one point in time the document indicated the commission paid to Mr Nguyen was 20 per cent of the net profit and at another point in time the document indicated the commission paid to Mr Nguyen was 10 per cent of the contract sum. Mr Nguyen said he could not recall receiving the payments identified in the

column marked "TN Kickback". He was shown his bank statement for the relevant period and accepted that it reflected a payment into his account on 17 August 2017 for \$2,813.49 from Mr Nguy with the description "monty owing 1". Mr Nguyen added that, based on what he had been shown, the payments he received probably lined up with the "Innerwest Council Progress Claim Tracker" spreadsheet. He ultimately conceded that the payments he received were reflected in the spreadsheet. That concession is consistent with the purpose of the spreadsheet, which was to keep a record of how much was owed to Mr Nguyen and how much was paid to him. The Commission is satisfied that, on 17 August 2017, Mr Nguyen received \$2,813.49 from Mr Nguy. The Commission is also satisfied he received a further payment of \$939.40 on or about 11 November 2017.

Mr Nguy told the Commission that, in about June 2017, he came to an agreement with Mr Nguyen whereby Mr Nguyen would receive payment equivalent to either 20 per cent of Constructicon's net profit or 10 per cent of the IWC contract sum for each IWC contract awarded to Constructicon. Mr Nguy was shown the "Innerwest Council Progress Claim Tracker" spreadsheet. Initially, he claimed he could not recall paying Mr Nguyen but conceded it was possible he did so. After being shown Mr Nguyen's bank statement, he agreed that it looked like he had paid Mr Nguyen \$2,813.49. Mr Nguy said he could not recall making any other payment but did not categorically deny making other payments. As noted above, the Commission is satisfied that a further payment of \$939.40 was made to Mr Nguyen.

Mr Nguyen gave evidence that he used a template for Constructicon to prepare dummy bids for other projects. Mr Nguy was aware that Mr Nguyen submitted dummy Constructicon quotes.

## SDL

SDL was a company operated by Mr Laphai. Mr Nguy worked for SDL from around April 2017. Around that time, Mr Nguyen discussed with Mr Nguy how he might be able to use SDL as part of the process for securing IWC work for contractors with whom he was associated.

On 30 May 2017, Mr Nguyen forwarded WhatsApp messages to Mr Nguy stating, "Bro there's a lot of work coming up," "I just saw the list," "If we can get Seng yours and a sister company" and "We are going to make something." Mr Nguyen told the Commission these messages indicated his intention to control the bidding arrangements for IWC work so that he, Mr Laphai and Mr Nguy could making money out of that work. The scheme involved him using three companies to manipulate the quotes for IWC work to ensure the work was allocated

to a company determined by Mr Nguyen. Mr Nguyen also made efforts to manage smaller jobs in the capital works program for the purpose of controlling the bids. Mr Nguyen believed that he got the idea for the dummy bidding from his time working on the Glenfield Junction Alliance and his involvement with ASN Contractors.

Once again, Mr Nguyen did not declare any conflict of interest when setting up SDL as an IWC supplier.

Mr Nguyen had access to a Remtech Pty Ltd template that Mr Laphai gave him, which he could use for dummy bids. Mr Nguyen sought reassurance from Mr Nguy that he could trust Mr Laphai. On 30 May 2022, Mr Nguy sent a message to Mr Nguyen asking if he could get away with quotes from two builders instead of three. Mr Nguyen responded that this was not guaranteed but he could “try and make it work”. Mr Nguyen added in his response, “I wanted something solid, that’s why I asked about a sister company.” Mr Nguyen also sent a further WhatsApp message to Mr Nguy stating, “if I get busted, I get done for fraud”. Mr Nguyen told the Commission he was referring to dummy bidding and manipulating the tender process.

Mr Nguyen awarded multiple IWC projects to SDL after Mr Nguy started working there. Mr Nguyen acknowledged that he took the initiative in terms of creating the scheme or arrangement. To that end, he obtained an email and created the alias “Joanne Breen” to communicate with himself on behalf of SDL. During his evidence given in the public inquiry, he accepted that Joanne Breen emails were from himself. Mr Nguyen accepted that he had an agreement with Mr Nguy and Mr Laphai to be paid. He described the arrangement as involving payment to him of 20 per cent of the net profit for smaller jobs done by Constructicon and between 10 and 20 per cent for the bigger jobs done by SDL. He stated he had asked for Mr Nguy to tell Mr Laphai that he could only be paid in cash to avoid payments being traceable.

Mr Nguyen accepted that, in relation to projects where SDL was successful, he had assisted Mr Laphai to inflate his prices so that there would be more profit on those jobs. In the open tender for the Steel Park project, he provided competitors’ pricing information to Mr Laphai so that he could succeed in the tender process. He assisted Mr Laphai to inflate prices by comparing the cost price to the IWC budget and providing this information to Mr Laphai so that SDL’s prices were closer to the budget. Mr Laphai conceded that this occurred, and that Mr Nguyen prepared and submitted at least some of the quotes to himself using the Joanne Breen email.

The table at Figure 2 on page 55 summarises the content of an exhibit shown to Mr Nguyen.

Mr Nguyen accepted that information in the exhibit prepared by Commission officers summarised the projects

awarded to SDL by IWC. Mr Laphai accepted it “probably” represented how much work was done by SDL for IWC.

As indicated in the table, between October 2017 and July 2019, IWC awarded \$1,606,464.24 (including GST) worth of work to SDL.

Item 9 in the table identifies a payment to Mr Nguyen of \$26,237.17. Mr Nguyen told the Commission this was a “minus kickback” that Mr Laphai sought from him because Mr Laphai lost money on the project. Mr Nguyen said this was supported by an email from Mr Laphai on 5 July 2020, stating:

*“As you have not helped us but actually tried to blacklist SDL during steel park project, we have suffered loss of over \$80,000. Please pay back \$22,000 of commission that you have accrued over the various projects.*

Mr Nguyen told the Commission he did not receive \$26,237.17 from Mr Laphai in relation to the Steel Park project and did not repay that money to him. He did not identify any other errors in the table.

Counsel Assisting submitted that Mr Nguyen received \$60,000 for the IWC work he awarded to SDL.

Attached to Mr Laphai’s email of 5 July 2020 was a spreadsheet tracker. The spreadsheet listed works that included but went beyond IWC work performed by SDL. At first, Mr Nguyen acknowledged receipt of the sums described as paid to him. Subsequently, he recalled receiving two payments totalling \$60,000. Of the money described as withdrawn on the spreadsheet, Mr Nguyen claimed he received \$60,000, not the \$70,000 indicated. He also admitted to receiving a mobile telephone from Mr Laphai to the value of \$970.

Mr Laphai disputed the extent of the payments made to Mr Nguyen. He accepted that \$15,000 was paid directly to Mr Nguyen and a further sum of \$7,000 was paid either directly to Mr Nguyen or via Mr Nguy. Mr Laphai also claimed that he gave Mr Nguy \$10,000 in cash to pass to Mr Nguyen by way of a “finder’s fee”. For his part, Mr Nguy denied giving any cash to Mr Nguyen on behalf of Mr Laphai.

In his submission in response to the submissions of Counsel Assisting, Mr Laphai acknowledged that his evidence was in conflict with that of Mr Nguyen. It was argued that Mr Nguyen was involved in many projects where he received payment and that he kept no records as to the amounts he received. It was submitted that Mr Nguyen was unable to recall precise details in respect of payments he received for his corrupt activity and the Commission should accept the evidence of Mr Laphai as more accurate. He claimed that he did not prepare the spreadsheet although it had his input.



Figure 2: IWC contracts awarded to SDL Project Solutions

Item	Project	Date	Contract Value (inc GST)	Competitors' Tenders	Recommended / Approved by Nguyen	Total Variations (inc GST)	Total Paid	Money to Tony Nguyen
1	Petersham Admin Building Level 2 Kitchen Upgrade	6-Oct-2017	\$ 18,084.00	<ul style="list-style-type: none"> <li>Spik Services Pty Ltd</li> <li>Construction Pty Ltd</li> <li>State Development Pty Ltd</li> </ul>	Nguyen recommended	\$ 3,729.00	\$ 21,813.00	
2	Pioneers Memorial Park, Rotunda remediation	15-Jan-2018	\$ 145,882.00	<ul style="list-style-type: none"> <li>State Development NSW Pty Ltd</li> <li>Priority One Coatings Pty Ltd</li> <li>Steelwork Engineering Pty Ltd</li> </ul>	No detail in the memorandum	\$ 44,308.00	\$ 190,190.00	\$ 25,030.50
3	Petersham Admin Building Level 3 Minor Refurb	20-Feb-2018	\$ 14,799.40	<ul style="list-style-type: none"> <li>Construction Pty Ltd</li> <li>Forefront Construction Pty Ltd</li> <li>Spik Services Pty Ltd</li> </ul>	Nguyen recommended	\$ 1,705.00	\$ 16,504.40	
4	Pioneers Memorial Park, electrical upgrade	20-Mar-2018	\$ 44,880.00	<ul style="list-style-type: none"> <li>GWB Electrical Contractors Pty Ltd</li> <li>Spik Services Pty Ltd</li> </ul>	Nguyen recommended	\$ 2,777.50	\$ 47,657.50	
5	Pioneers Memorial Park, concrete Slab remediation	27-Mar-2018	\$ 43,230.00	<ul style="list-style-type: none"> <li>Seal Solutions Pty Ltd</li> <li>Remedial Technologies Australia Pty Ltd</li> </ul>	Nguyen recommended	\$ 5,258.00	\$ 48,488.00	
6	Lambert Park toilet block upgrade	1-May-2018	\$ 144,278.97	<ul style="list-style-type: none"> <li>Marble Arch Pty Ltd</li> <li>Forefront Commercial Industries</li> <li>Clonono Constructions Pty Ltd (did not submit)</li> </ul>	Nguyen recommended	\$ 61,258.03	\$ 205,537.97	\$ 16,685.27
7	Bridgewater Park New Amenity Block	1-Jun-2018	\$ 333,375.07	<ul style="list-style-type: none"> <li>Maki Constructions Pty Ltd</li> <li>Kellyville Buildings Pty Ltd</li> <li>2020 Projects Pty Ltd</li> <li>Redmyre Group Pty Ltd</li> <li>Forefront Commercial Industries</li> </ul>	Nguyen recommended	\$ 100,335.45	\$ 433,910.53	\$ 15,000.00
8	Enmore Children Centre Kitchen Renewal	16-Nov-2018	\$ 36,395.00	<ul style="list-style-type: none"> <li>Auslux Pty Ltd</li> <li>Matrix Group Pty Ltd</li> <li>Construction Pty Ltd (withdrew submission)</li> </ul>	Nguyen recommended	\$ 8,688.90	\$ 45,087.90	
9	Steel Park Community rooms upgrade	1-Apr-2019	\$ 518,357.14	<ul style="list-style-type: none"> <li>Assett Group Services Pty Ltd</li> <li>Rork Projects Pty Ltd</li> <li>Sudiro Constructions Pty Ltd</li> <li>Cooper Commercial Constructions Pty Ltd</li> <li>SPK Services Pty Ltd</li> <li>Every Trade Interiors Pty Ltd</li> <li>Hyper Construction Pty Ltd</li> <li>Construction Pty Ltd</li> </ul>	Nguyen recommended	\$ 9,667.44	\$ 528,024.58	\$ 26,237.17
10	Lambert Park removal/disposal of existing roof	11-Jun-2019	\$ 35,121.04	<ul style="list-style-type: none"> <li>Hyper Construction Pty Ltd</li> <li>Construction Pty Ltd</li> </ul>	Nguyen recommended	\$ -	\$ 35,121.04	
11	Lambert Park Replacement of power cable	28-Jun-2019	\$ 9,938.50	Other projects: 1 written quotation between \$5k and \$10k (incl GST)	Raised Frost, Approved Nguyen	\$ -	\$ 9,938.50	
12	Enmore kitchen floor renewal	23-Jan-2019	\$ 4,939.00	Other projects: 1 written quotation \$5k - \$10k (incl GST)	Raised Frost, Approved Nguyen	\$ 990.00	\$ 5,929.00	
13	Lambert Park -Two light tower hire	1-Jul-2019	\$ 2,565.42	No quote required under \$5k (incl GST)	Raised Frost, Approved Nguyen	\$ -	\$ 2,565.42	
14	Plumber call out fee	17-Dec-2018	\$ 808.50	No quote required under \$5k (incl GST)	Raised Frost, Approved Nguyen	\$ -	\$ 808.50	
15	Enmore CCC-Fixing of leaks	21-Feb-2019	\$ 1,928.96	No quote required under \$5k (incl GST)	Raised Frost, Approved Nguyen	\$ -	\$ 1,928.96	
16	Release retention 50%	31-Oct-2019	\$ 12,958.94	N/A	Raised Frost, Approved Haddock	\$ -	\$ 12,958.94	
<b>Totals</b>			<b>\$ 1,367,745.94</b>		<b>\$ 238,717.32</b>	<b>\$ 1,606,464.24</b>	<b>\$ 82,952.94</b>	

The spreadsheet of 5 July 2020 appears to correspond with Mr Nguyen's evidence more closely. Mr Laphai claimed that the money referred to as withdrawn was in fact not all withdrawn, as an amount was kept for the construction of a duplex for Mr Nguyen that was never built. He did not seek leave to cross examine Mr Nguyen as to this assertion. Nor did he seek to repay the sum that, on his evidence, was outstanding after the breakdown in his relationship with Mr Nguyen.

In the circumstances, the Commission finds it more probable that Mr Nguyen received around \$60,000 in benefits and a mobile telephone valued at \$970 from Mr Laphai in return for arranging for SDL to receive IWC work.

## Marble Arch

Marble Arch was registered on 19 February 2018 with Mr Cox as the sole director, secretary, and shareholder. Mr Nguyen knew Mr Cox from his time working on the Glenfield Junction Alliance.

Mr Nguyen told the Commission that, following his work for the Glenfield Junction Alliance, he received an email from Mr Cox advising that he wanted to form a company and do something together with Mr Nguyen. Mr Nguyen informed him that he was working at IWC and could help him get started, intending to work in the same way he worked for Mr Nguy. Mr Cox agreed with this account.

In his evidence to the Commission, Mr Nguyen agreed that he proceeded to set up Marble Arch as an IWC supplier for the purpose of awarding work to the company. He did not declare any conflict of interest when doing so. Mr Nguyen added Marble Arch to his rotation system for IWC work, whereby he controlled the quotation process by preparing two dummy bids and a quotation from the company associated with himself that he had decided would be awarded the work. This involved rotating IWC work between companies with which he was associated. Mr Nguyen told Mr Cox that he had an email address and an alias set up within Constructicon and SDL, and said that he would "do the same steps" with Mr Cox and Marble Arch.

Mr Nguyen had access to an email address (laura@marblearch.com.au) and used an alias, "Laura Donnelly", project coordinator. Mr Cox told the Commission he came up with the name. Mr Nguyen used the Laura Donnelly alias and email address to send emails to and from himself. He also prepared quotes on behalf of Marble Arch and sent them to himself. He said he used the email and alias to make the company look bigger (it only comprised Mr Cox). Mr Cox agreed with this evidence. He accepted that Mr Nguyen effectively had the ability to speak on behalf of the company using the Laura Donnelly alias. Mr Cox was aware that this would allow

Mr Nguyen to adjust and submit quotes in his spare time and subsequently review them as the responsible person at IWC. He denied, however, being aware that Mr Nguyen used Marble Arch to submit dummy quotes.

Mr Cox told the Commission that, in some cases, he would work out what the direct cost would be and tell Mr Nguyen, who would then advise the price he should charge IWC. If there was something different in the scope, then he would send through what the variation would be and then he would be advised by Mr Nguyen whether to go ahead or not. Mr Cox stated that he was possibly advised to bump up the price. He did not know whether he could say the variations were charged fairly.

Two items on the list of IWC works performed by Marble Arch were described as "supply and install stair nosing at Petersham grandstand" and, again, "Supply and install stair nosing at Petersham grandstand." Mr Cox stated that he thought there were two sets of stairs. A lawfully intercepted telephone call of 3 June 2020 was played, in which Mr Nguyen informed Mr Cox he had been paid \$8,000 twice for the stair nosing. Mr Cox then conceded that he was in fact paid twice for the same job. He did not refund the money.

Mr Cox told the Commission there was a discussion with Mr Nguyen about Mr Nguyen sharing in any profit made by Marble Arch from IWC work and that he agreed to that proposal. He could not recall when the conversation occurred but thought it was probably towards the start of the first project. Mr Cox said no money was actually paid as Mr Nguyen subsequently told him not to worry about it.

Mr Nguyen told the Commission the only benefit that Mr Cox provided him was a mobile telephone purchased in December 2018 for \$1,960. He said he gave the mobile telephone to his wife as a birthday gift. He understood Mr Cox paid for the telephone as a means of "returning the favour" for Mr Nguyen helping Marble Arch to obtain IWC work. The payment for the mobile telephone is supported by a debit of \$1,960 recorded on 3 December 2018 in Marble Arch's bank statement. Mr Nguyen also recalled a discussion with Mr Cox about receiving a share of profits or revenue from Marble Arch's IWC work but said nothing materialised. Mr Cox acknowledged providing Mr Nguyen a mobile telephone valued at \$1,960, however, he stated that it was his understanding at the time that it would be paid back. Mr Cox said he was not paid for the mobile telephone and did not pursue that matter.

The Commission accepts Mr Nguyen's evidence to the effect he accepted the mobile telephone from Mr Cox as a reward for assisting Marble Arch to obtain IWC work. Mr Cox, however, made no admission that he intended the mobile telephone to be such a reward.

There is no evidence that Mr Cox paid any money to

Mr Nguyen in return for Mr Nguyen arranging for Marble Arch to be awarded IWC work.

Marble Arch bank statements recorded payments from IWC totalling \$750,788.93 for the period 23 May 2018 to 9 December 2020. Mr Cox agreed that Marble Arch received around \$750,000 from IWC during that period. The Commission accepts that Marble Arch received payments from IWC totalling \$750,788.93 (including GST).

In his evidence to the Commission, Mr Nguyen admitted to falsifying two insurance documents, being:

- a Berkley Insurance Company (“Berkley”) public liability insurance certificate of currency dated 26 September 2019 (policy number 201809-1577 R1 BIA) for the period 19 November 2019 to 19 November 2020, which falsely represented that Marble Arch had public liability insurance and that the limit of the indemnity was \$20,000,000
- an Insurance and Care NSW (“icare”) workers compensation insurance certificate of currency dated 27 November 2019 (policy number 183743501) for the period 27 November 2019 to 31 (sic) November 2020, which falsely represented that Marble Arch had workers compensation insurance in relation to four workers and wages/units of \$350,900.

Both certificates of currency were, in fact, issued to RJS Infrastructure, but relevant details, including period of cover dates, were altered to insert Marble Arch’s name and circumstances. Mr Nguyen admitted to falsifying the insurance documents. Even though he knew the policies generally last for a year and Marble Arch performed work for IWC over a longer period, he suggested that he was ticking a box in relation to checking insurance, by reference to documentation that, on its face, had expired. Mr Nguyen’s conduct was not known by Mr Cox.

The regional chief risk officer, Asia Pacific at Berkley provided the Commission with a statement confirming Marble Arch did not hold any public liability insurance policy with Berkley and confirming the policy number on the certificate of currency in Marble Arch’s name was, in fact, the policy number for insurance issued to RJS Infrastructure.

The general manager underwriting and employer engagement at icare also provided a statement to the Commission confirming that the icare workers compensation certificate of currency for policy number 183743501 was not issued on 27 November 2019 to Marble Arch. Instead, RJS Infrastructure had been issued the workers compensation insurance certificate of

currency on 27 August 2019, using that policy number.

Mr Nguyen also admitted stealing a saw during the time Marble Arch was working on an IWC project. This took place in July 2020 when Marble Arch was working on the Petersham Park grandstand concrete works. Mr Cox asked for a demonstration saw for the purpose of those concrete works. Mr Nguyen hired one for IWC but, when Mr Cox returned it to him, he kept it and reported it as stolen.

## JTG Services

Mr Nguyen met Mr Abdi through working on the Glenfield Junction Alliance and stayed involved with him through ASN Contractors/TRN Contractors (discussed further below). JTG Services was registered on 24 July 2018 with Mr Abdi’s wife, Jessica Tosh, as its sole director, secretary, and shareholder.

During his evidence in the public inquiry, Mr Abdi accepted he knew that JTG Services was potentially to be used for unlawful purposes. Mr Nguyen stated that JTG Services was established as a shell company for receiving funds from the TfNSW TAP projects in which Mr Abdi was involved. It was common ground that Mr Nguyen provided JTG Services with IWC work so that Mr Abdi could have money in the JTG Services bank account to pay for the company’s trading costs.

Commission officers prepared a list identifying three projects in respect of which JTG Services was paid a total of \$24,619.60 (including GST). Two of the purported projects were the May Murray Children Centre (sic) works awarded on 4 January 2019 and Enmore Children Centre (sic) labour hire awarded on 11 January 2019. Mr Nguyen’s evidence was that, although JTG Services was paid for work on these two projects, “no work was done” by JTG Services. In relation to the third project, being for painting at Leichhardt Oval awarded on 11 October 2019, Constructicon was subcontracted to do the work (despite unsuccessfully tendering itself), with a profit margin charged by Mr Abdi on top. Mr Nguyen said he assisted by preparing both the JTG Services and the Constructicon quotes for this project and suggested a mark-up on the price Constructicon would charge JTG Services. Mr Nguyen believed JTG Services received a margin of about \$1,000.

Mr Nguyen told the Commission he did not receive or expect a financial benefit for assisting JTG Services to obtain these contracts.

Mr Nguyen stated that he had access to JTG Services’ email account and prepared quotations on its behalf. At first, Mr Abdi stated that he had no idea if actual work was performed on the aforementioned projects.

Nonetheless, he agreed that Mr Nguyen established and had access to JTG Services' email accounts.

On 8 January 2019 and 15 January 2019, Mr Nguyen used Mr Abdi's JTG Services email account to email himself at IWC, attaching an invoice for work purportedly performed by JTG Services in relation to the May Murray Children Centre and the Enmore Children Centre projects respectively in the amounts of \$1,584 and \$1,023. The metadata for the invoice attached to the email showed that the author of the document was Mr Nguyen. Mr Abdi said he had not seen these invoices and he did not email them to Mr Nguyen. While Mr Abdi accepted that he had made an agreement with Mr Nguyen to provide a means to cover JTG Services' costs, Mr Abdi said he had not seen the invoices, did not create the invoices, did not email them to Mr Nguyen, and had no role in submitting the invoices to IWC.

Mr Abdi stated that he did not draft the third JTG Services invoice for Leichhardt Oval. Mr Abdi stated that Mr Nguyen may have told him that Constructicon was going to do some work through JTG Services, and then it would be paid through JTG Services with JTG Services keeping a fee. Although Mr Abdi claimed he did not know for certain, he thought he paid Mr Nguy \$15,000, with the leftover amount remaining in the JTG Services account. At that point in time, Constructicon had, in fact, been established and there was evidence that it submitted a higher quote to IWC for the painting work. However, Mr Abdi denied that the use of Constructicon was part of his request to Mr Nguyen to provide means so he could cover JTG Services' costs.

The evidence establishes that Mr Abdi had made an agreement with Mr Nguyen to provide a means to cover JTG Services' costs. However, Mr Abdi was not responsible for preparing or emailing the three JTG Services invoices to IWC. There is insufficient evidence to establish that Mr Abdi, at that time, had any detailed knowledge about the conduct Mr Nguyen was engaging in which caused IWC to deposit the payments into the JTG Services bank account.

## Sanber Group trading as RJS Civil

Mr Nguyen met Mr Sanber in 2014 when they were working as part of the Glenfield Junction Alliance, having met through Mr Abdi. Mr Nguyen and Mr Sanber created TRN Contractors to tender for TfNSW engineering and construction work. It was Mr Abdi, the other silent partner in the company, who requested Mr Nguyen provide council work to Sanber Group.

Sanber Group was incorporated on 20 October 2015. Mr Sanber was the sole director and shareholder. It traded as RJS Civil. Mr Nguyen set up RJS Civil as a council

supplier through Leichhardt Council. He did not identify any conflict of interest in doing so.

Mr Nguyen had a template for RJS Civil that he used to prepare its quotes for the four council projects awarded to RJS Civil, for which it received \$24,992 (including GST). He acknowledged inflating the prices with the purpose of RJS Civil making money. Despite this assistance, Mr Nguyen claimed that he did not receive any benefit. He explained this was because the long-term goal was to get RJS Civil established so that it would have sufficient funds to be able to seek transport project work. In fact, RJS Civil did subsequently obtain transport project work. Mr Nguyen acknowledged that he derived profits from RJS Civil in relation to that work.

Mr Sanber agreed that RJS Civil was awarded four council contracts to the value of \$24,992 (including GST). He said, however, that he prepared the RJS Civil quotes. He said he did not provide Mr Nguyen with an RJS Civil template. He recalled discussing pricing with Mr Nguyen for the purpose of making sure he was successful in getting the job but said he did not know whether there was any competitive process.

The Commission accepts Mr Nguyen's evidence against interest that he created the RJS Civil quotes and inflated them with the purpose of RJS Civil making money. There is insufficient evidence to determine whether Mr Sanber was aware Mr Nguyen inflated the quotes.

## Corrupt conduct

### Mr Nguyen

#### Innocon

Between August 2016 and April 2017, Mr Nguyen knowingly misused his public official position with IWC to arrange for the awarding of approximately \$306,914.83 (including GST) of IWC work to Innocon, a company of which his friend Mr Nguy was a director, to benefit Mr Nguy, having agreed to receive a financial benefit from Innocon in return.

Mr Nguyen's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it involved the dishonest and partial exercise of his official functions (s 8(1)(b)) and involved a breach of public trust (s 8(1)(c)).

For the purpose of s 9(1)(a) of the ICAC Act, it is relevant to consider s 249B(1) of the Crimes Act, the elements of which were described in chapter 3.

In relation to the s 249B(1) offence, as defined by s 249A of the Crimes Act, Mr Nguyen was the "agent" (as a person employed by IWC) and IWC was the "principal".

The benefits were the benefit he agreed to receive from Mr Nguy of Innocon in return for favouring Innocon in the awarding of IWC work. For the purposes of s 249B(1) of the Crimes Act, it is not necessary that Mr Nguyen receive the benefit or reward: see *R v Morgan* [1970] 3 All ER 1053 Crim R 15.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen committed offences under s 249B(1) of the Crimes Act of corruptly agreeing to receive benefits as an inducement or reward in relation to the affairs or business of IWC. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

The Commission is also satisfied for the purpose of s 9(1)(b) and s 9(1)(c) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen had committed a disciplinary offence giving rise to dismissal, being a substantial breach of the IWC code of conduct, requiring employees not to take advantage (or seek to take advantage) of their status or position within IWC, or of functions they perform for IWC, in order to obtain a private benefit for themselves or for any other person or body.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed an offence under s 249B(1) of the Crimes Act.

For the purpose of s 13(3A) the Commission is also satisfied that, if the facts as found were to be proved on admissible evidence to the civil standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed a disciplinary offence, being a breach of the requirements of the IWC code of conduct as set out above, and that such conduct is sufficiently serious to constitute grounds for his dismissal. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that Mr Nguyen's conduct is serious corrupt conduct given it involved significant planning, it extended over multiple IWC projects, he was motivated by financial gain and it involved a significant departure from his responsibilities in relation to running impartial

processes for IWC.

As noted above, Mr Nguyen did receive a benefit from Innocon in the form of work that was done installing floorboards in his sister's apartment. Counsel Assisting, however, did not make any submission that the Commission should make a finding of corrupt conduct in relation to that conduct and, accordingly, the Commission makes no corrupt conduct finding in this regard.

### **Constructicon**

Between June 2017 and September 2020, Mr Nguyen knowingly misused his public official position with IWC to arrange for the awarding of approximately \$1,071,168.42 (including GST) of IWC work to Constructicon, a company of which his friend Mr Nguy was the sole director, for the purpose of benefitting Mr Nguy, in return for receiving a financial benefit of \$3,752.89.

Mr Nguyen's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it constituted the dishonest and partial exercise of his official functions (s 8(1)(b)) and involved a breach of public trust (s 8(1)(c)).

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen committed an offence under s 249B(1) of the Crimes Act of corruptly receiving benefits as an inducement or reward in relation to the affairs or business of IWC. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

The Commission is also satisfied for the purpose of s 9(1)(b) and s 9(1)(c) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen had committed a disciplinary offence giving rise to dismissal, being a substantial breach of the requirement of the IWC code of conduct, which required employees not to take advantage (or seek to take advantage) of their status or position within IWC, or of functions they perform for IWC, in order to obtain a private benefit for themselves or for any other person or body: see IWC code of conduct s 6.15. Mr Nguyen's conduct, therefore, comes within s 9(1)(b) and s 9(1)(c) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal

would reasonably find that Mr Nguyen had committed offences under s 249B(1) of the Crimes Act.

The Commission is further satisfied that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed a disciplinary offence, being substantial breaches of the requirements of the IWC code of conduct as set out above. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that the conduct is serious corrupt conduct. Mr Nguyen's conduct involved the use of Constructicon as part of his rotation system to award IWC work to companies he favoured, and the use of an alias to communicate with himself in relation to dummy and actual bid documentation that he prepared. His conduct also involved significant planning; it extended over multiple IWC projects and work to a substantial value over a period of more than three years; and it involved a significant departure from his responsibilities in relation to running impartial tender processes for IWC, including the making of regular false and misleading statements to his employer and co-workers from IWC.

As noted above, Mr Nguyen also admitted receiving a second-hand mobile telephone from Mr Nguy. Counsel Assisting, however, did not make any submission that the Commission should make a finding of corrupt conduct in relation to that conduct and, accordingly, the Commission makes no corrupt conduct finding in this regard.

### **SDL**

Between October 2017 and July 2019, Mr Nguyen knowingly misused his public official position with IWC to arrange for the awarding of approximately \$1,606,464.24 (including GST) worth of IWC work to SDL, a company for which his friend Mr Nguy worked and of which Mr Laphai was sole director, for the purpose of improperly benefitting Mr Laphai and Mr Nguy, and in return for which he received about \$60,000 and a mobile telephone costing \$970.

Mr Nguyen's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. It constituted the dishonest and partial exercise of his official functions (s 8(1)(b)) and involved a breach of public trust (s 8(1)(c)).

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen committed offences under s 249B(1) of the Crimes Act of corruptly receiving

benefits as an inducement or reward in relation to the affairs or business of IWC. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

The Commission is also satisfied for the purpose of s 9(1)(b) and s 9(1)(c) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen had committed disciplinary offences giving rise to dismissal, being a substantial breach of the requirements of the IWC code of conduct, which required employees not to take advantage (or seek to take advantage) of their status or position within IWC, or of functions they perform for IWC, in order to obtain a private benefit for themselves or for any other person or body: see IWC code of conduct Section 6.15. Mr Nguyen's conduct, therefore, comes within s 9(1)(b) and s 9(1)(c) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed offences under s 249B(1) of the Crimes Act.

The Commission is also satisfied that, if the facts as found were to be proved on admissible evidence to the civil standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed disciplinary offences, being a substantial breach of the requirements of the IWC code of conduct as set out above, and that such conduct is sufficiently serious to constitute grounds for his dismissal. Accordingly, the jurisdictional requirements of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purposes of s 74BA of the ICAC Act that the conduct is serious corrupt conduct. Mr Nguyen's conduct involved significant planning, and extended over multiple IWC projects and work to a substantial value over a period of more than 18 months, as well as the receipt of substantial benefits. It involved a significant departure from his responsibilities in relation to running impartial tender processes for IWC.

### **Marble Arch**

Between about April 2018 and September 2020, Mr Nguyen knowingly misused his public official position with IWC to arrange for the awarding of approximately \$750,788.93 (including GST) worth of IWC work to Marble Arch, a company of which his friend Mr Cox was sole director, for the purpose of improperly benefitting

Mr Cox for which, in December 2018, he accepted from Mr Cox a mobile telephone to the value of \$1,960.

Mr Nguyen's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it constituted the dishonest and partial exercise of his official functions (s 8(1)(b)) and involved a breach of public trust (s 8(1)(c)).

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen committed an offence under s 249B(1) of the Crimes Act (corruptly receiving benefits as an inducement or reward in relation to the affairs or business of IWC).

The Commission is also satisfied for the purpose of s 9(1)(b) and s 9(1)(c) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen committed a disciplinary offence giving rise to dismissal, being a substantial breach of the requirements of the IWC code of conduct, which required employees not to take advantage (or seek to take advantage) of their status or position within IWC, or of functions they perform for IWC, in order to obtain a private benefit for themselves or for any other person or body: see IWC code of conduct s 6.15. Mr Nguyen's conduct, therefore, comes within s 9(1)(b) and s 9(1)(c) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed an offence under s 249B(1) of the Crimes Act.

The Commission is also satisfied that, if the facts as found were to be proved on admissible evidence to the civil standard of balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed a disciplinary offence, being a substantial breach of the requirements of the IWC code of conduct as set out above, and that such conduct is sufficiently serious to constitute grounds for his dismissal. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that the conduct is serious corrupt

conduct. It included his use of Marble Arch as part of his rotation system for awarding IWC work to companies he favoured, and use of an alias to communicate with himself in relation to dummy and actual bid documentation that he himself prepared. It involved significant planning; extended over multiple IWC projects and work to a substantial value over a period of more than two years; and involved falsification of insurance documents, a significant departure from his responsibilities in relation to running impartial tender processes for IWC.

### JTG Services

Between about January 2019 and October 2019, Mr Nguyen knowingly misused his public official position with IWC to arrange for the awarding of approximately \$24,619.60 (including GST) worth of IWC work to JTG Services for the purpose of improperly benefitting Mr Abdi. This included authorising payment of JTG Services invoices to IWC dated 4 January 2019, 11 January 2019 and 11 October 2019, for which JTG Services was paid despite knowing JTG Services did not perform any work in relation to the first two invoices and that the work in relation to the third invoice was performed by Constructicon.

Mr Nguyen's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it constituted the dishonest and partial exercise of his official functions (s 8(1)(b)) and involved a breach of public trust (s 8(1)(c)).

The Commission is satisfied for the purpose of s 9(1)(b) and s 9(1)(c) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen committed disciplinary offences giving rise to dismissal, being a substantial breach of the requirements of the IWC code of conduct, which required employees not to take advantage (or seek to take advantage) of their status or position within IWC, or of functions they perform for IWC, in order to obtain a private benefit for themselves or for any other person or body: see IWC code of conduct s 6.15. His conduct, therefore, comes within s 9(1)(b) and s 9(1)(c) of the ICAC Act.

The Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the civil standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed a disciplinary offence, being substantial breaches of the requirements of the IWC code of conduct as set out above, and that such conduct is sufficiently serious to constitute grounds for his dismissal.

Accordingly, the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied for the purposes of s 74BA of the ICAC Act that the conduct is serious corrupt conduct as it led to IWC paying JTG Services for work that it did not perform, involved significant planning, it extended over a period of around 10 months, and it involved a significant departure from Mr Nguyen's responsibilities in relation to the management of projects for IWC.

### **Sanber Group trading as RJS Civil**

Between September 2016 and February 2017, Mr Nguyen knowingly misused his public official position at IWC to arrange for the awarding of approximately \$24,992 (including GST) worth of IWC work to Sanber Group trading as RJS Civil, for which he created inflated quotes for the purpose of improperly benefitting Mr Sanber.

Mr Nguyen's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it constituted the dishonest and partial exercise of his official functions (s 8(1)(b)) and involved a breach of public trust (s 8(1)(c)).

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen committed offences of fraud under s 192E of the Crimes Act, namely by deception in dishonestly obtaining a financial advantage for Mr Abdi and Sanber Group. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

The Commission is also satisfied for the purpose of s 9(1)(b) and s 9(1)(c) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen committed disciplinary offences giving rise to dismissal, being a substantial breach of the requirements of the IWC code of conduct, which required employees not to take advantage (or seek to take advantage) of their status or position within IWC, or of functions they perform for IWC, in order to obtain a private benefit for themselves or for any other person or body: see IWC code of conduct s 6.15. His conduct, therefore, comes within s 9(1)(b) and s 9(1)(c) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted

by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed offences under s 192E of the Crimes Act.

The Commission is also satisfied that, if the facts as found were to be proved on admissible evidence to the civil standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed a disciplinary offence, being substantial breaches of the requirements of the IWC code of conduct as set out above, and that such conduct is sufficiently serious to constitute grounds for his dismissal. Accordingly, the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is satisfied for the purposes of s 74BA of the ICAC Act that the conduct is serious corrupt conduct because it involved significant planning, extended over a period of around four months, and involved a significant departure from Mr Nguyen's responsibilities as an IWC officer.

### **Mr Nguy**

#### **Innocon**

Mr Nguy agreed to provide a financial benefit to Mr Nguyen as a reward for Mr Nguyen misusing his public official position with IWC to arrange for the awarding of approximately \$306,914.83 (including GST) of IWC work to Mr Nguy's company, Innocon, between about August 2016 and April 2017.

Mr Nguy's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it involved conduct that adversely affected the honest and impartial exercise of Mr Nguyen's official functions (s 8(1)(a)).

For the purpose of s 9(1)(a) of the ICAC Act, it is relevant to consider s 249B(2) of the Crimes Act, the elements of which were described in chapter 3.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguy committed an offence under s 249B(2) of the Crimes Act of corruptly agreeing to provide benefits as an inducement or reward to Mr Nguyen in relation to the affairs or business of IWC. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted



by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguy had committed an offence under s 249B(2) of the Crimes Act. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that Mr Nguy's conduct is serious corrupt conduct, given it involved significant planning, it extended over multiple IWC projects, he was motivated by financial gain, and it involved Mr Nguyen in a significant departure from his responsibilities in relation to running impartial processes for IWC.

As noted above, Mr Nguy provided a benefit to Mr Nguyen in the form of work that was done installing floorboards in Mr Nguyen's sister's apartment. Counsel Assisting, however, did not make any submission that the Commission should make a finding of corrupt conduct in relation to that conduct. This was because it was not clear with which director of Innocon the arrangement with Mr Nguyen was made. Accordingly, the Commission makes no corrupt conduct finding in this regard.

### **Constructicon**

Mr Nguy provided a financial benefit to Mr Nguyen of \$3,752.89 as a reward for Mr Nguyen misusing his public official position with IWC to arrange for the awarding of approximately \$1,071,168.42 (including GST) of IWC work to Mr Nguy's company, Constructicon, between about June 2017 and September 2020.

Mr Nguy's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it involved conduct that adversely affected the honest and impartial exercise of Mr Nguyen's official functions (s 8(1)(a)).

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguy committed an offence under s 249B(2) of the Crimes Act of corruptly agreeing to provide benefits as an inducement or reward to Mr Nguyen in relation to the affairs or business of IWC. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguy had committed an offence under s 249B(2) of the Crimes Act. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that Mr Nguy's conduct is serious corrupt conduct, given it involved significant planning, it extended over multiple IWC projects, he was motivated by financial gain, and it involved Mr Nguyen in a significant departure from his responsibilities in relation to running impartial processes for IWC.

As noted above, Mr Nguy also admitted giving a second-hand mobile telephone to Mr Nguyen. Counsel Assisting, however, did not make any submission that the Commission should make a finding of corrupt conduct in relation to that conduct and, accordingly, the Commission makes no corrupt conduct finding in this regard.

### **Mr Laphai**

Mr Laphai provided a financial benefit to Mr Nguyen of about \$60,000 and a mobile telephone costing \$970 as a reward for Mr Nguyen misusing his public official position with IWC to arrange for the awarding of approximately \$1,606,464.24 (including GST) of IWC work to Mr Laphai's company, SDL, between about October 2017 and July 2019.

Mr Laphai's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it involved conduct that adversely affected the honest and impartial exercise of Mr Nguyen's official functions (s 8(1)(a)).

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Laphai committed offences under s 249B(2) of the Crimes Act of corruptly providing benefits as an inducement or reward to Mr Nguyen in relation to the affairs or business of IWC. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Laphai had committed offences under s 249B(2) of the Crimes Act. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that Mr Laphai's conduct is serious corrupt conduct, given it involved significant planning, it extended over multiple IWC projects, he was motivated by financial gain, and it involved Mr Nguyen in a significant departure from his responsibilities in relation to running impartial processes for IWC.

## Mr Cox

Mr Cox did not dispute he provided a mobile telephone to Mr Nguyen costing \$1,960, but said that he expected to be reimbursed by Mr Nguyen. Counsel Assisting did not make any submissions recommending that a corrupt conduct finding be made for Mr Cox in respect of the mobile telephone. In the absence of evidence that Mr Cox intended the mobile telephone as a reward for Mr Nguyen assisting Marble Arch to obtain IWC work, the Commission is not satisfied such a finding should be made with respect to Mr Cox.

## Mr Abdi

While Mr Abdi accepted that he had made an agreement with Mr Nguyen to provide a means to cover JTG Services' costs, the evidence is insufficient to establish that, at the time the three JTG Services invoices were submitted to IWC, Mr Abdi had any detailed knowledge about the conduct Mr Nguyen was engaging in which caused IWC to deposit the payments into the JTG Services bank account.

Counsel Assisting did not submit that corrupt conduct findings be made against Mr Abdi in relation to the three JTG Services invoices submitted to IWC. While there is some evidence Mr Abdi was involved, it is insufficient to support a corrupt conduct finding and the Commission ultimately accepts the evidence in respect of engaging in corrupt conduct is greater against Mr Nguyen.

## Mr Sanber

Counsel Assisting did not submit any corrupt conduct finding against Mr Sanber. The evidence does not appear to show that Mr Sanber was aware of Mr Nguyen creating false quotes. There was insufficient evidence that any conduct engaged in by Mr Sanber constituted serious corrupt conduct. The Commission, therefore, does not make a finding of corrupt conduct in respect of Mr Sanber.

## Section 74A(2) statements

For the purpose of the matters dealt with in this chapter, the Commission is satisfied that Mr Nguyen, Mr Nguy, Mr Laphai, Mr Cox and Mr Abdi are affected persons.

## Tony Nguyen

Mr Nguyen's evidence was the subject of a declaration under s 38 of the ICAC Act and cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that other admissible evidence would be available. This potentially includes the evidence

that could be given by Mr Nguy, Laphai, Mr Cox and Mr Abdi, and documentary evidence including relevant quotes, IWC documents and bank statements. In relation to the falsification of the two insurance documents, there are also the documents themselves, the provision of the documents to IWC, and the statements of the Berkley regional chief risk officer and the icare general manager underwriting and employer engagement.

Counsel Assisting submitted, and the Commission accepts, that the Commission would be of the opinion that the advice of the DPP should be sought with respect to the prosecution of Mr Nguyen for the common law offence of wilful misconduct in public office. Counsel Assisting submitted that Mr Nguyen's repeated acts of preparing dummy and legitimate bids on behalf of companies with which he was associated for the purpose of securing IWC work for those companies (including Constructicon, Innocon and Marble Arch) on a rotating basis, while employed by IWC, gave rise to the offence. The Commission is satisfied that admissible evidence would be available including the dummy and legitimate tender documents submitted on behalf of those companies to IWC and the WhatsApp chat between Mr Nguyen, Mr Laphai and Mr Nguy, and Mr Nguyen and Mr Cox.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Nguyen for:

- an offence of wilful misconduct in public office
- offences contrary to s 249B(1) of the Crimes Act in relation to his dealings with Innocon, Constructicon, SDL and Marble Arch
- offences contrary to s 253 of the Crimes Act of forgery, in respect of making false documents, being Marble Arch's public liability insurance certificate of currency dated 26 September 2019 and icare workers compensation certificate of currency dated 27 November 2019
- offences contrary to s 192G(b) of the Crimes Act of intention to defraud by false or misleading statement, in respect of publication of false or misleading statements, being Marble Arch's public liability insurance certificate of currency dated 26 September 2019 and icare workers compensation certificate of currency dated 27 November 2019, with the intention of obtaining a financial advantage for Marble Arch.

The elements of the common law offence of wilful misconduct in public office have been addressed in *R v Quach* (2010) 201 A Crim R 522 at 535, which decision was approved by the NSW Court of Criminal Appeal in *Obeid v R* [2015] NSW CCA 309 at 133. The Court confirmed that the elements of the offence are:

A public official;

- 1) *in the course of or connected to his public office;*
- 2) *wilfully misconducts himself, by act or omission, for example, by wilfully neglecting or failing to perform his duty;*
- 3) *without reasonable excuse or justification, and;*
- 4) *where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.*

The offence is made out if the public official is reckless as to whether the conduct was a breach of his or her duties as a public official or whether the public official knows the conduct was such a breach (see *R v Obeid* (No. 11) [2016] NSWSC 974). In *Macdonald v R* [2019] NSW CCA 32 at 72, the Court of Criminal Appeal stated that, for the mental element of the offence of misconduct in public office to be made out, the prosecution must also prove beyond reasonable doubt that the transaction in question would not have been undertaken but for the improper purpose.

Section 253 of the Crimes Act provides:

**253 Forgery--making false document**

*A person who makes a false document with the intention that the person or another will use it--*

- (a) *to induce some person to accept it as genuine, and*
- (b) *because of its being accepted as genuine--,*
  - (i) *to obtain any property belonging to another, or*
  - (ii) *to obtain any financial advantage or cause any financial disadvantage, or*
  - (iii) *to influence the exercise of a public duty*

*is guilty of an offence.*

The relevant elements of this offence are:

1. the accused made a false statement
2. with the intention that he/she or another person would induce a person to accept it as genuine
3. and because of it being accepted as genuine:
  - (i) ...

- (ii) obtains a financial advantage or causes a financial disadvantage

- (iii) influences the exercise of a public duty.

For the purposes of s 253 of the Crimes Act, a document is “false” if, and only if, the document (or any part of the document) purports to have been made in the form in which it has been made by a person who did not make it in that form (s 250(1)).

A person is to be treated as “making a false document” if the person alters a document so as to make it false within the meaning of this section, whether or not it is false in some other respect apart from that alteration (s 250(2)).

Further, section 192G of the Crimes Act provides (emphasis added):

**192G Intention to defraud by false or misleading statement**

*A person who dishonestly makes or publishes, or concurs in making or publishing, any statement (whether or not in writing) that is false or misleading in a material particular with the intention of:*

- (a) ..., or

- (b) *obtaining a financial advantage or causing a financial disadvantage,*

*is guilty of an offence.*

Pursuant to s 4B of the Crimes Act, “dishonest” means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.

“False” in a “material particular” means that the false particular be of the moment or of significance and not trivial or inconsequential (see *R v Maslen & Shaw* (1995) 79 A. Crim. R. 199).

Obtaining a financial advantage or causing disadvantage is defined in s 192D of the Crimes Act

As Mr Nguyen’s employment at IWC has ended, the question of whether consideration should be given to the taking of action against him for a disciplinary offence, or the taking of action with a view to his dismissal, does not arise.

## Monty Nguy

Mr Nguy’s evidence was the subject of a declaration under s 38 of the ICAC Act and cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible evidence that would be available, including

the bank statement recording receipt of the 17 August 2017 payment; the “Inner West Council Project Claims Tracker” emailed to Mr Nguyen; the dummy and legitimate tender documents submitted by Constructicon to IWC; and the WhatsApp messages referred to above.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Nguy for offences contrary to s 249B(2) of the Crimes Act of corruptly giving rewards to Mr Nguyen

### **Seng Du Laphai**

Mr Laphai’s evidence was the subject of a declaration under s 38 of the ICAC Act and cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible evidence that would be available, including the dummy and legitimate tendering documents submitted by SDL to IWC; the WhatsApp messages between Mr Nguyen, Mr Laphai and Mr Nguy; and the spreadsheet Mr Laphai prepared and emailed to Mr Nguyen, setting out the individual payments made to Mr Nguyen in connection with each IWC project that was awarded to SDL.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Laphai for offences contrary to s 249B(2) of the Crimes Act of corruptly giving benefits or rewards to Mr Nguyen.

### **Aidan Cox**

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP for the prosecution of Mr Cox for any criminal offence arising from the matters dealt with in this chapter.

### **Nima Abdi**

Mr Abdi’s evidence was the subject of a declaration under s 38 of the ICAC Act and cannot be used against him in criminal proceedings, except in relation to a prosecution for an offence under the ICAC Act. The Commission is not satisfied that there is sufficient other admissible evidence that would be available to prosecute Mr Abdi for any criminal offence. In these circumstances, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Abdi for any criminal offences.

## Chapter 5: Victoria Street Station

This chapter examines how Sanber Group, trading as RJS Civil, came to be awarded work on the TfNSW Victoria Street Station project.

### Background

Sanber Group was incorporated on 20 October 2015 with Mr Sanber as sole director, secretary, and shareholder. It traded as RJS Civil. Mr Nguyen described his and Mr Abdi's roles in Sanber Group as unofficial silent partners. In later evidence, Mr Nguyen characterised the agreement between himself, Mr Abdi and Mr Sanber as an agreement reached sometime before pricing the Victoria Street Station project to split the profits between the three of them. He stated that he was approached by Mr Abdi. At that point, Mr Nguyen did not know how Mr Aziz was involved, although he was advised that Mr Aziz was the project manager.

At this time, Mr Nguyen was still working for IWC, Mr Abdi for TfNSW, and Mr Sanber for Sydney Trains.

Mr Aziz submitted that he and Mr Abdi were not close friends. However, Mr Aziz's own evidence was that he and Mr Abdi became friendly at the same school in year 11 and this continued on-and-off thereafter, with both completing their engineering degrees around the same time. Their wives and children were also friendly with each other. Mr Abdi gave evidence that, in 2015, they contemplated buying a parcel of property together and building separate houses. Mr Aziz's evidence acknowledged the proposed purchase but described it as more of a business venture. There is documentary evidence of contract discussions in which Mr Aziz participated as a proposed purchaser, although he himself did not ultimately come to be involved. Overall, whilst the intensity of the relationship may have varied, the Commission is satisfied that it is appropriate to describe Mr Abdi and Mr Aziz as having a close friendship, taking into account its nature and duration. This is further

supported by the circumstances described below, in which Mr Abdi came to be a referee for Mr Aziz.

Mr Aziz is the principal of Tresca, which specialised in engineering consultancy work. As Mr Aziz did not want to declare his association with Tresca to any of his employers, in 2012, he replaced himself with his wife as Tresca's sole director and shareholder. Mr Aziz described his work at Tresca as more to do with supplying piping and specific equipment for the natural gas industry. He worked for Tresca at night, at weekends and during holiday periods.

On 24 February 2017, Mr Abdi forwarded Mr Aziz's resume to a Downer project engineer, stating:

*Tell me what you think before you spread it out.  
His[sic] really good, and I'm not just saying that!  
He will make you look good cause they will think you  
have good resource judgment!*

The resume contained false statements with respect to Mr Aziz's qualifications and experience. In particular, it falsely represented that Mr Aziz had obtained a Master of Engineering Management degree and managed and delivered projects that he had not.

On 6 March 2017, Mr Abdi also provided a reference for Mr Aziz that was glowing but entirely false. Included in that were claims that Mr Abdi was Mr Aziz's direct supervisor at TfNSW via ACOR Consultants. Mr Abdi never performed any such role. In fact, Mr Aziz had never worked with Mr Abdi, although the reference suggested he did. The reference also described Mr Aziz's attitude to safety as "great" and that he was looking after two tier 1 contractors. In fact, he had never done so. It also rated Mr Aziz's overall performance on a scale of 1-to-6 at "5 no doubt working way to 6".

Mr Abdi submitted that Counsel Assisting provided no evidence that he was aware of Mr Aziz providing false statements in his résumé and that the representations

made in the correspondence of 24 February 2017 were vague and statements of opinion. However, no submission was advanced addressing the reference provided by Mr Abdi which, when read together with the correspondence of 24 February 2017, provides evidence of the falsity of Mr Abdi's claims.

Taken together, the Commission is satisfied that Mr Abdi knowingly represented to Downer false claims about the skill and experience of Mr Aziz as an engineer.

The TAP involved a series of station accessibility upgrades. The program was delivered in stages. Tranche 1 included Victoria Street Station at Maitland. This was the first project in which Mr Aziz became involved, upon commencing employment at Downer in 2017. Mr Aziz stated that, with this building package, there were difficulties in getting a tenderer, and he had to reach out to others. Mr Abdi provided a list of people to approach that included Mr Dabit from Dabcorp, (who was an associate of Mr Sanber).

On 26 April 2017, Downer released a tender package for building works for Victoria Street Station to Dabcorp. Mr Abdi accepted that, before the package was released, he had discussions with Mr Aziz about making sure that Mr Dabit was on the list so that hopefully that would see Sanber Group involved. Mr Sanber stated that it was Mr Abdi who initially informed him of the project, and Mr Aziz subsequently called him in relation to the tender. However, there were text messages sent on 5 May 2017 by Mr Abdi requesting Mr Sanber to contact Mr Aziz. There is also evidence of Mr Abdi having text message contact with Mr Sanber in May 2017 relevant to the tender submission.

On 11 May 2017, following a request made by Mr Aziz, an extension of time for tender submissions was granted to 2 pm on 19 May 2017. On 12 May 2017, Mr Aziz was advised that Sanber Group had been added to the Victoria Street Station project building package.

On 21 June 2017, Alex Hidalgo from Downer wrote to Dabcorp with a tender clarification request to be submitted with revised pricing and response by 23 June 2017.

On 23 June 2017, Mr Hidalgo sent a tender clarification request to Dabcorp in reference to the tender with a deadline of 5 pm 23 June 2017.

On 23 June 2017, Mr Sanber wrote to Mr Dabit, stating:

*They said that they will award tomorrow, if we don't respond today, they will award to the other company. I have attached the responses to the clarification for review. I don't have the latest BOQ [bill of quantities] you sent through, and we need to update the attached*

*and send through. Could you please update and send through? or call me so we can catch up for an hour today to complete and send through.*

The request for clarification was responded to, quoting a price of \$975,596.

On 25 June 2017, Mr Dabit wrote to Mr Sanber, stating:

*See attached I've made a couple of changes. I think we should just let this one go on this occasion only due to timing of commencement as I am currently flat out on all my projects.*

Mr Sanber responded by stating:

*Thanks for sending through John.*

*I wouldn't let this one go too easily as I understand the other contractor has not submitted their revised price. Also, I have increased the price by almost \$200k to make it worthwhile. Also, as I mentioned previously I am keen to manage this for you if it suits, but I will need some support from you as needed.*

*I will need you to reply to Alex tomorrow after I find out from Abdul if a submission has been received. Can you please have your laptop with you so that you can send through when I call you. I have BCC'd you in my email to Abdul so that you have the files with you.*

*Call me in the morning when you get a chance and I will go through this with you in more detail.*

The process by which Sanber Group came to submit a tender price was outlined by Mr Nguyen. Mr Nguyen described how he was tasked to get a builder and obtain a price for the work as Sanber Group was not a builder, had no employees, and the only people involved were Mr Nguyen, Mr Abdi, and Mr Sanber. He described being tasked to get a cost price from SDL as he knew Mr Laphai. After passing that information to Mr Abdi, he would have got the mark-up from Mr Aziz relying on Downer budget information. That enabled Sanber Group to submit a price close to the project budget. Mr Sanber also conceded that Mr Aziz was providing him with information in relation to other contractors and where his pricing should be, in order to be successful.

A tender clarification request was sent to Mr Sanber (on behalf of Sanber Group) by Mr Hidalgo on 26 June 2017. This sought revised pricing and response by 27 June 2017. Mr Sanber responded to that request on 27 June 2017, quoting a price of \$954,000, although later that same day he advised Mr Dabit that he had increased the tender price to \$975,000, adding, "It is unlikely that we will get it however, we need to submit something as we were short listed, and if we get it then I can quit work and pay myself a couple years' wages with the increases." Mr Sanber's

evidence was that Mr Dabit made it clear to him that he was not in a position to take on more work and Mr Abdi had advised him that if Dabcorp withdrew then it would ruin the tender process. Accordingly, his suggestion was to increase the price sufficiently that if Dabcorp got the job he, Mr Sanber, would manage it.

In fact, the price nominated of \$975,000 was a reference to the price ultimately submitted by Sanber Group, not Dabcorp. There was no evidence to suggest Mr Dabit was aware of Sanber Group also submitting a tender. Nor was there any suggestion that the Dabcorp quotation was intended to be a dummy bid.

On 29 June 2017, Mr Sanber responded to requests by Downer to clarify Sanber Group's tender, enclosing CVs for persons said to be key personnel. Mr Abdi and Mr Sanber admitted they were not real persons. Mr Sanber also conceded that the information he provided about previously completed projects by Sanber Group was false.

## How Mr Aziz assisted

Counsel Assisting submitted, and the Commission accepts, that the evidence does not establish that Mr Aziz joined Downer to assist Mr Abdi in obtaining a subcontract of TfNSW work.

Counsel Assisting submitted a number of examples of assistance that Mr Aziz provided to Sanber Group in connection with the tender process for the Victoria Street Station project.

First among these was ensuring, on Mr Abdi's instruction, that Dabcorp was included on the tender list; Mr Aziz's submissions asserted that he had inquired about suitable contractors and Mr Abdi simply provided a list of subcontractors that could assist. According to Mr Aziz, Mr Abdi told him to reach out to Dabcorp, which was the first serious bidder. On the evidence, the Commission cannot determine how the tender by Dabcorp facilitated Sanber Group's ultimate success, although Mr Sanber's correspondence of 23 June 2017 suggested that, if Dabcorp were successful, he would manage it.

Even if the Commission were to accept Mr Aziz's submissions, nonetheless, the following are other examples of assistance that Mr Aziz provided to Sanber Group, being:

- a) reviewing mechanical drawings prior to Sanber Group's tender submission to work through problems and ambiguities with Mr Sanber; Mr Aziz conceded that this took some time. The Commission does not accept Mr Aziz's submission that this was "simply sensible conduct

by a project manager to ensure the tenderer gets things right." Nor does the Commission accept that the Downer project manager training material supported an engagement process with subcontractors during the tendering phase that would sanction such conduct

- b) requesting extension of the tender window to enable Sanber Group to be included in the list of tenderers and to submit a tender
- c) providing information to Mr Sanber as to pricing and the status of submissions from competing tenderers; Mr Aziz, in fact, conceded that he used an anonymous self-deleting email service to communicate with Mr Sanber because it was not correct that he was assisting a subcontractor in winning this work and he was using it "to cover it"
- d) advising on content of Sanber Group's and Dabcorp's submissions, including in relation to price, and the most efficacious timings by which these tenderers should submit their information to Downer, (including, to ensure secrecy through the anonymous self-deleting email software program named Guerrilla Mail)
- e) forewarning of the possibility that representatives of Downer may call Sanber Group's referees as a company website could not be located
- f) falsely reporting back to colleagues at Downer that he had conducted references checks with Sanber Group's fictitious referees.

Counsel Assisting submitted that Mr Aziz also manipulated timings within Downer by reference to rail-corridor possession periods to increase the degree of difficulty by which Downer could appoint an alternate subcontractor; Mr Aziz submitted that he did not create the time imperative but rather simply conveyed information to the commercial team for their decision. Mr Aziz stated, "Downer was under pressure to, to deliver this, yeah, to make a decision and move on and deliver, so I would have passed those concerns to the commercial manager." However, on 3 July 2017, Mr Aziz sent Mr Sanber a text message to advise "The commercial manager had asked for a D&B [Dun and Bradstreet] check on your company to verify financial standing. They are doublechecking because you have no website, and the company was created recently... Fairly routine. Give me a call as I've been through this (sic) already with my company." He followed up, advising Mr Sanber to say, when contacted, that Sanber Group's turnover is around 10 million dollars. Mr Aziz conceded that this was potentially false. In that context, he also advised, "Hey Raja [Sanber]. Sit tight I will have some answers tomorrow. I'm going to play the program card." Mr Aziz

claimed that the aim of this was to avoid spending “two months” going through commercial or financial audits. This is despite earlier describing the check as “routine.” While the Commission cannot be satisfied that Mr Aziz manipulated timings by reference to the rail corridor, it is satisfied that Mr Aziz knew that Sanber Group was vulnerable in the event of a check by Dun and Bradstreet and, to use his own words, “played the program card” to the advantage of Sanber Group.

Counsel Assisting also submitted that, despite admitting to not having a proper basis for holding such a belief, Mr Aziz persuaded his colleagues at Downer that he was confident Sanber Group had sufficient capability to deliver the works. Mr Aziz submitted that Counsel Assisting ignored his previously acquired knowledge during the early stages of the tender engagement of Sanber Group’s capacity. The Commission is satisfied that, in fact, Mr Aziz had no proper basis for belief as to Sanber Group’s capability. He knew it had no employees, was newly established with no record, and that he had to assist it as earlier described. He also conceded that he had “no intimate knowledge of who [Sanber] had lined up to do the work”.

## Awarding the contract to Sanber Group trading as RJS Civil

Downer issued a revised scope of works, to which Mr Sanber responded on 13 July with a revised Sanber Group quote of \$789,804. Rapid Constructions Pty Ltd (“Rapid”) quoted \$625,815, while Dabcorp quoted \$975,596. Despite Sanber Group’s higher quotation, Mr Aziz played a role in the ultimate selection of Sanber Group, telling fellow Downer employees involved in the decision by email on 13 July 2017:

*We don’t believe Rapid have the resources locked in to commence work on site immediately after award. They contacted us two days ago and requested details of plumbers, electricians and mechanical trades to assist them. This confirms our concern that they do not have adequate resources to meet our timeline. The price difference between the three bidders was discussed with Michel, Fernando and Nima from Transport and they are all in agreement with proceeding with Sanber.*

That email also recorded Mr Abdi’s involvement. Although stating that he could not remember, Mr Abdi accepted that he must have had a meeting, and all agreed with proceeding with Sanber. Mr Abdi could not recall his role but conceded that concerns about Sanber Group doing the work had been raised with him. He also accepted that he knew that SDL had quoted a figure to carry out the works for Sanber Group that allowed

for a pure profit of around \$300,000. In light of these concessions, the Commission does not accept Mr Abdi’s submission (which was based on instructions as opposed to evidence) that he did not meet Michel or Fernando until 2019, and that the name “Nima must be either a mistake or a reference to another Nima”. No application was made by Mr Abdi to cross examine Mr Aziz on this correspondence, although, in light of his own evidence, that was hardly surprising. Mr Aziz acknowledged that if he had told “Michelle [sic] and Fernando from Transport that Mr Abdi was a partner in Sanber Group that would be a problem and the job wouldn’t have been completed. Consistent with Mr Abdi’s own acknowledgement and bearing in mind the approach in *Briginshaw v Briginshaw* (1938) 60 CLR336; [1938] HCA 60, the Commission is satisfied that Mr Abdi participated in a meeting including Mr Aziz, in which he expressed his agreement to proceed with Sanber Group notwithstanding concerns about them and knowing that they would be profiting through further subcontracting the work.

Mr Aziz conceded that, if Downer were to look at Sanber Group on their merit, they would probably not have given them the work or at least “would not be comfortable going for them”.

Downer’s subcontractor recommendation, dated 13 July 2017, was co-signed by its employees, including Mr Aziz, and approved by Downer’s program director, Greg Barnes. The recommendation stated:

*After the first round of review Downer responded to all the tenders who submitted the tender on clarification and requested them to respond on Downer’s queries. All three tenderers provided with the revised price and respond on Downer’s queries. As per tender analysis and looking to the availability, experience and pricing Sanber Group Pty Ltd trading as RJS Civil is deemed to be the best value.*

*The Price above from Sanber includes \$49,000 for optional item such as Extra Over door for translucent glazed panel in door, Water to staff room, Sewer to Cleaners room, Water to Cleaners room, Install New Sewer Connections to G05 for new FAT and Drainage to storage room...*

A subcontract agreement between Sanber Group and Downer was signed on 14 and 18 July 2017, respectively.

Although Mr Aziz acknowledged assisting Sanber Group to win the tender, he asserted that there was no other real competitor as, from memory, Dabcorp had pulled out. He claimed he and Amit Patel, Downer’s senior contract administrator, discussed the situation with the program director, Mr Barnes, and advised that they had gone to nine or 10 parties: one had priced and was non-responsive, and one or two were not known. He could not recall



when this occurred, but it did not involve email. That statement is somewhat at odds with Mr Aziz's email of 13 July 2017 and the content of the subcontract recommendation. Further, Mr Aziz conceded that he knew the only way Sanber Group would deliver the project was through subcontractors.

Contrary to Mr Aziz's submissions, there is little evidence to support that Rapid did "drop by the wayside". In fact, on 29 June 2017, Mr Aziz sent a WhatsApp message to Mr Sanber expressing concern that Mr Patel was "trying to get Rapid to submit a bid", describing him as a "pain in the arse". During the public inquiry, Mr Aziz came to acknowledge that he was not happy that Mr Patel was trying to get Rapid on board as a competitor. The Commission is satisfied that the ultimate selection of Sanber Group was one that Mr Aziz purposefully sought and succeeded in bringing about in the manner described.

Mr Nguyen understood that the process by which Sanber Group had been selected to conduct the work at Victoria Street Station was manipulated by Mr Aziz and Mr Abdi.

## How was the contract performed?

Mr Nguy told the Commission that, while working at SDL, he was contacted in June 2017 by Mr Nguyen and advised of the opportunity to earn money doing building work at Maitland. As part of the TAP, he understood the prospect of follow-up projects. Mr Nguy stated that Mr Nguyen told him that he knew "Nima in Transport" who could get the budgets. He understood this as meaning that SDL could price the project, which could be priced up after obtaining the budget.

Mr Laphai first met Mr Nguyen in 2017 through Mr Nguy, in the context of the Victoria Street Station project. Mr Laphai stated that Mr Nguyen told him that he had a history in rail projects and knew people who could get a job in the industry. He recalled meeting Mr Nguyen and Mr Sanber at a coffee shop in North Strathfield to discuss the project. At that time, Mr Laphai knew Mr Sanber was working for Sanber Group and was looking for a contractor. He also knew Mr Nguyen worked for IWC. The price charged by SDL in connection with the project was around \$642,336 (including GST). Mr Laphai maintained that he priced the Victoria Street Station project independently of Mr Sanber and Mr Nguyen. He stated that Mr Nguy was onsite full-time, and Mr Nguy also priced up the variations. He did not think the pricing was inflated. However, there would have been a 30 per cent margin due to hiring accommodation and costs.

Mr Nguy's evidence was that he worked at Victoria Street Station as a project manager with SDL's workers or subcontractors.

Mr Nguyen described his function as assisting with administration, preparing the safe work method statements, finding methodologies, and being the main point of contact between SDL and Sanber Group. Mr Nguyen conceded that he probably used an alias in completing the safe work method statements. He also acknowledged that he completed safety inductions for workers without them being present for onsite inductions. Mr Abdi recalled that Mr Nguyen assisted with railway induction and making safe work method statements. Mr Sanber stated that Mr Nguyen had Sanber Group's safe work method statements and assisted SDL in getting their employees and contractors to fill out their forms, as some people could not speak English. He rejected the assertion that Mr Nguyen's involvement stemmed from an understanding that he would share in the project's profit. Mr Laphai stated that he believed the inductions were genuine. The substance of that belief cannot be accepted as accurate in light of Mr Nguyen's evidence to the contrary, which was against interest and in a context where Mr Nguyen is best placed to account for his activities. There is evidence of some Downer induction competency-assessment and questionnaire forms being completed and collectively forwarded by Mr Nguy to Mr Aziz on 24 July 2017.

Mr Aziz recalled that the bulk of the work was to be delivered by SDL; however, he could not recall when he became aware of that. He conceded that, during the project delivery stage, he knew that the key personnel nominated by Sanber Group never turned up onsite, and he did not inform Downer.

Counsel Assisting submitted that Mr Aziz was also responsible for advising Sanber Group on prices and approving variations to the highest limit without attracting adverse attention. Mr Aziz submitted that this ignores the reality of the approval process by a committee of individuals. The Commission accepts Counsel Assisting's submissions, which accord with Mr Aziz's own evidence. In fact, as of 9 March 2018, the variations approved were \$948,166, exceeding the original subcontract sum of \$789,804.

Mr Aziz stated that, initially, his reason for aiding Sanber Group was due to the importance to himself and Downer of the project being delivered on time, in light of potential financial penalty to Downer and the limited availability of contractors. Counsel Assisting submitted, and the Commission accepts, that this is inconsistent with the extent of the assistance provided to Sanber Group, particularly during the tender phase of the project.

Mr Laphai stated that the job involved remediating a heritage railway station, including night-time work. While working, his workers were wearing RJS Civil uniforms. He said that Mr Nguyen was there for the initial kick-off

meetings but Mr Laphai did not see him when he was out there. Mr Laphai did not recall seeing Mr Abdi onsite. Mr Nguy recalled that, during construction, Mr Nguyen was onsite about once a month, while Mr Sanber attended once at the beginning, and Mr Abdi was not seen much but was probably at site meetings.

Mr Aziz asserted that, after a few months into the project, he realised that Mr Abdi, Mr Nguyen and Mr Sanber would not be onsite and viewed this as unacceptable. He claims that he told the Sanber Group to either be there, hire someone, or do something. In that context, he ended up doing site supervision and sought payment.

### Profit split and fall-out

Mr Sanber gave evidence that neither Mr Abdi, Mr Nguyen or Mr Aziz were partners in the Victoria Street Station project and that he had no arrangement to split the profit. For reasons that appear below, that evidence is rejected.

Mr Nguyen initially stated that, when he first became involved in the Victoria Street Station project, there had been some discussions in which it was agreed that the split of profits concerning the Victoria Street Station project would be 50 per cent to Mr Aziz and 50 per cent split between Mr Abdi, Mr Sanber and himself.

Mr Abdi also accepted that, before the project had been awarded, he had promised Mr Aziz that he would get a cut of whatever was made. Mr Abdi acknowledged that, by 29 June 2017, when Mr Aziz claimed to have carried out referee reports regarding Sanber Group, he had cut a deal with Mr Aziz in the event that Sanber Group was to be awarded the work. On Mr Abdi’s account, when Mr Aziz effectively became the project manager, he

became firmer in his advocacy for payment, as Mr Sanber did not show up.

According to Mr Aziz, he didn’t form any agreement with anyone, before the tender was awarded, that they would receive a profit share. On his account, he was only to be paid for delivering a service on behalf of Sanber Group, although he acknowledged that this would have been unacceptable to Downer. Mr Aziz conceded that receipt of such money amounted to a secret commission, was not orthodox, and involved a conflict of interest. Mr Aziz submitted that the payment could also be viewed as consistent with “undeclared secondary employment”. He complained that this option was not presented to him during the public hearing. Such a characterisation, however, obscures Mr Aziz’s clear conflict of interest, his desire to conceal the true state of his involvement from Downer, and his acceptance that secondary employment otherwise would have not met with Downer’s approval. The Commission does not accept Mr Aziz’s contention that “in circumstances where the project was managed to completion, on time within budget, the payments to Aziz lose ... their nefarious connotation”.

Around early-2018, it appears that a dispute arose as to payment of profits. Mr Sanber declined to show his laptop to the others in “real time”.

Mr Sanber claimed Mr Nguyen threatened him, and, to get Mr Nguyen off his back, Mr Sanber drew up a spreadsheet, (see Figure 3 below) titled “Summary to 19 January 2018”, to show costs and expenses and to explain that he could not get Mr Nguyen any money.

Mr Sanber claimed that he drew up the spreadsheet quickly when he was working long hours and that it was inaccurate. The project at that time was said to be

**Figure 3: Raja Sanber Summary to 19 January 2018 spreadsheet**

Summary			E19-1595-AS-7-9-PR-0012		
To 19/01/2018					
	Income	Expense		Income	Expense
Downer	\$902,644.14		Total Contract Income	\$789,804.60	
Director	\$221,000.00	-\$221,000.00	Current Variation Income	\$773,052.84	
SDL		-\$558,410.13	SDL		-\$628,316.27
Ranieri		-\$97,677.53	Ranieri		-\$182,677.53
Health		-\$8,750.00	Health		-\$93,750.00
Insur/Tax/Business Costs		-\$149,169.40	Insur/Tax/Business Costs		-\$229,169.40
Client		-\$67,353.00	Nett (ex GST)	\$428,944.25	
Reinvestment		-\$15,956.90	Split	\$214,472.12	
Income received to date (ex GST)	\$820,585.58				

“months” away from closure. That statement recorded director’s fees of \$221,000 that Mr Sanber was unable to explain. The statement recorded a net amount of \$428,944, split at 50 per cent. Mr Sanber gave evidence that this was not a profit, as there were further expenses. Despite using the word “split” in his own spreadsheet, Mr Sanber denied there was any agreement to split profits and specifically denied splitting profits with Mr Aziz in connection with the project during the tender phase.

In seeking to account for the project’s profitability, Mr Sanber admitted that he constructed falsified bank statements to show Mr Nguyen. However, he accepted that payments were disclosed therein to Ssadco Group Pty Ltd (“Ssadco”) and SSD (NSW) Pty Ltd (“SSD”) and totalled \$554,280.75. The Commission’s own investigation confirmed payments totalling \$662,487.60 to both companies from Sanber Group, after including an additional two payments made to SSD for \$100,000 on 24 April 2018 and \$8,206.98 on 25 April 2018. Mr Sanber did not know what SSD was and assumed payments to it were payments to Ssadco. He claimed there were two separate events where material needed to be removed offsite, the first for earthworks and the second, as he understood, for builder’s rubble.

Mr Sanber maintained that the first he knew of Mr Aziz being interested in a profit share was sometime after January 2018, when Mr Nguyen sent him an email copied to Mr Aziz.

An argument also developed with Mr Sanber in which he was accused of obtaining kickbacks for himself. Mr Nguyen stated that he confronted Mr Sanber with a copy of a bank statement that he believed demonstrated this.

Mr Nguyen gave evidence that, around April 2018, the relationship with Mr Sanber deteriorated, as the latter claimed the contract cost from SDL was \$100,000 higher than it actually was. Mr Nguyen prepared spreadsheets that, in his view, confirmed his suspicion, including one document that recorded the profit split based on the percentages referred to earlier in this chapter (assuming “Partner Share” referred to Mr Aziz). He sent this to Mr Aziz on 13 April 2018. That document, reproduced in Figure 4 at right, also recorded “Raj Cash Injection \$221,000”, which corresponds with the amount claimed by Mr Sanber on his schedule for “Directors fees.”

The spreadsheet further recorded \$554,280.75 paid to Ssadco as being deducted from the amount to be split. This aligned with the actual payments recorded in Mr Sanber’s bank statements that he sent to Mr Nguyen.

Mr Nguyen gave evidence that Mr Sanber, Mr Abdi and himself each earned \$128,000 and recalled this being paid in cash. He believed that Mr Sanber could have

**Figure 4: Tony Nguyen Spreadsheet Victoria Street Station project**

	G	H	I
DOWNER PAYMENT (IN)		\$ 1,907,799.36	
MICK (OUT)		\$ 222,120.30	
PAUL (OUT)		\$ 139,129.62	
SDL (OUT)		\$ 599,359.95	
SDL REMAINING (OUT)		42,975.34	
BUSINESS EXPENSE (OUT)		\$ 36,717.27	
TAX (OUT)		\$ 96,834.08	
TOTAL TO SPLIT		\$ 770,662.80	
SSADCO PAID TO DATE		\$ 554,280.75	
		\$ 216,382.05	OWING
<b>SPLIT SHOULD BE</b>			
Partner Share		\$ 385,331.40	
Raj Share (1/3)		\$ 128,443.80	
T Share (1/3)		\$ 128,443.80	
N Share (1/3)		\$ 128,443.80	
		\$ 385,331.40	

SSADCO PAID TO DATE	\$ 554,280.75	
	\$ 216,382.05	OWING
<b>SPLIT SHOULD BE</b>		
Partner Share	\$ 385,331.40	
Raj Share (1/3)	\$ 128,443.80	
T Share (1/3)	\$ 128,443.80	
N Share (1/3)	\$ 128,443.80	
	\$ 385,331.40	
Raj Cash Injection (IN)	\$ 221,000.00	
Raj Cash Withdrawal (OUT)	\$ 421,000.00	
DIFFERENCE	\$ 200,000.00	

successfully retained more profit for himself. Both Mr Aziz and Mr Abdi denied receiving the amounts claimed by Mr Nguyen.

Mr Aziz claimed that he received what he was pretty sure was \$80,000 or between \$40,000 or \$60,000 and \$80,000. As Mr Aziz gave his own account of the money he claimed to have received, the Commission rejects the suggestion that he was denied procedural fairness in not being reminded of evidence he gave in a compulsory examination about this payment.

For his part, Mr Abdi recalled receiving around \$40,000.

Mr Aziz claimed that 50 per cent of the profits went to Mr Sanber and the remaining 50 per cent went one-third each to himself, Mr Abdi, and Mr Nguyen.

Mr Aziz denied preparing a spreadsheet sent by Guerrilla Mail to rajasanber@gmail on 17 April 2018 that depicted his profit share at 50 per cent with the remaining amount shared between Mr Abdi, Mr Sanber and Mr Nguyen. The Guerrilla Mail message and the spreadsheet were sent on 17 April 2018 at 23:33:08. The message stated:

*You guys need to resolve this tomorrow and tell me know [sic] which number will be coming through.*

*SDL figure doesn't match RS statement. SDL's numbers are used here unless RS can show Netbank statement (in real time on a laptop) as this is what SDL have done.*

Between 13 and 17 April 2018, Mr Aziz and Mr Nguyen discussed the figures relating to the project via WhatsApp messages. In a message dated 17 April 2018 at 8:18:26 am, Mr Aziz indicated to Mr Nguyen that he was preparing a spreadsheet at Mr Sanber's request, to "make it clearer with notes etc". At 9:04:18 pm, Mr Aziz sent a further WhatsApp message to Mr Nguyen, stating "I sent it to you from random email so check spam." Mr Nguyen confirmed that only Mr Aziz used Guerrilla Mail. Mr Aziz accepted that he used Guerrilla Mail and did not remember anyone else in the group doing so. Mr Sanber recalled that it was Mr Aziz who sent the email with the table. Mr Aziz's denial of preparing the message and spreadsheet sent by Guerrilla Mail is not accepted. The content and timing of the WhatsApp messages referred to support his authorship, as does the use and timing of the Guerrilla Mail message and spreadsheet. The spreadsheet, along with the evidence of Mr Abdi and Mr Nguyen, does not support Mr Aziz's claim that he was being remunerated by reference to services he was delivering as opposed to a profit share. Indeed, he later asserted that he struck an agreement with Mr Abdi and Mr Nguyen that they would go three ways on a share of 50 per cent, with Mr Sanber receiving the remaining 50 per cent.

After reflecting on the evidence in the public inquiry, Mr Nguyen stated that he would have imagined Mr Abdi advising him of Mr Aziz getting a cut after the price had been submitted. Mr Nguyen could not recall when he was told the amount, but recalled that it had been before Mr Aziz vented about the effort he had to make to cover for SDL.

Mr Aziz provided extensive assistance to Sanber Group before he aided with project delivery. It is implausible that the agreement for remuneration did not include Mr Aziz at the point that Sanber Group was successfully awarded the Victoria Street Station project building works. The Commission does not accept Mr Aziz's evidence in this regard nor his claim that he was to be remunerated for services delivered, as opposed to profit share. It was contrary to the evidence of both Mr Abdi and Mr Nguyen, and leave was not sought to challenge their evidence on this issue. The latter's evidence was also consistent with the Guerrilla Mail spreadsheet of 17 April 2018 that the Commission is satisfied Mr Aziz prepared. Although it is unclear as to the precise point in time at which the profit-share figure of 50 per cent was agreed, the Commission is satisfied this figure was reached at the latest when Mr Aziz was involved in onsite project supervision. It is a figure confirmed on the spreadsheet of 17 April 2018.

Mr Sanber's evidence as to the absence of any profit-sharing agreement is inconsistent with the evidence of Mr Aziz, Mr Nguyen, and Mr Abdi. His engagement and payment to Mr Abdi, Mr Aziz, and Mr Nguyen in circumstances where, on his version, there was no agreement is implausible. There was no application on his behalf for leave to challenge evidence on this issue. The Commission is satisfied that this was, again, evidence of Mr Sanber seeking to distance himself from a dishonest scheme that returned him profits. The Commission does not accept his evidence in this regard.

Mr Sanber's accounting for payments to Ssadco and SSD is undermined by the following:

- a) SDL had contractual responsibility for project disposal costs (other than asbestos).
- b) The Ssadco and SSD charges did not comprise variation claims issued by Sanber Group to Downer.
- c) Mr Aziz gave evidence that there was more need for rubble removal than spoil removal from Victoria Street Station.

Mr Aziz submitted that his evidence referred to there being more need for rubble removal than spoil removal. On this basis, he argued that Counsel Assistings' submission that there was no need for spoil removal, as opposed to

rubble removal, should be rejected. Mr Aziz advanced no submission addressing points made at (a) and (b) above.

Mr Sanber denied any knowledge of a relationship between Ssadco and Mr Aziz. Mr Aziz also denied any knowledge of such a connection. There was evidence that a payment made to Ssadco was communicated to Mr Aziz in a WhatsApp messages by Mr Sanber including when the funds could be expected to be in the account. Mr Aziz was unable to provide any explanation for his contact with Mr Sanber at the time that payments were made to Ssadco and SSD, while accepting that this was a vehicle to avoid tax. There was also evidence that Mr Aziz's accountants used the same post office box, "PO Box 140 Rosebery NSW 1445," as did Ssadco, SSD and Tresca.

Counsel Assisting ultimately submitted that Mr Sanber engaged in a similar invoicing arrangement to that in relation to the Glenfield Transport Interchange car park defect rectification works in order to avoid paying tax. While Mr Sanber denied this, Mr Aziz accepted that this was most logical. Mr Nguyen gave evidence that the companies were sourced as a vehicle so that payments could be provided in cash to each of him, Mr Aziz and Mr Abdi. Although at the time he did not understand it to be a mechanism to avoid paying tax, he came to accept that this was so. Mr Abdi stated that he did not know what Ssadco was.

Mr Laphai acknowledged that the amount credited into SDL's bank account from the Victoria Street Station project was around \$642,336.

The profit earned upon completion of the Victoria Street Station project appears to be around \$872,895, as recorded in Mr Aziz's spreadsheet. Counsel Assisting submitted that \$221,000 had been siphoned off by Mr Sanber, based on a summary sheet he prepared and evidence of bank statement transfers and withdrawals between July and October 2017. The Commission, however, is prepared to accept that this relates to an advance that Mr Sanber made to Sanber Group. This is so, as it was described as such in Mr Nguyen's spreadsheet of 13 April 2018 and supported by Sanber Group's banking records.

Based on Mr Nguyen and Mr Aziz's spreadsheets, the recorded split was 50 per cent to Mr Aziz and the remaining 50 per cent shared evenly between Mr Nguyen, Mr Abdi, and Mr Sanber. Mr Abdi, Mr Aziz and Mr Sanber claimed that the money each of them received was less.

The Commission accepts that Mr Aziz protested at the volume of work he was required to perform, leading him to seek an enhanced profit share. The amounts described as being received in credit in the spreadsheet prepared by Mr Aziz by 15 April 2018 individually and in total of

\$564,280.75 correspond with the payments made by Mr Sanber as marked in his bank statement and with the Commission's own analysis of Ssadco and SSD's banking records. Mr Aziz's spreadsheet also shows a payment on 15 April 2019 of \$370,285.75 to himself and \$183,384.76 to "NT" that the Commission accepts was Mr Nguyen and Mr Abdi's share. The spreadsheets also refer to deduction of farm costs, it being unclear at that stage if Mr Sanber was to be part of the fig farm venture. The farm costs were calculated at \$65,531.90. Mr Aziz was not involved in that venture.

In the aftermath of the dispute as to payment with Mr Sanber, Mr Nguyen stated that farm costs were divided two ways between himself and Mr Abdi. Thereafter, he received a cash amount for the balance from Mr Abdi. There is evidence, accordingly, in Mr Aziz's spreadsheet of \$129,662.25, comprising \$65,569.47 to Mr Aziz and \$64,065.68 to Mr Nguyen and Mr Abdi. Although a further \$108,206.85 was transferred by Sanber Group to SSD on 24 and 25 April 2018, the Commission cannot be satisfied that this was forwarded to Mr Aziz, Mr Abdi and Mr Nguyen.

## Corrupt conduct

### Mr Nguyen

Counsel Assisting submitted that Mr Nguyen colluded with Mr Abdi and Mr Sanber (both TfNSW employees) and Mr Aziz (a Downer employee) in relation to the Victoria Street Station project. It was submitted that Mr Nguyen assisted Sanber Group in profiting from the works by completing SWMSs under a false name and safety inductions for workers who were not present. It was submitted that this was corrupt conduct for the purpose of s 8(2A)(a), s 8(2A)(b) and s 8(2A)(c) of the ICAC Act. That is, any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve collusive tendering (s 8(2A)(a)); fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety (s 8(2A)(b)) (in relation to his preparation of safety inductions using the names of workers who were not present for those inductions); and dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage (s 8(2A)(c)).

For the purposes of s 8(2A) of the ICAC Act, the relevant public administration was the administration and oversight of tender processes by TfNSW. The relevant conduct, as submitted by Counsel Assisting, was completion of safe work method statements (SWMSs) under a false name and safety inductions for workers who were not present.

While it can be accepted that there was collusive tendering in the awarding of the contract to Sanber Group, Mr Nguyen's conduct in relation to completion of SWMSs under a false name and safety inductions for workers who were not present cannot be said to include collusive tendering as it post-dated the tendering process. Accordingly, the Commission is not satisfied that 8(2A)(a) is engaged.

The features of an SWMS and safety induction under the Work Health and Safety regulations are to provide a structured and systematic approach to managing the safety risks associated with high-risk construction work activities. It helps ensure the health and safety of workers and others involved in or affected by the work, while also fulfilling legal obligations and promoting a culture of safety within the workplace. The SWMS is a prerequisite for high-risk construction work pursuant to clause 299 of the Work Health and Safety Regulation 2017. However, the Commission is not satisfied that s 8(2A)(b) of the ICAC Act is engaged as Mr Nguyen's conduct does not involve "fraud *in relation to application* for licences, permits or other authorities" (emphasis added).

Even if public funds could be said to have been involved (see chapter 2), the Commission is not satisfied that Mr Nguyen's conduct in completing SWMSs under a false name and safety inductions for workers who were not present was conduct that impaired or could impair public confidence in public administration and which could involve dishonestly obtaining or assisting in obtaining or dishonestly benefitting from the payment of public funds for private advantage within the terms of s 8(2A)(c) of the ICAC Act.

It follows that there is no jurisdiction to find that Mr Nguyen engaged in corrupt conduct in relation to the conduct the subject of the submissions of Counsel Assisting.

### Mr Abdi

As an employee of TfNSW, Mr Abdi was a public official. He had a hidden financial interest in Sanber Group. He was partial towards that company in relation to the Victoria Street Station project by supporting its selection as subcontractor in the course of his duties with TfNSW. This amounted to corrupt conduct, in the sense of conduct of a public official that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of that public official's official functions (s 8(1)(a) ICAC Act).

On the basis of his collusive dealings with Mr Sanber and Mr Aziz to secure the Victoria Street Station work for Sanber Group, and substantial secret payments received in relation to that project, Mr Abdi engaged in corrupt conduct pursuant to s 8(2A)(a) of the ICAC Act.

That is, conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve collusive tendering (s 8(2A)(a)).

The relevant public administration is the administration and oversight of tender processes by TfNSW.

For the purpose of s 9(1)(a) of the ICAC Act it is relevant to consider s 249B(1) of the Crimes Act (the elements of which are set out in chapter 3), having regard to Mr Abdi's conduct in supporting the selection of Sanber Group and from which he benefitted financially.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Abdi committed an offence under s 249B(1) of the Crimes Act of receiving a corrupt benefit as an inducement or reward in relation to the affairs or business of TfNSW. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

Such conduct could also constitute or involve a breach of the TfNSW code of conduct requirements concerning manager responsibilities, conflicts of interest, gifts and benefits and secondary employment. There are two codes that cover the period in question, dated September 2015 and March 2018; however, the relevant sections, quoted below, appear the same.

The Commission is satisfied for the purpose of s 9(1)(c) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the requisite standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude Mr Abdi had breached the TfNSW code of conduct, Parts 4, 6–8 and 21, such as to give rise to reasonable grounds for his dismissal from TfNSW. His conduct, therefore, comes within s 9(1)(c) of the ICAC Act.

Pursuant to s 13(3A) of the ICAC Act the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Abdi committed a criminal offence under s 249B(1) of the Crimes Act.

Pursuant to s 13(3A) of the ICAC Act the Commission is satisfied that, if the facts as found were to be proved on admissible evidence on the civil standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Abdi committed disciplinary offences of breaching the TfNSW code of conduct Parts 4, 6–8 and 21 and

that such conduct is sufficiently serious to constitute grounds for his dismissal. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

For the purpose of s 74BA of the ICAC Act, Mr Abdi's conduct is serious corrupt conduct because it involved significant planning with his partners, work to a substantial value, and a serious departure from his responsibilities within TfNSW.

### Mr Aziz

Based on his collusive dealings with, and secret payments received from, Mr Sanber, Mr Nguyen and Mr Abdi in relation to the Victoria Street Station project, the Commission finds that Mr Aziz engaged in corrupt conduct pursuant to s 8(2A)(a) of the ICAC Act. That is, any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve collusive tendering (s 8(2A)(a)).

For the purpose of s 8(2A) of the ICAC Act the relevant public administration is the administration and oversight of tender processes by TfNSW.

For the purpose of s 9(1)(a) of the ICAC Act it is relevant to consider s 249B(1) of the Crimes Act (the elements of which are set out in chapter 3), having regard to Mr Aziz's conduct in manipulating the Downer tender process to ensure Sanber Group was awarded the tender, and from which he would benefit financially.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Aziz committed an offence under s 249B(1) of the Crimes Act of receiving a corrupt benefit as an inducement or reward in relation to the affairs or business of Downer. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

Pursuant to s 13(3A) of the ICAC Act the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Aziz had committed a criminal offence under s 249B(1) of the Crimes Act. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

For the purpose of s 74BA of the ICAC Act, Mr Aziz's conduct is serious corrupt conduct as it involved significant planning with his partners, and making regular false and misleading statements to his employer and

co-workers from Downer. The statements included Mr Aziz making false reports with respect to carrying out reference checks in relation to Sanber Group.

### Mr Sanber

Based on his collusive dealings with Mr Abdi and Mr Aziz and substantial secret payments made in relation to the Victoria Street Station project, Mr Sanber engaged in corrupt conduct pursuant to s 8(2A)(a). That is, any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve collusive tendering (s 8(2A)(a)).

The relevant public administration is the administration and oversight of tender processes by TfNSW.

For the purpose of s 9(1)(a) of the ICAC Act it is relevant to consider s 249B(2) of the Crimes Act (the elements of which are set out in chapter 3), having regard to Mr Sanber's conduct in agreeing to Mr Aziz being provided with a benefit in return for his role in manipulating the Downer tender process to ensure Sanber Group was awarded the tender.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Sanber committed an offence under s 249B(2) of the Crimes Act of providing a corrupt benefit to Mr Aziz as an inducement or reward for Mr Aziz showing favour to Sanber Group in relation to the affairs or business of Downer. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

Such conduct could also constitute or involve a breach of the TfNSW code of conduct requirements concerning manager responsibilities, conflicts of interest, gifts and benefits, and secondary employment. There are two codes dated September 2015 and March 2018 that cover the period in question; however, the relevant sections quoted below appear the same.

The Commission is satisfied for the purpose of s 9(1)(c) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the requisite standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude Mr Sanber had breached the TfNSW code of conduct Parts 4, 6–8 and 21 such as to give rise to reasonable grounds for his dismissal from TfNSW. His conduct, therefore, comes within s 9(1)(c) of the ICAC Act.

Pursuant to s 13(3A) of the ICAC Act the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Sanber had committed a criminal offence under s 249B(2) of the Crimes Act.

Pursuant to section 13(3A) of the ICAC Act the Commission is satisfied that, if the facts as found were to be proved on admissible evidence on the civil standard of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Abdi committed disciplinary offences of breaching the TfNSW code of conduct Parts 4, 6–8 and 21, and that such conduct is sufficiently serious to constitute grounds for his dismissal. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

For the purpose of s 74BA of the ICAC Act, Mr Sanber's conduct is serious corrupt conduct as it involved significant planning with his partners, and making regular false and misleading statements to his employer and co-workers from TfNSW and Downer. His conduct included his repeated failure to declare any pecuniary interest or conflict of interest, and failure to seek any secondary employment approval from TfNSW in relation to his role in Sanber Group.

## Section 74A(2) statements

The Commission is satisfied that, in respect of the matters dealt with in this chapter, Mr Nguyen, Mr Abdi and Mr Sanber are affected persons.

Each of Mr Nguyen, Mr Abdi and Mr Sanber gave evidence subject to a declaration under s 38 of the ICAC Act. This means that their evidence cannot be used against them in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act.

### Tony Nguyen and Nima Abdi

Counsel Assisting made no submission in relation to seeking advice pursuant to s 74A(2) of the ICAC Act regarding Nguyen and Abdi. Accordingly, the Commission makes no statement in relation to them in this respect.

### Abdal Aziz

The Commission is of the opinion that the advice of the DPP should be sought with respect to the prosecution of Mr Aziz for the following specified criminal offences:

- a) Section 249B(1) of the Crimes Act (receiving corrupt benefit) in relation to the cash payment he received in connection with the Victoria Street Station project, proof of which is established to a *prima facie* level by the WhatsApp chat between he and Mr Sanber, and he and Mr Nguyen, and the spreadsheet Mr Aziz prepared, supported by metadata sent to Mr Sanber using Guerrilla Mail.
- b) Section 87(1) of the ICAC Act in relation to his false or misleading statement that he was only paid around \$80,000 or the equivalent of 16.6 per cent of Sanber Group's profits for the assistance he provided to that company in connection with the Victoria Street Station project, whereas the project spreadsheet that he created for Victoria Street Station and sent to Mr Sanber records him receiving an amount equivalent to 50 per cent of Sanber Group's profits, namely \$436,492 less the outstanding amount referred to of \$65,596.57.
- c) Section 87(1) of the ICAC Act in relation to his false or misleading statement that he was only paid by Sanber Group for the assistance he provided to the company, as a de facto project manager, during the delivery phase of the Victoria Street Station project, whereas he also provided considerable assistance to Sanber Group during the tender phase of the project and was paid a profit share.

### Raja Sanber

The Commission is of the opinion that the advice of the DPP should be sought with respect to the prosecution of Mr Sanber for the following specified criminal offences:

- a) Section 249B(2) of the Crimes Act (giving corrupt benefit) in relation to the cash payment he made to Mr Abdi in connection with the Victoria Street Station project, proof of which is established to a *prima facie* level by the WhatsApp chat between Mr Sanber and Mr Aziz, and Mr Aziz and Mr Nguyen, and the spreadsheet Mr Aziz prepared (see metadata) and sent to Mr Sanber using Guerrilla Mail.
- b) Section 249B(2) of the Crimes Act (giving corrupt benefit) in relation to the cash payment he made to Mr Aziz in connection with the Victoria Street Station project, proof of which is established to a *prima facie* level by the WhatsApp chat between Mr Sanber and Mr Aziz, and Mr Aziz and Mr Nguyen, and the spreadsheet Aziz prepared (see metadata) and sent to Mr Sanber using Guerrilla Mail.



- c) Section 87(1) of the ICAC Act in relation to his false or misleading statement that the invoices from Ssadco and SSD (which totalled more than \$661,000) reflected genuine cartage, tipping, and disposal expenses in connection with the Victoria Street Station project, whereas SDL had contractual responsibility for project disposal costs other than in relation to asbestos. There was no need for spoil (as opposed to rubble) removal from the Victoria Street Station site.
- d) Section 87(1) of the ICAC Act in relation to his false or misleading statement that he did not have an agreement to split profits with Mr Aziz in connection with the Victoria Street Station project and that the first time he understood Mr Aziz to be interested in splitting profits was around the start of 2018, whereas it was agreed during the tender phase that Mr Aziz would share in the profit of the Victoria Street Station project.
- e) Section 87(1) of the ICAC Act in relation to his false or misleading statement that he did not have an agreement to split profits with Mr Nguyen in connection with the Victoria Street Station project, whereas Mr Nguyen was a partner in the Sanber Group.

## Chapter 6: Central Station

This chapter examines the circumstances in which RJS Infrastructure came to be awarded work on the TfNSW Central Station project, for which it was ultimately paid \$510,497.92 (excluding GST).

The upgrade of Central Station formed part of the TfNSW NIF station upgrades program. It involved upgrades to signal cabling and heritage conservation work. Downer was the managing contractor responsible for engaging subcontractors to undertake construction works on behalf of TfNSW.

### The creation of RJS Infrastructure

RJS Infrastructure was registered on 5 June 2018, with Mr Nguyen listed as the sole director and shareholder. According to Mr Nguyen, he, Mr Aziz and Mr Abdi had the collective idea to start RJS Infrastructure after parting ways with Mr Sanber at the end of the Victoria Street Station project, as they required a new company to tender for TfNSW TAP projects. Mr Nguyen told the Commission that they continued the model of the Victoria Street Station project, whereby Mr Abdi and Mr Aziz were partners in RJS Infrastructure.

Mr Nguyen told the Commission that the word “RJS” in the company name was specifically chosen by Mr Abdi and Mr Aziz to assist RJS Infrastructure to leverage off the reputation of RJS Civil, following its successful completion of the Victoria Street Station project for Downer. Mr Nguyen also told the Commission that they wanted to use the name “RJS” so Mr Aziz could convince everyone that it was the same RJS that did the Victoria Street Station project.

The opportunity to tender for works at Central Station then arose. Mr Aziz denied ever being a silent partner in RJS Infrastructure. However, as set out later in this chapter, Mr Aziz shared in the profits made by RJS Infrastructure on this project and the Commission is satisfied that, at all relevant times, it was his intention and

understanding that he would do so.

Mr Abdi’s evidence was that, after parting ways with Mr Sanber, a decision was made to form RJS Infrastructure. Mr Abdi didn’t identify Mr Aziz as a partner. Mr Abdi also agreed that the name was chosen to trade off the success RJS Civil had on the Victoria Street Station project. He stated that he became a silent partner in RJS Infrastructure with Mr Nguyen.

### The awarding of work to RJS Infrastructure

While Mr Aziz did not hold the formal role of project manager for this project, he ran the Part A NIF conservation works package at Central Station and was the project manager for the tender process.

Between 18 and 19 June 2018, he and Mr Nguyen exchanged a series of text messages as follows:

18/6/18 at 8:44 pm, Nguyen: *Whats your email*

18/6/18 at 8:59 pm, Aziz:  
*Abdal.aziz@downergroup.com*

18/6/18 at 10:42 pm, Nguyen: [sent a photograph of an email displayed on a computer screen, addressed to *Abdal.aziz@downergroup.com*, as follows]:

*Dear Abdal,*

*Thank you for giving RJS Infrastructure Group an opportunity to carry out the works for Victoria Street Station Upgrade. I appreciate the effort you and your team have professionally demonstrated throughout this project. Together, as one team we have achieve [sic] what we have set out and I look forward to working with you again in the near future. If you need any assistance or pricing enquiries, please do not hesitate to contact me directly.*

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*Kind regards,*

*Tony Nguyen.*

*RJS Infrastructure Group.*

19/6/18 at 7:45 am, Nguyen: *Im ready when you say go*

19/6/18 at 7:56 am, Aziz: *send it*

19/6/19 at 7:57 am Nguyen: *Sent the email last night. I meant whatever you want me to do for downer im ready lol*

19/6/18 at 7:58 am, Aziz: *Hahaha ok cool. Stand by.*

This email was deliberately misleading, as it was RJS Civil, not RJS Infrastructure, that worked on the Victoria Street Station project.

Mr Nguyen also confirmed that the name “RJS” was deliberately chosen to rely upon the similarity of the company names to misrepresent to Downer that RJS Infrastructure had completed the Victoria Street Station works. Mr Nguyen stated this was in order to trade on RJS Civil’s reputation in an effort to increase the likelihood of his company being awarded the work.

On 5 July 2018, Mr Aziz forwarded Mr Nguyen’s email to Downer quantity surveyor Gareth Hutcherson, who was performing a contracts administrator role. Mr Aziz suggested that Mr Hutcherson request a quote from RJS Infrastructure for the Central Station Part A NIF conservation works package. Mr Aziz did not correct the misrepresentation in Mr Nguyen’s email that RJS Infrastructure had completed the Victoria Street Station project, which the Commission finds he knew at the time to be false.

Mr Aziz denied that, in forwarding the email, he was deceiving Mr Hutcherson and conveying the impression it was the same company that had completed the Victoria Street Station project. Mr Aziz stated:

*It’s the, the directors have split up and it’s a new company. But basically, yeah, they, they kicked one of the directors out. That’s how I would have verbally explained it.*

Mr Aziz also said that RJS Infrastructure had a different ABN and was required to be set up within the Downer system, and that questions were asked.

The Commission rejects Mr Aziz’s evidence that he did not forward Mr Nguyen’s email to Mr Hutcherson with an intention to deceive Mr Hutcherson into forming the belief that RJS Infrastructure completed the work on Victoria Street Station.

When Mr Aziz first received the photograph of the email in a message from Mr Nguyen, it is evident that he believed it had not yet been sent. Mr Aziz had the opportunity to request Mr Nguyen to correct the misleading statement, namely, that RJS Infrastructure had completed the Victoria Street Station project, and instead Mr Aziz instructed Mr Nguyen to send the email.

Even if Mr Aziz’s evidence were to be accepted, what he advised Downer, namely, that Mr Nguyen and Mr Abdi were directors of Sanber Group and had “kicked out” a third director, was untrue. Mr Sanber was the sole director of Sanber Group trading as RJS Civil that undertook the Victoria Street Station project, and Mr Nguyen and Mr Abdi were not involved in undertaking substantive work on the project. It also did not address or correct the fundamental misleading statements, namely, that RJS Infrastructure did not complete work on the Victoria Street Station project and that it did not have the relevant experience the email suggested it had.

The Commission is satisfied that omission on the part of Mr Aziz was deliberate and was part of the assistance he improperly provided to ensure RJS Infrastructure was awarded work on the project.

On 10 and 11 July 2018, Mr Hutcherson emailed Mr Nguyen an invitation to quote for Part A and Part B of the package works.

Mr Abdi told the Commission he reviewed the initial design and methodology for the Central Station project and spoke with Mr Nguyen to ensure RJS Infrastructure was capable of undertaking the work. Mr Abdi agreed with Counsel Assistings' proposition that he would have had discussions with Mr Nguyen and Mr Aziz to ensure RJS Infrastructure was awarded the work.

Mr Nguyen told the Commission that Mr Aziz provided him with the amount RJS Infrastructure should quote. Mr Aziz told the Commission that he "probably did" tell Mr Nguyen how much RJS Infrastructure should quote for the job. The Commission is satisfied he did so. That finding is consistent with the evidence given by Mr Nguyen that was not disputed and with Mr Aziz's conduct with respect to other projects within this investigation. The Commission is satisfied that Mr Aziz told Mr Nguyen how much RJS Infrastructure should quote to ensure that company would be awarded the contract.

Mr Nguyen prepared and submitted the RJS Infrastructure quote to Mr Hutcherson for Part A of the works via email on 19 July 2018 in the amount of \$92,200 and a quote for part B of the works was prepared on 26 July 2018 in the amount of \$103,077.

The tender process for awarding the Central Station Part A NIF conservation works package involved Downer inviting three companies to submit quotes. Of the three companies, only RJS Infrastructure and Constructicon submitted quotes. However, the latter quote was a dummy quote.

## The Constructicon quote

After being provided with the contact details by Mr Nguyen via text message, Mr Aziz sent an email to "Anthony Bryne" of Constructicon on 25 July 2018, inviting that company to tender for Parts A and B of the Central Station works. It stated:

*Anthony,*

*As discussed could you please provide a price for conservation works at Central a [sic] per documents attached (download from below link).*

*Please provide pricing urgently for both Parts A and B, keeping in mind that they may be awarded separately. We look forward to receiving your tender no later than 10.00AM Friday 27/07/18. Please let me or Gareth know if you have any queries. Documents download: <https://we.tl/66zboDNs3O>*

The Constructicon quote was submitted on 27 March 2018. It was for \$253,231 and substantially exceeded the quote for parts A and B that Mr Aziz arranged to be submitted by RJS Infrastructure.

The Constructicon quote was purportedly sent by Constructicon engineer "Anthony Bryne". Mr Nguyen told the Commission "Anthony Bryne" was an alias he used when conducting business on behalf of Constructicon. He accepted it was fair to assume he drafted the Constructicon quote and confirmed that Constructicon director, Mr Nguy, had no knowledge that a Constructicon quote was being submitted to Downer for the Central Station project. Mr Nguy told the Commission he did not know that Constructicon was being used to submit a quote for the Central Station project; however, he was aware that, at that time, Mr Nguyen had access to his company's email account.

The Constructicon quote document metadata shows it was sent from Mr Nguyen's laptop to Mr Aziz. Accordingly, the Commission is satisfied that the evidence establishes that Mr Nguyen drafted and submitted the Construction quote to Downer as a dummy bid to ensure RJS Infrastructure was awarded the Central Station contract.

Mr Aziz agreed that the Constructicon quote was a dummy quote.

Mr Nguyen told the Commission that he obtained the Constructicon quote at the request of either Mr Aziz or Mr Abdi because they needed three quotes. It is not necessary for the Commission to determine whether it was Mr Aziz or Mr Abdi who requested the quote. It is sufficient that Mr Aziz knew it was a dummy quote. The Commission is satisfied that Mr Aziz allowed the dummy Constructicon quote, which he received from Mr Nguyen, to go forward as part of his intention to ensure RJS Infrastructure was awarded the contract.

During the tender process, Mr Aziz continued to deliberately perpetuate the misrepresentation made by Mr Nguyen to Downer that RJS Infrastructure completed the Victoria Street Station project. On 31 July 2018, a Downer employee in the role of "heritage specialist" sent an email to Mr Aziz and others advising of the requirement under the TfNSW contract that Downer engage specialist tradespeople to perform works on Central Station. Mr Aziz responded stating, "we have approached subcontractors who have completed S60 station upgrades in the past for us, e.g. Alfab, RJS, and the other builder who did Sydenham from memory... We should be OK."

The email chain to which Mr Aziz responded referred to RJS Infrastructure as "RJS". Mr Aziz's evidence was that he had cut ties with Mr Sanber of RJS Civil by that time.

The Commission is satisfied Mr Aziz's reference to "RJS" in this email was a reference to RJS Infrastructure.

Mr Aziz knew the statement he made in his email was deliberately misleading as RJS Infrastructure had no experience in completing heritage works, being a newly formed company.

Submissions on behalf of Mr Aziz assert that he lacked the authority to appoint RJS Infrastructure on the Central Station project. While the Commission accepts Mr Aziz did not have this authority, for the reasons outlined above, the Commission is satisfied that he used his position at Downer to influence the awarding of a subcontract on the Central Station project to RJS Infrastructure.

Mr Hutcherson advised Mr Nguyen by email on 31 August 2018 that RJS Infrastructure was successful and would be awarded the Part A works on Central Station. RJS Infrastructure was not awarded the Part B works it tendered for at that time.

## The subcontracting of work by RJS Infrastructure

RJS Infrastructure had no employees. Instead, Mr Nguyen engaged BH Civil and SDL as subcontractors to undertake the work on the Central Station project.

Mr Nguyen told the Commission he did some work on the project, namely, managing and supervising the works, by attending site at 7 am for half an hour for a "pre-start" briefing, before continuing on to his full-time job at IWC or returning home. Alternatively, Mr Nguyen would nominate a supervisor from BH Civil to undertake the pre-start briefing if he was unable to attend.

Mr Nguyen gave evidence to the Commission that Mr Aziz knew that RJS Infrastructure was subcontracting out all the work on the Central Station project to BH Civil and SDL. Mr Aziz's evidence was consistent with Mr Nguyen's evidence, as he stated that he knew labourers, including Mr Laphai from SDL, were undertaking the work and Mr Nguyen was coordinating and supervising them. However, it appears that Downer was not aware that this was occurring. The BH Civil and SDL employees did not wear uniforms with logos when onsite, and Mr Nguyen believed Downer employees, including Mr Hutcherson, would assume they were RJS Infrastructure employees.

On 4 March 2019, Mr Nguyen submitted an RJS Infrastructure work activity briefing document to Downer on the Central Station project, which included a list of "key contacts" that purported to list key RJS Infrastructure employees who would be working on the Central Station project. The list stated Monty Nguy held

the role of project engineer. This was false, as Mr Nguy was an associate of Mr Nguyen's who never worked on the Central Station project. The key contacts list also incorrectly included SDL and BH Civil employees as RJS Infrastructure employees when, in fact, they were subcontractors hired by RJS Infrastructure, which, with the exception of Mr Aziz, was unknown to Downer.

Mr Nguyen told the Commission he provided false information in the key contacts list to Downer to create a perception that there were more employees allocated to the project than was the case.

Mr Nguyen essentially coordinated the works of smaller subcontractor companies and marked up their costs when submitting RJS Infrastructure invoices to Downer. The result was that Downer had no knowledge of the background, technical knowledge, skills or experience of subcontractors undertaking construction work on critical infrastructure and heritage works at Central Station and nor did TfNSW.

## The variations

The original contract sum for the Central Station Part A conservation works awarded to RJS Infrastructure was \$92,200 (excluding GST). However, in addition to this amount, RJS Infrastructure was paid approximately \$418,000 by way of at least 26 contract variations, bringing the total amount it was paid to \$510,497.92 (excluding GST).

Mr Nguyen told the Commission that, while each variation submitted was legitimate, in the sense it was for work actually completed, each variation was also inflated. He agreed that variations were used by RJS Infrastructure as a means of inflating its profit on the project. He said that Mr Abdi and Mr Aziz told him by how much to inflate the cost, as Mr Aziz knew the threshold or the maximum amount Downer would allow Mr Nguyen to charge for each variation.

Mr Abdi's evidence was that he had limited involvement with the Central Station project and he wasn't sure whether Mr Aziz inflated the prices of variations. Mr Abdi did accept that it was possible that Mr Aziz did, given they would financially benefit from it. The Commission accepts Mr Nguyen's evidence that Mr Abdi was involved, noting Mr Abdi gave evidence to the Commission that indicated he had detailed knowledge that a large variation was attributable to "new scope" being added to the original contract works and Mr Abdi's acceptance that he financially benefitted from the variations.

Submissions on behalf of Mr Aziz assert that he lacked the authority to approve variations and Mr Nguyen's evidence that Mr Aziz directed the value of variations should be rejected.

Counsel Assisting submitted, and the Commission accepts, that Mr Aziz did provide advice to Mr Nguyen on how much to inflate the variations. The Commission bases its conclusions on the following facts:

- The total value of variations.
- Mr Nguyen's unchallenged evidence of Mr Aziz's involvement.
- Mr Aziz's access to budgetary information.
- Mr Aziz stood to financially benefit from inflating the variations.
- Mr Aziz's inability to recall with any certainty whether or not he gave advice to RJS Infrastructure on what to charge for variations.
- Mr Aziz's acceptance that he was responsible for approving payment for the variations.

Submissions on behalf of Mr Aziz that Downer witnesses could and should have been called to demonstrate that due process had been adhered to in approving variations are not accepted. Records obtained by the Commission show that Mr Aziz used encrypted emails and private messages to communicate confidential information to Mr Nguyen. Once the variation paperwork was formally submitted by RJS Infrastructure, the fact that variation prices had been inflated would have been undetectable in Downer documents or by Downer employees.

### Variation: additional CSR works awarded

One of the variations awarded to RJS Infrastructure was titled "Central CSR [Combined Service Route] works".

On 26 February 2019, Mr Hutcherson invited Mr Nguyen to provide a price for an additional large scope of "CSR works", which involved excavating trenches and laying conduit for communications cables for platforms 4/5, 6/7 and 8 at Central Station. On 27 February 2019, Mr Nguyen submitted a quote to Downer in the amount of \$219,000 (excluding GST) and the following day Mr Hutcherson sent Mr Nguyen an email instructing him to "proceed to book in the resources".

Downer awarded the additional CSR works directly to RJS Infrastructure by describing the CSR works as a "variation" to the original scope of works, instead of creating a new package of works. A new package of works would ordinarily require an open tender process or Downer obtaining three quotes, which would have ensured competitive pricing for the additional CSR works.

Mr Nguyen told the Commission that Mr Aziz told him that they would try and submit the CSR works as a variation in a deliberate attempt to avoid a competitive process. Mr Nguyen told the Commission that Mr Aziz

took advantage of time constraints on the project and the fact that RJS Infrastructure was already onsite, to influence Downer to award work to RJS Infrastructure by way of a variation. Mr Aziz told the Commission he could not recall whether he advised Mr Nguyen how much to quote for the CSR work.

The CSR works variation was approved by Mr Aziz, Mr Hutcherson and Downer general manager Kevin Brady on 12 March 2019. On 13 March 2019, a further variation to the scope of the CSR works awarded to RJS Infrastructure was approved by Mr Aziz and Mr Hutcherson in the amount of \$33,200.

Mr Nguyen told the Commission that RJS Infrastructure submitted all progress claims, including variations, to Mr Aziz in his role as project manager on the Central Station project. Records obtained by the Commission show that Mr Aziz signed and approved payment of all progress claims submitted by RJS Infrastructure.

### The profit split

Mr Nguyen and Mr Aziz gave evidence that an agreement was made between them and Mr Abdi at the start of the Central Station project to split the profits obtained by RJS Infrastructure evenly three-ways between them.

In his evidence to the Commission, Mr Abdi claimed that he could not recall making an agreement to split profits three-ways on the Central Station project. His understanding was that he was a silent partner in the company. Mr Abdi said he understood that the profits were intended to stay in the company and, at the end of the year, he expected Mr Nguyen to transfer him his share of the profits from "all the jobs" that RJS Infrastructure undertook.

Whether the agreement was to split the profits at the end of the Central Station project or at a later date is inconsequential. It is clear Mr Abdi, Mr Nguyen and Mr Aziz had a common understanding that they each would receive a share of the profits made by RJS Infrastructure on the Central Station project.

A spreadsheet located on Mr Nguyen's laptop indicated the total profit to RJS Infrastructure upon completion of the Central Station project was \$198,622 (excluding GST), with Mr Nguyen, Mr Abdi and Mr Aziz to receive \$66,207 each.

Mr Aziz, and Mr Abdi in part, were paid their share of the profits from the Central Station project by issuing false invoices from their respective companies, Tresca and JTG Services. RJS Infrastructure also purchased a SOTA tractor for Mr Abdi on 22 April 2020, which was delivered to Mr Abdi's Glenorie property under the alias

“Nick Shakur” and cost \$46,690. Mr Nguyen told the Commission the tractor was purchased out of Mr Abdi’s share of the profits from the Central Station project and the Lithgow Station project (discussed in chapter 7). Mr Abdi’s evidence was that the tractor was paid for out of the overall company profits, and was for a farming venture he shared with Mr Nguyen on Mr Abdi’s property.

Mr Nguyen assisted Mr Abdi to set up JTG Services on 24 July 2018. Mr Nguyen told the Commission the company was created specifically to facilitate Mr Abdi issuing false invoices from JTG Services to RJS Infrastructure, as a means for Mr Nguyen to pay Mr Abdi his share of the profits. Mr Abdi confirmed this was the arrangement and indicated it was Mr Nguyen’s idea. Mr Abdi said that Mr Nguyen drafted the JTG Services invoices.

On 18 August 2019, JTG Services issued an invoice to RJS Infrastructure in the amount of \$560,997.55 for works described as “labour hire and resource services”. Mr Abdi and Mr Nguyen both admitted that the description of works on the invoice was false. This invoice included both Mr Aziz and Mr Abdi’s share of the profits for the Central Station project, and also included part of their share of the profits for a later project they undertook with Mr Nguyen at Lithgow Station. The amount of \$560,997.55 was transferred from the RJS Infrastructure CBA bank account to the JTG Services CBA bank account on 10 September 2019.

On 25 September 2019, Mr Aziz’s company, Tresca, issued an invoice to JTG Services in the amount of \$207,342.52 for works described as “consulting services March-September 2019”. Mr Abdi agreed that the description of works on the Tresca invoice was false. This invoice included Mr Aziz’s share of the profits for the Central Station project and part of his payment of profits for the Lithgow Station project. The amount of \$247,372.52 was transferred from the JTG Services bank account to the Tresca bank account on 25 September 2019. Mr Aziz accepted that his share of the Central Station project profits was paid to him via invoice to JTG Services.

## Corrupt conduct

### Mr Aziz

Between 5 July 2018 and 25 September 2019, Mr Aziz misused his position as a Downer project manager to influence the awarding of the Central Station Part A NIF conservation works package to RJS Infrastructure. His conduct included telling Mr Nguyen the amount for which RJS Infrastructure should quote and knowingly allowing a dummy quote for a higher amount, apparently from another company, to go forward to ensure RJS

Infrastructure was awarded the work. His conduct also included colluding with Mr Nguyen for RJS Infrastructure to submit inflated variations for which that company received additional payments. In return, he received \$66,207, being his share in RJS Infrastructure’s profit for its work on the project.

This conduct on the part of Mr Aziz was corrupt conduct for the purpose of s 8 of the ICAC Act as it constituted conduct that could impair public confidence in public administration and involved collusive tendering (s 8(2A)(a)).

For the purpose of s 8(2A)(a) the relevant public administration is the administration and oversight of tender processes by TfNSW.

Section 249B(1) of the Crimes Act is relevant for the purpose of s 9(1)(a) of the ICAC Act. The elements of the offence are set out in chapter 3 of this report. In this case, it applies to Mr Aziz (as agent for Downer) personally receiving a benefit from Mr Nguyen via Mr Abdi, as an inducement or reward for influencing the award of a contract to RJS Infrastructure and colluding in the submission of inflated variations by that company.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Aziz committed an offence under s 249B(1) of the Crimes Act of corruptly soliciting or receiving benefits as an inducement or reward for showing favour to RJS Infrastructure, in relation to the awarding of work by Downer to RJS Infrastructure on the TfNSW TAP project at Central Station. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Aziz had committed an offence under s 249B(1) of the Crimes Act of corruptly soliciting or receiving benefits as an inducement or reward for showing favour to RJS Infrastructure, in relation to the awarding of work by Downer to RJS Infrastructure on the TfNSW TAP project at Central Station. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct because it involved serious manipulation of a tender process; Mr Aziz’s secret collusion with a contractor to submit inflated variations by that company; his

receipt of a substantial improper payment; and a serious criminal offence.

## Mr Nguyen

Between 18 June 2019 and 25 September 2019, Mr Nguyen colluded with Mr Aziz and Mr Abdi to effect an agreement whereby Mr Aziz misused his position as a Downer project manager on a TfNSW NIF Central Station project to influence the awarding of the Central Station Part A NIF conservation works package to RJS Infrastructure. Mr Aziz's assistance included telling Mr Nguyen the amount for which RJS Infrastructure should quote, knowingly allowing a dummy quote for a higher amount, apparently from another company, to go forward to ensure RJS Infrastructure was awarded the work. His conduct also included submitting inflated variations for which RJS Infrastructure received additional payments, in return for Mr Nguyen paying Mr Aziz \$66,207.

The conduct was corrupt conduct for the purpose of s 8 of the ICAC Act as it constituted conduct that could impair public confidence in public administration and which involved collusive tendering (s 8(2A)(a)).

The relevant public administration is the administration and oversight of tender processes and the oversight of contract administration by TfNSW.

Section 249B(2) of the Crimes Act is relevant for the purposes of s 9(1)(a) of the ICAC Act. The elements of this offence are set out in chapter 3 of this report. In this case, it applies to Mr Nguyen giving a benefit to Mr Aziz as an inducement or reward for Mr Aziz influencing the award of a contract to RJS Infrastructure and colluding in the submission of inflated variations by that company.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proven on admissible evidence to the criminal standard of proof beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen had committed an offence under s 249B(2) of the Crimes Act of giving a corrupt benefit. His conduct, accordingly, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed a criminal offence under s 249B(2) of the Crimes Act of giving a corrupt benefit. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct because it involved serious manipulation of a tender process, the provision of a substantial improper payment, and a serious criminal offence.

## Mr Abdi

Whilst Mr Abdi contributed very little in relation to the Central Station project, it is evident that it was Mr Abdi's personal relationship with Mr Aziz that laid the foundation for the agreement between Mr Aziz, Mr Nguyen and Mr Abdi.

Mr Abdi participated in the inflation of variations submitted by RJS Infrastructure on the Central Station project, with a view to increasing profits. Mr Abdi also facilitated the payment to Mr Aziz by using a false purchase order issued by his company, JTG Services, to Mr Aziz's company, Tresca. Mr Abdi also received payment of his share of the profits derived by RJS Infrastructure on the project.

Counsel Assisting submitted that Mr Abdi's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act as it constituted conduct that could impair public confidence in public administration (s 8(2A)), and involved dishonestly obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage (s 8(2A)(c)).

In his submissions, Mr Abdi contended that a corrupt conduct finding pursuant to s 8(2A)(c) was not available due to a lack of evidence showing Mr Abdi's dishonest intent in receiving his share of the profits from the Central Station project. It is unnecessary to address this issue for the reasons outlined below.

The Commission accepts the relevant public administration is the administration and oversight of tender processes by TfNSW.

Chapter 2 of this report outlines in detail the Commission's jurisdiction in this investigation with respect to s 8(2A) of the ICAC Act.

The TfNSW NIF MCC entered into by Downer and TfNSW for the Central Station project contained the contractual provisions governing payments made by TfNSW to Downer in relation to the Central Station project. With the exclusion of design and preliminaries work, which was paid to Downer in a lump sum, the entirety of Downer's work under the contract, including the payment of subcontractors, was considered "reimbursable work", subject to it being performed under a subcontractor agreement approved by a TfNSW representative. Subject to approved exceptions, Downer was required to pay all amounts due and payable to



subcontractors before submitting a payment claim to TfNSW for payment of those reimbursable costs. Given the nature of the payment regime pursuant to the MCC as discussed in chapter 2, the absence of any evidence that TfNSW advanced money to Downer in respect of the unpaid subcontractor costs, and the absence of any evidence that TfNSW approved the subcontractor agreement, the Commission is unable to determine that public funds were involved for the purpose of s 8(2A)(c) of the ICAC Act. Accordingly, the Commission makes no finding of corrupt conduct against Mr Abdi in relation to the Central Station project.

## Section 74A(2) statements

The Commission is satisfied in relation to the conduct examined in this chapter that Mr Aziz, Mr Nguyen and Mr Abdi are affected persons.

### Abdal Aziz

Mr Aziz's evidence was the subject of a declaration under s 38 of the ICAC Act and it cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible and available evidence, including:

- WhatsApp messages between Mr Nguyen and Mr Aziz, in which Mr Aziz directed Mr Nguyen to send an email to his Downer email address to provide a basis for Mr Aziz to recommend to other Downer employees that RJS Infrastructure be invited to tender
- Downer emails in which Mr Aziz made misleading and favourable statements about RJS Infrastructure
- Downer progress claim forms for RJS Infrastructure including variation payments totalling \$418,000 that were approved by Mr Aziz
- profit-split spreadsheets obtained from Mr Nguyen's laptop seized during the execution of a search warrant on Mr Nguyen's house
- a Tresca invoice to JTG Services relating to the payment of Mr Aziz's share of the Central and Lithgow Station project profits.

Mr Nguyen's evidence would also be admissible against Mr Aziz in criminal proceedings.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Aziz for an offence

under s 249B(1)(a) of the Crimes Act of, between 18 June 2018 and 11 November 2019, corruptly soliciting and receiving a benefit, as a reward for using his position at Downer to influence the awarding of a subcontract to RJS Infrastructure at Central Station.

### Tony Nguyen

Mr Nguyen's evidence was the subject of a declaration under s 38 of the ICAC Act and cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible and available evidence, including:

- Mr Aziz's evidence
- emails from Mr Nguyen to Mr Aziz's Downer email account
- Downer progress claim forms submitted by RJS Infrastructure, including variation payments approved by Mr Aziz
- profit-split spreadsheets obtained from Mr Nguyen's laptop, seized during the execution of a search warrant on Mr Nguyen's house
- bank statements from the RJS Infrastructure CBA business account.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Nguyen for an offence under s 249B(2)(a) of the Crimes Act of, between 18 June 2018 and 10 September 2019, corruptly giving a benefit to Mr Aziz for Mr Aziz showing favour to Mr Nguyen and RJS Infrastructure in relation to Downer's allocation of the Central Station project subcontract.

### Nima Abdi

Submissions received on behalf of Mr Abdi contend that the Commission should not form the opinion that consideration be given to obtaining the advice of the DPP with respect to the prosecution of Mr Abdi for an offence of corruptly giving a benefit to Mr Aziz for Mr Aziz showing favour to RJS Infrastructure in relation to Downer's allocation of Central Station project subcontracts on the TfNSW TAP project, in contravention of 249B(2)(a) of the Crimes Act, because:

- a *lacuna* exists as to evidence that is capable of giving the primary records their corrupt character
- Mr Aziz and Mr Nguyen would need to give evidence in criminal proceedings against Mr Abdi. They may not be compellable witnesses because their evidence would be self-incriminating

- the primary materials are of limited value in establishing that Mr Abdi corruptly provided a benefit to Mr Aziz
- Mr Aziz and Mr Nguyen's evidence lacks specific knowledge of Mr Abdi's corrupt conduct and lacks credibility.

The Commission does not accept these submissions.

Counsel Assisting submitted that there are admissible documentary records sufficient to amount to *prima facie* proof of Mr Abdi's payment to Mr Aziz in the context of a s 249B(2) offence. Counsel Assisting's observation that a *potential* evidential lacuna may exist in relation to the corrupt nature of that payment is limited to circumstances in which Mr Aziz and Mr Nguyen do not give oral evidence in criminal proceedings. Counsel Assisting submitted despite that, it remains open to the Commission to obtain the advice of the DPP with respect to the prosecution of Mr Abdi for an offence contrary to s 249B(2) of the Crimes Act.

The Commission concludes that the evidence of Mr Nguyen and Mr Aziz, as it relates to Mr Abdi's conduct on the Central Station project, is credible, on the basis that it is largely against self-interest and there is corroborative documentary evidence.

Mr Abdi's evidence was the subject of a declaration under s 38 of the ICAC Act and it cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that the evidence of Mr Aziz and Mr Nguyen, in combination with relevant documentary evidence including financial records and JTG Services and Tresca invoices (the substance of which has been outlined in detail in this chapter), would be admissible in any prosecution of Mr Abdi for an offence of corruptly giving a benefit to Mr Aziz in contravention of s 249B(2)(a) of the Crimes Act.

Questions as to whether or not Mr Aziz and Mr Nguyen would be available to give evidence against Mr Abdi in any possible criminal proceedings are not for the Commission to decide. Such questions are matters for the DPP to determine.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Abdi for an offence under s 249B(2)(a) of the Crimes Act of, between 18 August 2019 and 19 November 2019, corruptly giving a benefit to Mr Aziz for Mr Aziz showing favour to RJS Infrastructure in relation to Downer's allocation of a Central Station project subcontract on the TfNSW TAP project.

## Chapter 7: Lithgow Station

This chapter examines the circumstances in which RJS Infrastructure came to be awarded work on the TfNSW Lithgow Station project, for which it was paid approximately \$1,681,848 (excluding GST). As noted in chapter 5, RJS Infrastructure was a company of which Mr Nguyen was the sole director and shareholder but in which Mr Abdi and Downer employee Mr Aziz were silent partners.

### The awarding of work to RJS Infrastructure

Lithgow Station is a train station on the Blue Mountains Line that required extension of the platform to accommodate the NIF trains that were being introduced by TfNSW. As managing contractor, Downer was responsible for organising and overseeing the subcontracting of this work.

Mr Aziz was employed by Downer and was assigned the role of project manager for the Lithgow Station project. Mr Nguyen told the Commission that Mr Aziz contacted him and enquired whether RJS Infrastructure was capable of undertaking the civil works package on Lithgow Station. Mr Nguyen told the Commission he was initially concerned that the project was too high-risk. However, Mr Nguyen contacted his associate, Mr Cox, for advice due to his technical knowledge and Mr Cox told Mr Nguyen it would be “piss easy” to construct.

Mr Nguyen told the Commission that a meeting took place, attended in person by Mr Nguyen, Mr Cox, Mr Abdi and Mr Aziz, to allow Mr Aziz and Mr Abdi to ask questions of Mr Cox and make an assessment as to whether or not he could do the work. Mr Aziz and Mr Abdi formed a favourable assessment of Mr Cox and consequently Mr Nguyen was sent an email from Downer containing an invitation to tender for the Lithgow Station civil works package on 28 February 2019.

### The tender process

According to Mr Cox, he and Mr Nguyen jointly prepared the RJS Infrastructure quote for the Lithgow Station project.

The first quote of \$1,291,756 (excluding GST) was submitted by RJS Infrastructure to Downer on 26 March 2019. On 4 April 2019, Downer quantity surveyor Mr Hutcherson sent an email to Mr Cox and Mr Nguyen (original emphasis):

*Can you allow for a **provisional sum** item for \$300,000 with the following description: 'Temporary works, construction sequencing and methodology and design development'. TfNSW will not allow us to price a contingency ourselves so we need to have it in your price, This is to be used only if required and agreed by both parties. Can you resend your pricing schedule with the additional item with the description above.*

RJS Infrastructure submitted a second quote of \$1,591,756.20 (excluding GST) to Downer on 5 April 2019.

On 16 April 2019, as part of the tender, RJS Infrastructure submitted to Downer an “organisational chart” purporting to show their employees and their respective roles. Mr Cox told the Commission that the organisational chart was intentionally deceptive, included three “make-believe” employees, and that they were included to make RJS Infrastructure appear larger than it, in fact, was.

### Mr Aziz's assistance

Mr Cox and Mr Nguyen told the Commission that Mr Aziz provided them with assistance and confidential information, which gave them an advantage over other companies tendering for the Lithgow Station civil works package. Mr Cox accepted that Mr Abdi and Mr Aziz

played a role in ensuring the work was awarded to RJS Infrastructure. Mr Abdi's evidence was also that he thought the tender process was "cooked" to a certain point.

Mr Cox told the Commission that Mr Nguyen showed him a quote for the Lithgow Station project from Kilmac Pty Ltd, a competitor.

In submissions, Mr Aziz accepted that he provided the competitor's quote to RJS Infrastructure, although he argued that it was only provided as an example to assist in formulation of the work and scope required, after the competitor had withdrawn from tender. Despite Mr Aziz's vague recollection to the contrary, there was no evidence to support the claim that the competitor company withdrew or had withdrawn before its quote was provided to RJS Infrastructure. Indeed, the competitor was part of Mr Aziz's tender review email of 8 April 2019. Even if the quote were provided on this basis, the information contained in the competitor's quote was confidential information that Mr Aziz provided to RJS Infrastructure, and not others, to assist RJS Infrastructure and provide it with an advantage during the tender process.

Documents obtained by the Commission show that Mr Aziz communicated secretly with Mr Nguyen during the tender clarification stage using a Guerrilla Mail email address.

Mr Aziz sent Mr Nguyen emails on 12, 15 and 23 April 2019. The emails contained confidential Downer meeting minutes relating to the Lithgow Station project; provided advice to Mr Nguyen in relation to how best to structure RJS Infrastructure's contractual agreements with Downer to reduce the risk of progress claims being queried or rejected; and attached an excerpt of a Downer document that disclosed another company's schedule of rates on a different project that Mr Nguyen told the Commission he used in preparing RJS Infrastructure's quote. Mr Nguyen stated the schedule of rates assisted by informing him of the maximum hourly rates Downer would approve, thereby enabling him to increase pricing to charge the maximum possible.

Mr Nguyen was shown an MS Word document containing feedback, comments and questions relating to RJS Infrastructure's quote for the Lithgow Station project. Mr Nguyen told the Commission that he sent the RJS Infrastructure quote to Mr Aziz to review and the Word document was prepared by Mr Aziz, providing his feedback and comments on the RJS Infrastructure quote. The document assisted RJS Infrastructure as it contained advice relating to the pricing schedule and identified items where RJS Infrastructure had underquoted work.

As project manager on the Lithgow Station project, Mr Aziz was involved in reviewing the tenders submitted by companies for the civil works package. Mr Aziz was

asked by Counsel Assisting about a Lithgow Station tender review document that he prepared on 8 April 2019, which compared and ranked the companies tendering for the civil works subcontract. The document contained information about RJS Infrastructure's annual turnover, listed as \$30 million, and previous projects completed with Downer, including Victoria Street Station. Mr Aziz knew these claims to be false. Mr Aziz further ranked RJS Infrastructure highest overall.

For his part, Mr Aziz asserted that he did not think he passed this information on. An email sent from Mr Aziz to another Downer employee on the same day, however, indicates Mr Aziz intended to present the tender review document he was preparing to a tender evaluation meeting to be held that afternoon. Irrespective of whether the information was passed on, Mr Aziz's preparation of the document demonstrated a willingness on his part to provide false information and to use his position as Downer project manager to ensure the Lithgow Station civil works package was awarded to RJS Infrastructure.

RJS Infrastructure was ultimately awarded the civil works subcontract at Lithgow Station. The subcontract was executed on 2 May 2019 in the amount of \$1,591,756.20 (excluding GST) and, in addition to the \$300,000 provisional sum included in the RJS Infrastructure quote, the contract provided for a further provisional sum of \$156,099.25 to be released at Downer's discretion.

The Commission rejects Mr Aziz's submission that he "did nothing other than work in an undisclosed secondary employment capacity".

## Undertaking the work

Mr Nguyen gave evidence to the Commission that he took two weeks' leave from his job at IWC to supervise works at Lithgow Station. RJS Infrastructure subcontracted out the work to other companies while he and Mr Cox managed the works.

## Variations

Mr Nguyen told the Commission that he consulted Mr Aziz when RJS Infrastructure submitted a variation. Mr Nguyen told the Commission that Mr Aziz gave him feedback on the proposed cost of variations, advising when he could increase the cost of a variation. Mr Nguyen accepted that this was done for the purpose of inflating the price he could ultimately charge and increasing the profits made by RJS Infrastructure on the project. Mr Abdi also gave evidence that the Lithgow Station project was "cooked" in terms of the variations.

Records obtained by the Commission show that RJS Infrastructure submitted six progress claims on the Lithgow

Station project and Mr Aziz approved half of the claims, including over \$40,000 in variations. The variations paid to RJS Infrastructure totalled approximately \$228,734.

## The profit split

Mr Nguyen told the Commission that Mr Abdi and Mr Aziz did not want to include Mr Cox in the profit-share arrangement for the Lithgow Station project.

Mr Aziz and Mr Abdi, in their evidence to the Commission, confirmed they believed the arrangement was for a three-way split of the profits between each of them and Mr Nguyen. Mr Abdi and Mr Aziz wanted Mr Cox to be paid an hourly rate; however, Mr Nguyen told the Commission Mr Cox wasn't happy with that, so, unbeknown to Mr Abdi and Mr Aziz, Mr Nguyen made a separate agreement with Mr Cox to split the profits on the Lithgow Station project with him.

To facilitate these arrangements, Mr Nguyen created a spreadsheet recording two sets of project costs. The spreadsheet column titled "TN & AC Only, actual actual" recorded the true itemised project costs and the profit split for Mr Cox, with an additional minor split for Mr Nguyen. The second spreadsheet column titled "for AA + NN" was created by Mr Nguyen to show to Mr Aziz and Mr Abdi. Mr Nguyen inflated the project costs shown to Mr Abdi and Mr Aziz in order to siphon off additional profits, which he shared solely with Mr Cox.

Mr Nguyen's spreadsheet recorded the total profits made by RJS Infrastructure on the Lithgow Station project as \$1.322 million. Mr Nguyen's spreadsheet shows he split the bulk of the profits evenly three ways, between Mr Aziz, Mr Abdi and himself, totalling at least \$221,000 (excluding GST) each. The Commission rejects submissions by Mr Aziz that dispute Mr Nguyen's evidence that Mr Aziz received a profit share of approximately \$221,000 (excluding GST). In evidence, Mr Aziz accepted that he was to receive a third of the profits, totalling around \$221,000. He, further, used a Tresca invoice to receive the profits from the Lithgow Station project and agreed that the profit figures in Mr Nguyen's schedule looked about right.

In order to extract Mr Abdi and Mr Aziz's combined profits for the Central and Lithgow station projects, Mr Abdi issued three invoices with false narrations from his company JTG Services to RJS Infrastructure. The first invoice was dated 18 August 2019 in the amount of \$509,997.77 (excluding GST). Bank account records show that Mr Nguyen transferred that payment to the JTG Services bank account on 10 September 2019.

The second invoice was dated 17 February 2020 in the amount of \$79,061.61 (excluding GST). Bank account

records show that Mr Nguyen transferred that payment to the JTG Services bank account on 19 February 2020.

The third invoice was dated 28 April 2020 in the amount of \$99,576.96 (excluding GST). Bank account records show that Mr Nguyen transferred that payment to the JTG Services bank account on 21 May 2020. The total amount paid to Mr Abdi was \$688,636.16 (excluding GST).

Mr Aziz issued two invoices, also with false narrations, from his company, Tresca, to JTG Services. The first invoice was dated 25 September 2019 in the amount of \$188,493.20 (excluding GST). Bank account records show that Mr Abdi transferred that payment to the Tresca bank account on 25 September 2019.

The second Tresca invoice issued to JTG Services was dated 11 November 2019 in the amount of \$97,930.89 (excluding GST). Bank account records show that Mr Abdi transferred that payment to the Tresca bank account on 19 November 2019. The total payments Mr Aziz received for the Central and Lithgow Station projects totalled \$286,424 (excluding GST).

Invoice and bank account records show that Mr Abdi retained \$402,212.16 (excluding GST). It is common ground the payments to Mr Aziz and Mr Abdi included their share of the RJS Infrastructure profits on the Central and Lithgow station projects.

For the profit split with Mr Cox, Mr Nguyen added the additional siphoned-off profits, totalling approximately \$526,000 (or \$473,000 excluding GST), to his share of the bulk profits (\$221,000 excluding GST) and split this amount with Mr Cox. On 15 August 2019, Mr Cox issued an invoice to RJS Infrastructure from his company, Marble Arch, in the amount of \$350,000 (excluding GST). Following the success of the project, Mr Nguyen made Mr Cox a 50 per cent shareholder in RJS Infrastructure.

## Corrupt conduct

### Mr Aziz

Between 28 February 2019 and 31 March 2020, Mr Aziz used his position as a Downer project manager on the Lithgow Station TfNSW NIF project to influence the awarding of a Lithgow Station civil works package to RJS Infrastructure, and approved inflated variations, in exchange for a financial benefit of around \$221,000 (excluding GST). His conduct also included collusive dealings with Mr Nguyen.

This conduct on the part of Mr Aziz was corrupt conduct for the purpose of s 8 of the ICAC Act as it constituted

conduct that could impair public confidence in public administration and which involved collusive tendering (s 8(2A)(a)).

For the purpose of s 8(2A)(a) of the ICAC Act the relevant public administration is the administration and oversight of tender processes by TfNSW.

Section 249B(1) of the Crimes Act is relevant for the purpose of s 9(1)(a) of the ICAC Act. The elements of the offence are set out in chapter 3 of this report.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Aziz committed an offence under s 249B(1) of the Crimes Act of corruptly soliciting or receiving benefits as an inducement or reward for showing favour to RJS Infrastructure, in relation to the awarding of a subcontract on the TfNSW NIF project at Lithgow Station. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Aziz had committed an offence under s 249B(1) of the Crimes Act of corruptly soliciting or receiving benefits as an inducement or reward for showing favour to RJS Infrastructure, in relation to the awarding of a subcontract on the TfNSW NIF project at Lithgow Station. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct because it involved significant planning and a serious criminal offence.

### Mr Nguyen

Between 28 February 2019 and 10 September 2019, Mr Nguyen entered into an agreement with Mr Aziz that Mr Aziz would use his position as a Downer project manager on a TfNSW NIF Lithgow Station project to provide assistance to RJS Infrastructure and influence the tender process to award the civil works subcontract to RJS Infrastructure in exchange for a financial benefit of about \$221,000 (excluding GST).

The conduct was corrupt conduct for the purpose of s 8 of the ICAC Act as it constituted conduct that could impair public confidence in public administration and which involved collusive tendering (s 8(2A)(a)).

The relevant public administration is the administration and oversight of tender processes by TfNSW.

Section 249B(2) of the Crimes Act is relevant for the purpose of s 9(1)(a) of the ICAC Act. The elements of this offence are set out in chapter 3.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proven on admissible evidence to the criminal standard of proof beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen had committed an offence under s 249B(2) of the Crimes Act of giving corrupt benefits. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed a criminal offence under s 249B(2) of the Crimes Act of giving corrupt benefits. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct because it involved the provision of a substantial improper payment and a serious criminal offence.

### Mr Abdi

Counsel Assisting submitted that, given Mr Abdi's role in relation to the Lithgow Station project did not touch on the tender processes, no corrupt conduct finding is open pursuant to s 8(2A)(a) of the ICAC Act. The Commission accepts that submission.

Counsel Assisting maintained, however, that Mr Abdi's conduct still engaged s 8(2A)(c) of the ICAC Act.

As outlined, the evidence shows that Mr Abdi was party to an agreement with Mr Nguyen and Mr Aziz to share equally in the profits made by RJS Infrastructure. Mr Abdi received around \$221,000 (excluding GST).

The relevant public administration is the administration and oversight of tender processes by TfNSW.

Chapter 2 of this report outlines in detail the Commission's jurisdiction in this investigation with respect to s 8(2A) of the ICAC Act.

The TfNSW NIF MCC entered into by Downer and TfNSW for the Lithgow Station project contained the contractual provisions governing payments made by TfNSW to Downer. With the exclusion of design and

preliminaries work, which was paid to Downer in a lump sum, the entirety of Downer's work under the contract, including the payment of subcontractors, was considered "reimbursable work", subject to it being performed under a subcontractor agreement approved by a TfNSW representative. Subject to approved exceptions, Downer was required to pay all amounts due and payable to subcontractors before submitting a payment claim to TfNSW for payment of those reimbursable costs. Given the nature of the payment regime pursuant to the MCC as discussed in chapter 2, in the absence of any evidence that TfNSW advanced money to Downer in respect of the unpaid subcontractor costs and the absence of any evidence of an approval by TfNSW of the subcontractor agreement, the Commission is unable to determine that public funds were involved, for the purpose of s 8(2A)(c) of the ICAC Act. Accordingly, the Commission makes no finding of corrupt conduct against Mr Abdi in relation to the Central Station project.

## Mr Cox

Mr Abdi, Mr Aziz and Mr Nguyen gave consistent evidence in the public inquiry that Mr Cox had no involvement in the collusive tendering arrangement entered into by them, namely, that Mr Aziz would use his position at Downer to influence the awarding of the contract to RJS Infrastructure, and, in return, they would all split the profits evenly. Mr Abdi and Mr Nguyen facilitated the corrupt payment to Mr Aziz, while Mr Cox had no involvement in the payment made to Mr Aziz.

The evidence given by Mr Nguyen and Mr Aziz in the public inquiry corroborated Mr Cox's evidence that he undertook a significant amount of legitimate work on the Lithgow Station project, for which he was remunerated with his share of the company's profits, albeit secretly.

Counsel Assisting did not submit that a corrupt conduct finding should be made in relation to Mr Cox's conduct on the Lithgow Station project. The Commission accepts this position.

## Section 74A(2) statements

In relation to the matters examined in this chapter, the Commission considers Messrs Aziz, Nguyen and Abdi are affected persons.

### Abdal Aziz

Mr Aziz's evidence was the subject of a declaration under s 38 of the ICAC Act and it cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible and available evidence, including:

- Downer emails
- Guerrilla Mail emails sent from Mr Aziz to Mr Nguyen providing guidance to Mr Nguyen regarding the Lithgow Station project tender
- Mr Aziz's awareness of painshare/gainshare loss associated with awarding the tender to RJS Infrastructure
- Downer progress claim forms for RJS Infrastructure including variation payments approved by Mr Aziz
- profit-split spreadsheets obtained from Mr Nguyen's laptop
- a Tresca invoice to JTG Services relating to the payment of Mr Aziz's share of the Central and Lithgow station project profits. Mr Nguyen's evidence is also admissible in criminal proceedings against Mr Aziz.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Aziz for an offence under s 249B(1)(a) of the Crimes Act of, between 28 February 2019 and 31 March 2020, corruptly soliciting and receiving a benefit as a reward for using his position at Downer to influence the awarding of a contract to RJS Infrastructure.

### Tony Nguyen

Mr Nguyen's evidence was the subject of a declaration under s 38 of the ICAC Act and cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible and available evidence, including:

- Mr Aziz's evidence
- emails from Mr Nguyen to Downer employees
- RJS Infrastructure's tender documents
- Guerrilla Mail emails sent from Mr Aziz to Mr Nguyen providing guidance to Mr Nguyen regarding the Lithgow Station project tender
- Downer progress claim forms submitted by RJS Infrastructure, including variation payments approved by Mr Aziz
- profit-split spreadsheets obtained from Mr Nguyen's laptop
- Mr Abdi's admissions to Mr Nguyen in lawfully intercepted telecommunications
- bank statements from the RJS Infrastructure CBA business account.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Nguyen for an offence under s 249B(2)(a) of the Crimes Act of, between 28 February 2019 and 10 September 2019, corruptly giving a benefit to Mr Aziz for Mr Aziz showing favour to Mr Nguyen and RJS Infrastructure in relation to Downer's allocation of the Lithgow Station civil works package subcontract.

### **Nima Abdi**

Submissions received on behalf of Mr Abdi contend that there is insufficient admissible evidence capable of establishing that the payment made by JTG Services to Tresca was a corrupt benefit for Mr Aziz showing favour to RJS Infrastructure in relation to Downer's allocation of the Lithgow Station civil works package subcontract.

Mr Abdi's evidence was the subject of a declaration under s 38 of the ICAC Act and it cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible and available evidence as outlined in this chapter, including financial records, JTG Services invoices and Tresca invoices. Mr Nguyen's evidence is also admissible in criminal proceedings against Mr Abdi.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Abdi for an offence under s 249B(2)(a) of the Crimes Act of, between 18 August 2019 and 19 November 2019, corruptly giving a benefit to Mr Aziz for Mr Aziz showing favour to RJS Infrastructure in relation to Downer's allocation of the Lithgow Station civil works package subcontract.



## Chapter 8: Kingswood Station

This chapter examines the circumstances in which RJS Infrastructure came to be awarded work on the TfNSW TAP building and landscaping works on the Kingswood Station project, for which it was paid a total of \$892,490 (excluding GST).

### Kingswood Station TAP project

Kingswood Station was the first TfNSW TAP project that RJS Infrastructure worked on. The TfNSW TAP involved upgrading train stations throughout NSW to improve accessibility. This included building works to add ramps, lifts, lighting and car parking at train stations. Downer was the managing contractor for tranche 3 of the TAP projects, which included Kingswood Station. As managing contractor, Downer was responsible for organising and overseeing the subcontracting of this work.

Mr Abdi was employed by TfNSW as project manager on the Kingswood Station project. Mr Abdi regularly worked onsite in the site office and worked closely with the Downer engineering manager, Sairam Pilli. While Mr Pilli did not hold the role of project manager onsite, his evidence was that he had a difficult relationship with the Downer project manager, who was often offsite. Accordingly, Mr Pilli had responsibility day to day for the management of the Kingswood Station project, including the recommendation of subcontractors for the building and landscaping subcontract tenders.

### Recruiting Sairam Pilli

Mr Pilli told the Commission that he first formally met Mr Abdi while working on the Kingswood Station project. Mr Pilli said that he understood Mr Abdi to be the TfNSW client representative on that project.

Mr Pilli formed a close working relationship with Mr Abdi. Mr Pilli told the Commission that he spoke to Mr Abdi about his problems, particularly the difficulties

he experienced with the Downer project manager and that Mr Abdi was a shoulder to cry on. Mr Pilli told the Commission that Mr Abdi undertook to look after and defend him if he heard the Downer project manager speaking badly about him. Mr Abdi agreed in his evidence that Mr Pilli had told him he was unhappy with his workload and had issues with the Downer project manager. Mr Abdi provided an undertaking to Mr Pilli to correct anything negative said about Mr Pilli, if it were untruthful.

Mr Pilli recalled that he had a professional working relationship with Mr Abdi until the building package subcontract arose. In about May 2019, Mr Pilli finalised preparations to put the building package subcontract out to tender. Mr Pilli stated that, prior to the awarding of the building subcontract, Mr Abdi had told him if RJS Infrastructure were awarded the building subcontract, he might get Mr Pilli to assist with some of their work.

There is difference in the evidence of Mr Pilli and Mr Abdi as to when Mr Abdi offered Mr Pilli a profit share if he assisted RJS Infrastructure on the Kingswood Station project. Mr Pilli stated that this occurred after RJS Infrastructure had been awarded the building subcontract. He recalled that Mr Abdi approached him while he was alone in a site office and told him, if he assisted RJS Infrastructure onsite to deliver their scope of works, he would receive a one-third share of the profits and he agreed to the arrangement. Mr Pilli told the Commission that he thought that, if he helped Mr Abdi, Mr Abdi could help him onsite and he wouldn't lose his job.

Mr Abdi could not recall with certainty when he offered Mr Pilli a 30 per cent share of RJS Infrastructure's profits if he assisted RJS Infrastructure. However, Mr Abdi was able to recall that Mr Pilli's assistance began prior to the tender process. At the time, Mr Pilli provided Mr Abdi with the Downer budget for the building package to assist RJS Infrastructure in preparing their quote to ensure they had the cheapest tender. Mr Pilli requested that Downer

add SDL, Constructicon and RJS Infrastructure to the list of contractors to invite to tender for the building package. Mr Abdi ultimately agreed with Counsel Assisting that Mr Pilli provided this assistance because he had already discussed the profit-share arrangement with Mr Pilli before Downer had issued the invitations to tender for the Kingswood Station building contract.

Counsel Assisting submitted that the Commission would not accept Mr Pilli's assertion that he was only offered a share of RJS Infrastructure's profit in return for providing engineering assistance to the company during the project delivery phase, rather than from an earlier point in time, that is, during the tender phase of the project. It was submitted that Mr Pilli's assertion to this end is self-serving. Counsel Assisting further submitted that Mr Pilli's assertion is belied by his own evidence that, notwithstanding Mr Abdi apparently first informing him in September 2019 that he was a silent partner in RJS Infrastructure, Mr Pilli had already requested a \$5,000 advance profit-share payment from Mr Abdi in July 2019.

While Mr Pilli was not questioned directly as to whether he provided the Downer budget to Mr Abdi for the building subcontract, nonetheless, he was legally represented during the public inquiry and there was no application for leave to cross examine Mr Abdi. Nor were any submissions advanced in reply to Counsel Assisting's submissions that outlined that Mr Pilli's evidence ought not to be accepted. Having considered Counsel Assisting's submissions and, in the absence of any submissions to the contrary, the Commission accepts that Mr Pilli accepted a 30 per cent profit share from RJS Infrastructure in return for his assistance, prior to submitting the names of contractors to Downer to invite to tender for the building subcontract on 4 June 2019.

## Tendering for the building package

Mr Pilli's responsibilities as Downer engineering manager included compiling a list of suitable contractors and sending that list to the Downer tender team to invite those contractors to tender for the building package on the Kingswood Station project.

The building package subcontract was a "reimbursable cost" pursuant to the Kingswood Station MCC, as it did not involve design work or preliminaries, which were excluded under the MCC from reimbursable work. The building subcontract costs paid to RJS Infrastructure were, therefore, charged by Downer to TfNSW and paid for using public money, as has been discussed in detail in chapter 2 of this report.

Mr Pilli told the Commission that, when he was preparing the building subcontract tender package, Mr Abdi told him Downer should just use RJS Infrastructure for the building

subcontract. Mr Pilli said that Mr Abdi then approached him and said he wanted Mr Pilli to add three contractors to the tender invitation list for the building package, which included RJS Infrastructure, Constructicon and SDL. Mr Pilli said that Mr Abdi provided him with the contact details for the contractors either in person or via telephone message.

Mr Pilli told the Commission that, in addition to the three contractors suggested by Mr Abdi, he added one other contractor, NHR Group, to send to the Downer tender team. He selected NHR Group, despite being of the belief that contractor wasn't capable of undertaking the work. He also added another contractor that the Downer project manager suggested. On 4 June 2019, Mr Pilli submitted the list of five contractors, including the three suggested by Mr Abdi, to the Downer tender team and requested the tender team issue an invite to tender to those contractors.

Mr Pilli denied any knowledge of wrongdoing at that stage. Nevertheless, he agreed with Counsel Assisting that Mr Abdi had suggested all three contractors and he had queried whether there was a relationship between them. He then stated that:

*I don't think I had the guts at that stage to question him about it, like, as in, like, Nima was, like, was quite senior, like, from my end, it's quite overbearing. And I was new to the company, so I didn't know what to do with the client. And, generally, in Downer, we were just told to, like, appease the client, you know, kind of give them what they want.*

As outlined above, the Commission is satisfied that Mr Pilli did in fact accept a 30 per cent profit share from RJS Infrastructure in return for his assistance, prior to submitting the names of contractors to Downer to invite to tender for the building subcontract on 4 June 2019. In these circumstances, the Commission rejects Mr Pilli's evidence that he was unaware of any wrongdoing at the time he submitted the contractors' names to Downer.

Mr Abdi agreed that he recommended Mr Pilli approach RJS Infrastructure for the building package. This was in a context where Mr Pilli asked him for additional building contractors to add to the list of tenderers. Mr Nguyen provided the contact details for SDL and Constructicon, which Mr Abdi knew Mr Nguyen essentially controlled. Mr Abdi then provided these to Mr Pilli. Mr Abdi agreed that the idea was always to try to have RJS Infrastructure win the tender.

Mr Nguyen stated that Mr Abdi asked him to get a "cost price" for the Kingswood Station building contract. Mr Nguyen approached Mr Nguy of Constructicon, and together they determined an overall lump sum price for the works. Mr Nguyen stated he provided the lump sum

price to Mr Abdi. Mr Abdi and Mr Nguyen agreed that Mr Abdi then instructed Mr Nguyen to add \$100,000 on top. RJS Infrastructure then submitted their tender price of \$388,756 to Downer on 21 June 2019 for the building works package.

Mr Nguyen told the Commission, and Mr Abdi confirmed in his evidence, that Mr Abdi verbally told Mr Nguyen what the Downer budget was for the Kingswood Station project, and he received this information from Mr Pilli. Mr Pilli was not asked whether he provided the Downer building subcontract budget to Mr Abdi; however, the Commission notes that Mr Pilli did admit to later providing Mr Abdi with multiple Downer budgets for different scopes of work in relation to variations on multiple occasions.

The Commission notes that Mr Abdi and Mr Nguyen's admissions that Mr Pilli provided them with the Downer budget for the building subcontract were made against self-interest, and that Mr Abdi's instruction to add \$100,000 onto the cost price infers that Mr Abdi knew what the Downer budget was for the building package. There was no submission by Mr Pilli in response to Counsel Assistings' submission that Mr Pilli provided the Downer building subcontract budget to Mr Abdi. In all the circumstances the Commission is satisfied that Mr Pilli provided the Kingswood Station Downer building subcontract budget to Mr Abdi to assist RJS Infrastructure in submitting their tender for the building subcontract.

After Mr Nguyen gave the Constructicon and SDL contractor details to Mr Abdi, Mr Nguyen prepared a tender submission on behalf of Constructicon with a price of \$509,234 and submitted it to Downer on 21 June 2019, using the alias "Anthony Bryne" and the Constructicon admin email address. Mr Nguyen also prepared a tender submission on behalf of SDL with a price of \$409,798 and submitted it to Downer on 21 June 2019 using the "projects@sdl.com.au" email address and signed off using the alias signature block "Joanne Breen".

Mr Nguy told the Commission that he knew Mr Nguyen had put in a bid on behalf of Constructicon and he was aware that it "wasn't an actual bid". Mr Nguyen accepted that he prepared the SDL and Constructicon tender prices to be above the price of RJS Infrastructure and the Commission finds that they were "dummy bids" prepared for the purpose of collusive tendering.

On 27 June 2019, the Downer project manager at that time, Mr Watters, emailed Mr Nguyen, Mr Pilli and other Downer employees, advising that he had given RJS Infrastructure the "go ahead" for the building works to commence onsite on 4 July 2019. RJS Infrastructure was formally awarded the building contract in about September 2019.

## Undertaking the work

Mr Nguy's company, Constructicon, was engaged by RJS Infrastructure as subcontractor to undertake the work on the building subcontract on the Kingswood Station project. Mr Nguy held the role of project manager and managed all the building works. Mr Nguy used the alias "Monty Huynh" to conceal his real name so he could not be linked back to Constructicon, because it was used as a dummy bid in the tender process. Mr Nguy priced in his profits to the costs he submitted to Mr Nguyen. He did not pay Mr Nguyen any benefits nor did Mr Nguy receive a share of the profits made by RJS Infrastructure on the Kingswood Station project.

Mr Pilli was aware the other workers onsite were subcontractors of RJS Infrastructure. Mr Pilli told the Commission that, when RJS Infrastructure started working onsite, Mr Abdi told him he wanted him to assist RJS Infrastructure with the works onsite, to help them deliver the project and to report any day-to-day issues to Mr Abdi rather than to Downer. Mr Pilli agreed with Counsel Assisting that the assistance he gave to RJS Infrastructure onsite was above and beyond the assistance he gave to any other subcontractor, and that there was an extent to which he was effectively acting in the interests of RJS Infrastructure rather than those of Downer.

## Variations (building subcontract)

The original contract sum for the building subcontract was \$388,756 and RJS Infrastructure was paid an additional total of \$435,211 in variations.

It is uncontroversial that Mr Pilli would identify any variations to Mr Abdi; Mr Nguyen would calculate a cost price for the variation; and Mr Abdi would instruct Mr Nguyen on how much to charge on top, using Downer budget information provided by Mr Pilli. Mr Pilli would authorise the variations and submit them to the Downer project director for final approval.

Two large variations were for fencing, for which RJS Infrastructure charged \$81,580, and for asphalt re-sheeting, for which RJS Infrastructure charged \$160,891. Mr Pilli sourced the fencing subcontractor used by RJS Infrastructure at Mr Abdi's instruction, after the original fencing subcontractor fell through. Mr Pilli told the Commission he provided the Downer budget to Mr Abdi for both variations, and they were additional large scopes of work awarded to RJS Infrastructure, and probably should have gone out to tender.

## Tendering for the landscaping package

In November 2019, Downer undertook a tender process for the landscaping package on the Kingswood Station project. Mr Pilli told the Commission that Mr Abdi told him he knew a good landscaper and was adamant that RJS Infrastructure should be awarded the landscaping package.

The landscaping package subcontract was a “reimbursable cost” pursuant to the Kingswood Station MCC, as it did not involve design work or preliminaries, which were excluded under the MCC from reimbursable work. The landscaping subcontract costs paid to RJS Infrastructure were, therefore, charged by Downer to TfNSW and paid for using public money.

Mr Pilli provided Mr Abdi with the Downer budget for the landscaping package, then Mr Abdi provided the figure to Mr Nguyen, who drafted the RJS Infrastructure quote. Mr Abdi organised for WHC Landscaping, whose owner was a relation of Mr Abdi’s, to provide a quote to Mr Nguyen for the cost of the landscaping works, which totalled \$36,436 (excluding GST). Using their knowledge of the Downer budget, Mr Nguyen and Mr Abdi marked up the price to \$59,790 (excluding GST) and submitted this quote to Downer on behalf of RJS Infrastructure.

Mr Nguyen provided contact details to Mr Abdi for two other contractors (both of which Mr Nguyen effectively controlled), for Mr Pilli to submit to Downer as part of the collusive tendering process, to ensure Downer met its requirements to obtain three prices in the tender process. Mr Pilli sent the three contractors’ contact details to the Downer procurement team on 7 November 2019.

One of the other contractors was Marble Arch, Mr Cox’s company. Mr Nguyen drafted and submitted the Marble Arch quote for the landscaping package to Downer on 27 November 2019, using the alias “Laura Donnelly”, without Mr Cox’s knowledge. Mr Nguyen also drafted the other contractor’s quote and was responsible for its submission to Downer. Both quotes were dummy bids and priced higher than RJS Infrastructure’s quote to ensure it was awarded the work.

Downer records show that RJS Infrastructure was the recommended contractor due to “competitive pricing” and “capability to perform the works”, despite its quoted price significantly exceeding Downer’s target budget estimate. On 2 December 2019, Mr Pilli sent Mr Nguyen an email awarding the landscaping subcontract contract to RJS Infrastructure and instructing him to commence work on 6 December 2023.

Mr Nguyen described Mr Abdi as having had “control” of the tendering process and Mr Abdi accepted Counsel Assistings’ proposition that the Kingswood Station

landscaping package was a “rigged tender”. Mr Pilli agreed with Counsel Assisting that, ultimately, he allowed Mr Abdi to interfere with the tender process for the Kingswood Station landscaping package and that it was inappropriate.

## Profit split

The profit earned by RJS Infrastructure in relation to the Kingswood Station project building and landscaping packages was in the order of \$331,507. It is common ground that the profits that RJS Infrastructure made on the Kingswood Station project landscaping and building packages were roughly split three ways between Mr Pilli, Mr Abdi and Mr Nguyen.

Mr Pilli told the Commission that Mr Abdi gave him three cash payments either onsite or in the car park at Kingswood Station. Mr Pilli stated that he was paid \$5,000 cash in July, \$28,000 cash around September and \$5,000 cash around November 2019. Mr Pilli registered the company PSR 360 Pty Ltd on 11 May 2020 for the sole purpose of creating an invoice to send to RJS Infrastructure in the amount of \$63,500, being the remainder of his share of the profits on the Kingswood Station project. Mr Pilli accepted that he created the PSR 360 invoice for \$63,500, which he submitted to RJS Infrastructure, and that he made up the amounts on the invoice for work described as “management fees”, being his share of the RJS Infrastructure profits from the Kingswood Station project. Mr Pilli also created false timesheets to match the invoice, in case he was audited. Mr Nguyen transferred the \$63,500 into Mr Pilli’s account on 21 May 2020 and Mr Pilli purchased a car using the proceeds.

Mr Pilli told the Commission that he asked Mr Abdi to take back the second cash payment of \$28,000 in September 2019 on multiple occasions, after he saw how big the cash payment was and realised it was wrong, but Mr Abdi refused. Counsel Assisting submitted that the Commission should treat Mr Pilli’s evidence on this issue with scepticism due to:

- a) Mr Abdi’s evidence, namely, that Mr Pilli never said that he didn’t want the money or tried to give it back or stated that it was wrong. Mr Abdi told the Commission that Mr Pilli asked for a payment upfront, before they had even started the project. Mr Abdi paid Mr Pilli the first cash payment of about \$5,000 using Mr Abdi’s corrupt profits from the Glenfield Transport Interchange car park defect rectification work and Victoria Street Station projects. Mr Abdi denied that any effort was required to persuade Mr Pilli to take the money and stated that Mr Pilli agreed to the profit-share agreement from the outset.

- b) Mr Pilli's willingness to subsequently accept:
  - (i) a further \$5,000 cash payment from Mr Abdi
  - (ii) the additional \$63,500 by way of invoicing arrangement (or by way of payment in kind).
- c) Mr Pilli's ongoing eagerness to be paid by RJS Infrastructure in connection with the Banksia Station project, as discussed by Mr Abdi and Mr Nguyen during during lawfully intercepted telephone calls.

The Commission notes the absence of any evidence to suggest that threats were made to Mr Pilli at any stage during the Kingswood Station project. Nor is there any other evidence to indicate that his conduct was not voluntary. Furthermore, Mr Pilli did not make any attempt to report the corrupt conduct to Downer, the NSW Police Force or the Commission.

The Commission received no submission in response to Counsel Assistings' submission that Mr Pilli's evidence that he essentially tried to back out of the corrupt arrangement is not credible.

Overall, the Commission is satisfied that Mr Pilli was acting voluntarily at all relevant times during the Kingswood Station project, including in accepting one-third of the profits in return for his assistance, and was a willing participant in the corrupt scheme.

Mr Abdi received \$109,000 as his share of the profits, via Mr Nguyen's payment of tradespeople undertaking work on Mr Abdi's property at Glenorie, and via purchases Mr Abdi made using the RJS Infrastructure credit card to which Mr Abdi had access. The remainder was paid to Mr Abdi by way of a JTG Services invoice, prepared by Mr Nguyen and paid for by RJS Infrastructure.

## Corrupt conduct

### Mr Nguyen

The Commission is satisfied that, between 2019 and 2020, Mr Nguyen colluded with Mr Abdi to manipulate the tender process for the building and landscaping subcontracts on the Kingswood Station project.

He participated in manipulating the tender processes for those contracts to favour RJS Infrastructure, and used confidential Downer budget information, obtained from Mr Pilli and provided to him by Mr Abdi, so that the work was awarded to his company, RJS Infrastructure. In return, he split the \$331,000 profit derived by RJS Infrastructure with Mr Pilli and Mr Abdi.

His conduct included submitting dummy bids to Downer; inflating the subcontract tender prices and cost of

variations using confidential Downer budget information; and making corrupt payments to Mr Pilli and Mr Abdi for their assistance.

This was corrupt conduct for the purpose of s 8(2A) of the ICAC Act as it was conduct that impairs, or that could impair, public confidence in public administration and which could involve collusive tendering (s 8(2A)(a)).

The relevant public administration is the administration and oversight of tender processes and the oversight of contract administration by TfNSW.

Section 249B(2) of the Crimes Act is relevant for the purposes of s 9(1)(a) of the ICAC Act. The elements of this offence are set out in chapter 3.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proven on admissible evidence to the criminal standard of proof beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen had committed an offence under s 249B(2) of the Crimes Act of giving corrupt benefits. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed a criminal offence under s 249B(2) of the Crimes Act of giving corrupt benefits. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct because it involved significant planning; a high degree of sophistication in the drafting and submission of dummy bids; the provision of a substantial improper payment; and a serious criminal offence.

### Mr Pilli

The Commission is satisfied that, between 2019 and 2020, Mr Pilli colluded with Mr Abdi to favour RJS Infrastructure in the awarding of building and landscaping subcontracts on the Kingswood Station project. He manipulated the tender processes for those contracts to favour RJS Infrastructure and provided confidential Downer budget information to Mr Abdi, so that work was awarded to RJS Infrastructure. In return, Mr Pilli received approximately \$101,500, being his share of the \$331,000 profit derived by RJS Infrastructure.

Mr Pilli's conduct included requesting that Downer invite RJS Infrastructure and other contractors selected by himself and Mr Abdi to tender for the building and landscaping subcontracts, which resulted in collusive tendering. Mr Pilli provided confidential Downer budget information to Mr Abdi, resulting in the marking up of costs submitted by RJS Infrastructure and receipt of corrupt payments to a value of over \$100,000.

This was corrupt conduct for the purpose of s 8(2A) of the ICAC Act as it was conduct that impairs, or that could impair, public confidence in public administration and which could involve collusive tendering (s 8(2A)(a)).

For the purpose of s 8(2A)(a) of the ICAC Act the relevant public administration is the administration and oversight of tender processes and oversight of contract administration by TfNSW.

Section 249B(1) of the Crimes Act is relevant for the purpose of s 9(1)(a) of the ICAC Act. The elements of this offence are set out in chapter 3.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proven on admissible evidence to the criminal standard of proof beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Pilli had committed an offence under s 249B(1) of the Crimes Act of receiving corrupt commissions or rewards. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Pilli had committed a criminal offence under s 249B(1) of the Crimes Act of receiving corrupt benefits. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct because it involved a serious criminal offence and the receipt of a substantial improper payment.

## Mr Abdi

Submissions received on behalf of Mr Abdi on 4 September 2023 contend that, apart from Mr Nguyen's evidence, there is no evidence that suggests Mr Abdi held an official role, nor one of project manager, on behalf of TfNSW on the Kingswood Station project. The submissions assert that Mr Abdi was not the TfNSW project manager for the Kingswood Station

project and that this further demonstrates the unreliability of Mr Nguyen's evidence.

The Commission's corrupt conduct finding does not rely on Mr Abdi engaging in conduct as a TfNSW public official; however, the Commission notes Mr Abdi's own résumé, located on his TfNSW laptop, records that he held the position of TfNSW project manager between 2017 and 2020, and that he was responsible for the management of design, construction and commissioning of station upgrades including at Kingswood, Glenbrook and Hazelbrook. The Commission, therefore, rejects this submission.

The Commission is satisfied that, between 2019 and 2020, Mr Abdi colluded with Mr Nguyen and Mr Pilli to favour RJS Infrastructure in the awarding of building and landscaping subcontracts on the Kingswood Station project. He manipulated the tender process for those contracts to favour RJS Infrastructure, and provided confidential Downer budget information he received from Mr Pilli to Mr Nguyen, so that work was awarded to RJS Infrastructure. In return, Mr Abdi received approximately \$109,000, being his share of the \$331,000 profit derived by RJS Infrastructure.

Mr Abdi's conduct included providing contractor details to Mr Pilli for Downer to invite to tender for the building and landscaping subcontracts, which resulted in collusive tendering. He also provided confidential Downer budget information he received from Mr Pilli to Mr Nguyen, resulting in the marking up of costs submitted by RJS Infrastructure and his receipt of corrupt payments to a value of over \$100,000.

This was corrupt conduct for the purpose of s 8(2A) of the ICAC Act as it was conduct that impairs, or that could impair, public confidence in public administration and which could involve collusive tendering (s 8(2A)(a)).

The relevant public administration is the administration and oversight of tender processes and contract administration by TfNSW.

Section 249B(1) and s 249B(2) of the Crimes Act are relevant for the purpose of s 9(1)(a) of the ICAC Act. The elements of these offences are set out in chapter 3. Additionally, such conduct could also constitute a breach of the requirements of the TfNSW code of conduct, and comprise reasonable grounds for dismissing, dispensing with the services or otherwise terminating the services of, a public official, which is relevant for the purpose of s 9(1)(c) of the ICAC Act.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an

appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Abdi committed offences under s 249B(1) and s 249B(2) of the Crimes Act of corruptly soliciting or receiving benefits and corruptly giving benefits as an inducement or reward for his role in the collusive tendering that resulted in the awarding of the building and landscaping subcontracts on the Kingswood Station project. In respect of s 249B(2), Mr Abdi's conduct involved giving Mr Pilli multiple cash payments for his role in awarding the subcontracts to RJS Infrastructure. His conduct therefore comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 9(1)(c) of the ICAC Act it is appropriate to consider the TfNSW code of conduct, by which Mr Abdi was bound as a TfNSW employee. Parts 5, 6–8, 15 and 21 of that code relating to manager responsibilities, conflicts of interest, gifts and benefits, secondary employment and breaches are relevant to Mr Abdi's conduct as outlined in this chapter.

The Commission is satisfied for the purpose of s 9(1)(c) of the ICAC Act that, if the facts as found were to be proved on admissible evidence to the civil standard of proof and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Abdi had breached the aforementioned provisions of the TfNSW code of conduct such as to give rise to reasonable grounds for dismissal, dispensing with his services or otherwise terminating his employment with TfNSW. Mr Abdi's conduct, therefore, comes within s 9(1)(a) and s 9(1)(c) of the ICAC Act.

For the purposes of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the requisite standard and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Abdi had committed offences under s 249B(1) and s 249B(2) of the Crimes Act of corruptly soliciting or receiving benefits and giving benefits as an inducement or reward for Mr Abdi and Mr Pilli's role in the collusive tendering that resulted in the awarding of the building and landscaping subcontracts on the TfNSW NIF project at Kingswood Station. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct because it involved the receipt of a substantial improper payment, significant planning and a serious criminal offence.

## Section 74A(2) statements

In relation to the matters examined in this chapter, the Commission considers Mr Nguyen, Mr Pilli and Mr Abdi are affected persons.

### Tony Nguyen

Mr Nguyen's evidence was the subject of a declaration under s 38 of the ICAC Act and it cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible and available evidence, including:

- lawful telecommunication intercepts
- electronic documents obtained from Mr Nguyen's laptop
- telephone messages between Mr Nguyen and Mr Abdi
- banking records showing payments made to Mr Abdi and Mr Pilli.

Mr Nguyen's evidence is also admissible in criminal proceedings against Mr Abdi and Mr Pilli.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Nguyen for an offence under s 249B(2) of the Crimes Act of corruptly giving a benefit to Mr Pilli and Mr Abdi as a reward for influencing the tender process, resulting in the awarding of the building and landscaping subcontracts to RJS Infrastructure.

### Sairam Pilli

Mr Pilli's evidence was the subject of a declaration under s 38 of the ICAC Act and cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible and available evidence, including:

- Mr Abdi and Mr Nguyen's evidence
- Downer records and emails
- lawful telecommunication intercepts
- profit-split spreadsheets obtained from Mr Nguyen's laptop
- PSR 360 invoices
- bank statements from the RJS Infrastructure CBA business account.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Pilli for an offence under s 249B(1) of the Crimes Act of corruptly receiving a benefit from Mr Abdi and Mr Nguyen in connection with manipulating the Downer tender process to ensure the building and landscaping subcontracts were awarded to RJS Infrastructure.

## Nima Abdi

A submission received on behalf of Mr Abdi on 4 September 2023 contend that there is insufficient admissible evidence to show that payments made by RJS Infrastructure to JTG Services were corruptly received or were paid as an inducement or reward for the purpose of s 249B(1) of the Crimes Act, or that payments made by Mr Abdi to Mr Pilli were as an inducement or reward for the purpose of s 249B(2) of the Crimes Act.

Mr Abdi's evidence was the subject of a declaration under s 38 of the ICAC Act and it cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible and available evidence as set out in this chapter, and which includes financial records, JTG Services invoices, lawful telecommunication intercepts and telephone messages. Mr Nguyen and Mr Pilli's evidence is also admissible in criminal proceedings against Mr Abdi. The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Abdi for the following specified criminal offences:

- a) Section 249B(1) of the Crimes Act (receiving corrupt commissions and rewards) in relation to the payment he received in connection with manipulating the Downer tender process on the building and landscaping subcontracts to ensure RJS Infrastructure was successful.
- b) Section 249B(2) of the Crimes Act (giving corrupt commissions and rewards) in relation to the payments he made to Mr Pilli in connection with manipulating the Downer tender process on the building and landscaping subcontracts to ensure RJS Infrastructure was successful.

Counsel Assisting have recommended consideration should be given to obtaining the advice of the DPP with

respect to the prosecution of Mr Abdi for the following specified criminal offences:

- a) Section 88(1) of the ICAC Act in relation to counselling and procuring Mr Pilli to delete messages and content from his mobile telephone that may have been required in connection with the Commission's investigation, with the intent of preventing those messages and content from being used in connection with the investigation.
- b) Section 87(1) of the ICAC Act in relation to his false or misleading evidence in relation to his counselling and procuring of Mr Pilli to delete messages and content from his mobile telephone.

Submissions on behalf of Mr Abdi assert that the wording of s 88(1) of the ICAC Act does not extend to a factual scenario whereby a third party conspires, induces, coerces, aids or abets another person to delete messages and content from their mobile telephone which may have been required in connection with the Commission's investigation. The Commission accepts this submission.

Mr Pilli was unable to recollect with any degree of specificity what content the deleted messages on his telephone contained. Mr Pilli also declined the Commission's invitation to provide a formal witness statement. Mr Pilli's evidence is also self-serving in circumstances where Mr Pilli's version of events exculpates himself for the act of deleting the telephone messages.

The Commission, therefore, declines to seek the advice of the DPP in relation to the s 88(1) and s 87(1) offences.



## Chapter 9: North Strathfield Station

In September 2018, TfNSW awarded Downer the MCC for the TAP upgrade works at North Strathfield Station. The Downer project manager assigned to those works was Mr Watters.

In October 2019, towards the end of the project, Downer awarded RJS Infrastructure a subcontract to perform works in the absence of any formal tender process. This chapter examines the circumstances in which RJS Infrastructure was awarded that subcontract and whether Mr Watters sought or received a benefit from RJS Infrastructure in return for assisting RJS Infrastructure to be awarded the subcontract.

### RJS Infrastructure provides a quote

Mr Nguyen initially met Mr Watters in mid-2019, while Mr Nguyen's company, RJS Infrastructure, was working on the Kingswood Station project. At the time, Mr Watters was Downer's project manager for the North Strathfield Station project, and was also acting as project manager for the Kingswood Station works for four to five weeks, while the incumbent project manager for Kingswood Station, Mr Stanculescu, was on leave.

Mr Nguyen told the Commission that, towards the end of the Kingswood Station project, he received an email from Mr Watters advising him of a further opportunity for RJS Infrastructure to tender for building works at North Strathfield Station. The email is dated 10 September 2019 and is in the following terms:

*...Now that RJS are coming to an end of works at Kingswood, I have a small package of heritage style building works at North Strathfield that I need looked at...Still finalising design details, but if possible can you get out to site this week for a walk around and a look at what needs to be done? Keen to get you guys pricing asap.*

There was an initial site view that took place on 12 September 2019. On 30 September 2019, Mr Cox, on behalf of RJS Infrastructure, emailed Mr Watters an initial quote for the proposed works in the amount of \$34,209.10 (excluding GST).

On 16 October 2019, Mr Cox attended a further site view with Mr Watters, at which meeting a higher quote of around \$40,000 was discussed. Mr Cox told the Commission that this higher quote was estimated in light of a more defined scope of the proposed works having been arrived at, subsequent to RJS Infrastructure's initial quote.

Shortly after that site view, Mr Watters sent Mr Cox a follow-up email setting out "a few items to be added or amended/confirmed in the quote".

On 17 October 2019, RJS Infrastructure sent a second quote to Mr Watters. This quote was for \$45,107.52 (excluding GST) and reflected the amendments to the scope of works.

The following day, 18 October 2019, in the absence of any formal tender process, Mr Watters sent an email to Mr Cox at RJS Infrastructure that advised: "[p]lease take this email as acceptance of the quote, as agreed works to start on site Monday 28th."

On the same day, Mr Watters sent an email to a manager in Downer's commercial team, Amit Patel, which advised that: "[a]s discussed, we will be engaging RJS to complete the waiting room floor lowering works at North Strathfield." Attached to the email were the relevant scope of works and other documents including RJS' quote. The email also noted that:

*In summary, they have quoted \$45,107.52 against a allowable budget of \$49,141.02, gain of \$4,033.50. It should be noted that this is a robust quote and we will be expecting \$0 variations as all considerations have been made, including multiple site visits and adjustments from RJS before this final quote.*

Of note in respect of Mr Watters engaging RJS Infrastructure, in addition to the absence of any formal tender or request for quotation process, is that TfNSW was not notified by Downer of its recommendation that RJS Infrastructure carry out the relevant work until late November 2019, almost a month after RJS Infrastructure had actually commenced the work. That correspondence to TfNSW came from another Downer employee and identified that the works to be carried out by RJS Infrastructure were, in fact, a variation to the head contract between Downer and TfNSW in respect of the North Strathfield Station project and, as such, did not require a separate tender or expression of interest process. Rather, Downer advised TfNSW that RJS Infrastructure had been added to the list of tenderers previously developed in conjunction with TfNSW on the basis that “both Downer and TfNSW believe that they are suitable for this Project”.

### A few extra for me?

Mr Cox gave evidence that Mr Watters had suggested to him in an SMS text message that RJS Infrastructure should “put in a few extra for him” in the second quote so that RJS Infrastructure would “get the job”. Mr Cox said that, shortly after the further site meeting with Mr Watters on 16 October 2019, he received a text message from Mr Watters that said words to the effect “...If you put a few extra in for me, you get the work”.

Mr Cox was unable to produce that text message to the Commission, and agreed that he could not recall its exact words. The text message was not otherwise in evidence before the Commission.

Mr Cox said that he informed Mr Nguyen about the text message and recalled showing it to Mr Nguyen. He said that, because RJS Infrastructure wanted the work, Mr Nguyen agreed to pay Mr Watters.

For his part, Mr Nguyen confirmed to the Commission that he understood that Mr Watters had contacted Mr Cox following submission of the initial RJS Infrastructure quote and suggested that he inflate the price so as to include “a cut” for Mr Watters.

Mr Nguyen said that Mr Cox showed him a text message from Mr Watters, which he recalled said “...something along “just add a few more for myself” or something like that and then a smiley face...”. Mr Nguyen conceded that he was happy for RJS Infrastructure to submit a higher quote for the works and pay Mr Watters in relation to the North Strathfield Station job.

It was put to Mr Cox by counsel for Mr Watters that he did not in fact show Mr Nguyen the text message he received from Mr Watters. Mr Cox disagreed with that

proposition. However, leave to cross examine Mr Nguyen on the issue was not sought by Mr Watters. As such, Mr Nguyen’s evidence as to seeing the text message that Mr Watters had sent to Mr Cox was unchallenged.

Mr Cox accepted in cross examination that he could not recall the exact words of Mr Watters’ text message. However, he disagreed with the proposition that it was a mistaken assumption on his part that Mr Watters was seeking a kickback. He agreed, however, that he could not say for sure that he did ultimately increase the RJS Infrastructure quotation to include an allowance for an amount to be paid to Mr Watters.

It was subsequently submitted on behalf of Mr Watters that it is plausible that the terms of his text message to Mr Cox were innocuous, and merely referred to a suggestion that RJS Infrastructure might increase its quotation to ensure all elements of the additional works were adequately covered. Given, however, Mr Cox’s unequivocal evidence as to the contents of Mr Watters text message and the fact that he acted on it by approaching Mr Nguyen, the Commission does not accept that submission.

### The payment to Mr Watters

Mr Cox told the Commission that he ultimately paid Mr Watters “around six grand or something”, and possibly up to \$8,000 in an underground car park in George Street, North Strathfield. He recalled that Mr Nguyen gave him the money to pass on to Mr Watters but was unsure whether he had discussed the actual amount with Mr Nguyen.

Mr Nguyen confirmed to the Commission that he gave the cash to Mr Cox to pass on to Mr Watters. He was uncertain as to the exact amount paid to Mr Watters, stating that:

*... it was, it was about the \$8,000 mark, I think, yeah. That, that’s, thereabouts. Could be a little bit more, little bit less but 8,000 is, sounds about right.*

While Mr Cox was unable to recall when the payment to Mr Watters took place, Mr Nguyen gave evidence that the payment was made at the end of the project “after the invoice had been paid”.

Other evidence tendered in the public inquiry confirms that RJS Infrastructure issued three “progress claim” invoices to Downer dated 1 December 2019, 29 January 2020 and 2 April 2020 in respect of the North Strathfield Station project. The final of those invoices was ultimately paid by Downer by way of a funds transfer to RJS Infrastructure’s bank account on 29 May 2020.

Assuming Mr Nguyen's evidence reference to "after the invoice was paid" was referring to Downer's payment of the final progress claim invoice, this would place the payment made to Mr Watters as having occurred sometime in June 2020. Given, however, that the first of the RJS Infrastructure invoices (dated 1 December 2019) was for the bulk of the total ultimately paid by Downer to RJS Infrastructure for the North Strathfield Station project, it may be that this was "the invoice" to which Mr Nguyen referred. That would, therefore, place the date of the payment to Mr Watters closer to February 2020.

Mr Watters flatly denied that he had ever requested or received any money from Mr Cox or Mr Nguyen in relation to work on North Strathfield Station. This was consistent with his denial of any such payment given in an interview with Commission investigators on 17 February 2022.

Mr Watters denied meeting Mr Cox in a car park.

During the public inquiry, the Commission played a lawfully intercepted telephone call between Mr Cox and Mr Nguyen. The call occurred on 19 August 2020 and contained the following exchange between Mr Nguyen and Mr Cox (emphasis added):

...

COX: *Even if we don't get this one, if we don't get this and they go to Shotcrete Australia. I'm ringing Kevin Watters and going to Kevin, "remember that eight grand I gave you last year in cash". This is how the conversation goes. This is how the conversation with Keven [sic], "remember the eight grand of cash I gave you last year, what the fuck's going on here, we're being excluded from fucking tenders because we – we're – we're fuckin' clever enough to know who the crack subcontractor to go with. You then go behind our back and fuckin' going direct to that contractor. That's twice that it's happened. How the fuck do you think –"*

NGUYEN: *Oh but don't – don't mention the eight grand, just whatever – whatever you said before–after the eight grand, yeah say that. You don't need to remind him.*

A prior telephone conversation between Mr Cox and Mr Nguyen on 14 May 2020 was also in evidence before

the Commission, in the course of which Mr Cox said to Mr Nguyen:

*...so the only person we have to look after is Kevin ... he'd be a fraction of the cost of those other wankers.*

These conversations between Mr Cox and Mr Nguyen related more broadly to RJS Infrastructure's (then) proposed tender for works on the upcoming Wollstonecraft Station project. The Commission is, however, satisfied that the exchange in the call of 19 August 2020 quoted above refers to the payment by Mr Cox to Mr Watters in relation to the North Strathfield Station project, and that Mr Cox was proposing to exert some leverage in respect of it.

The conversations between Mr Cox and Mr Nguyen provide persuasive contextual support for Mr Cox's account as to that payment over Mr Watters' version of events, given its nature and the circumstances. They tend to independently confirm both the payment to Mr Watters and its quantum. It is highly unlikely that the statements would have been made in a private conversation between those who made the payments if, in fact, the payment to Mr Watters had not been made.

Counsel for Mr Watters put to Mr Cox that he may have withheld and kept for himself the money that Mr Nguyen had given to him to pay Mr Watters, along with the proposition that Mr Cox was willing or predisposed to "rip off" or "skim" money from Mr Nguyen. Mr Cox rejected this and the further suggestion that his belief that Mr Watters had sought a "kickback" was merely a mistaken assumption on Mr Cox's part.

Counsel Assisting submitted that, while the allegation that Mr Watters received a payment in cash from Mr Cox as a reward for giving the North Strathfield Station building package to RJS Infrastructure is a serious allegation, the Commission would be satisfied on the balance of probabilities that this in fact occurred.

Mr Watters submitted that the Commission should not accept the evidence of Mr Cox and that, accordingly, in the absence of other evidence of either the request by Mr Watters or the payment made to him by Mr Cox, the Commission would not be satisfied that Mr Watters did indeed solicit, and was paid, a kickback from RJS Infrastructure in relation to the North Strathfield Station works.

In submissions, Mr Watters proposed an alternative explanation; namely, that Mr Cox had lied to Mr Nguyen about Mr Watters having requested a kickback and that, rather than paying to Mr Watters the money that Mr Nguyen had given him for that purpose, Mr Cox had instead kept it for himself. It was submitted that Mr Cox had, therefore, been untruthful in his "inherently

implausible” evidence as to the payment, and that this was demonstrated by the vagueness of Mr Cox’s evidence on the issue.

While it is acknowledged that Mr Cox was, at times, imprecise, the Commission found Mr Cox to be a credible witness overall, and particularly so in respect of the evidence he gave against self-interest. The Commission agrees with the submission of Counsel Assisting that Mr Cox had no apparent reason to lie to the Commission about the request by Mr Watters, nor about having made a payment to Mr Watters in a car park in North Strathfield. It follows that the Commission accepts Mr Cox’s evidence on this matter.

The Commission also does not agree with Mr Watters’ further submission that he should be considered a witness of credit, on the basis that he was not an advocate for his cause, was willing to make concessions against interest, and was responsive to the questions asked. Rather, the Commission accepts Counsel Assisting’s submission that Mr Watters was one of several witnesses in the public inquiry whose evidence demonstrated an inclination to minimise their role and/or an inability to accept logical inferences.

Regarding Mr Watters’ submission as to the possibility that Mr Cox had lied to Mr Nguyen about having made the payment to Mr Watters, the Commission considers it far less likely that Mr Cox would have been so concerned about revealing to Mr Nguyen that he had deceived him out of \$8,000, under the ruse of paying that money to Mr Watters, as to consider it preferable to invent a serious allegation regarding a person against whom he harboured no ill-will and to present that falsely (against self-interest) to the Commission under pain of penalty for doing so.

Applying the approach in *Briginshaw v Briginshaw*, the Commission is satisfied on the balance of probabilities that Mr Watters solicited a payment to himself and Mr Cox came to pay Mr Watters approximately \$8,000. The Commission is similarly satisfied that Mr Watters instructed Mr Cox to increase RJS Infrastructure’s quote to Downer to cover his payment. Counsel Assisting, however, did not submit, and the Commission does not find, that the RJS Infrastructure quotation for the North Strathfield Station works was inflated to incorporate the said sum.

## Contract variations

Notwithstanding Mr Watters’ suggestion in his 18 October 2019 email to Mr Patel that “we will be expecting \$0 variations as all considerations have been made”, the amount ultimately paid to RJS Infrastructure for the North Strathfield Station work totalled \$95,299 (excluding GST)—an additional \$44,292 (excluding GST)

over and above the initial contract price. The amount paid to RJS Infrastructure included four contract variations; that is, additional works carried out by RJS Infrastructure that were approved by Mr Watters.

Mr Nguyen gave evidence that RJS Infrastructure was not expecting any variations on the North Strathfield Station work. He said that the need for the additional works did not become apparent until after RJS Infrastructure had commenced work and discovered that unforeseen work was required, arising from the “latent condition” of the site. He said that, although it was Mr Cox who was primarily responsible for managing the North Strathfield Station job and submitting any contract variations, as far as he was aware, the variations were legitimate. He said that, in respect of the pricing for those variations, RJS Infrastructure would have included a “standard mark-up, standard margin”, but he did not believe that the prices that RJS Infrastructure had charged Downer for the variations had been unusually inflated.

Mr Nguyen said that he was not aware of Mr Watters having been involved in any discussions with himself or Mr Cox about artificially inflating the prices of the variations. He said that, if any such discussions had taken place between Mr Cox and Mr Watters, he would most likely have known about it, as Mr Cox would have told him.

Mr Cox told the Commission the “latent condition” issues included the discovery of hard stone under the floor of a building that required specialist heritage work, and the discovery, treatment and removal of asbestos and lead-based paint, which then resulted in soil contamination that required removal, as well as associated additional delay costs. Mr Cox noted that, whereas the works were initially supposed to take three weeks to complete, they ultimately took about three months. In short, Mr Cox’s evidence was that the contract variations were warranted and legitimate.

While it was the case that each of the variations was approved by Mr Watters, there is no evidence that the variations were a contrivance or artificially inflated, or that Mr Watters sought or received any payment from Mr Cox or Mr Nguyen in relation to the variations.

## Corrupt conduct

### Mr Watters

In early- to mid-2020, Mr Watters accepted a payment of approximately \$8,000 from Mr Cox as a reward for arranging for RJS Infrastructure to be awarded a contract for works on the TfNSW North Strathfield Station project.

The Commission’s findings are pursuant to s 13(3)(a) and s 74A(1) of the ICAC Act.

In their submissions of 24 July 2023, Counsel Assisting submitted that:

*On the basis of his \$8,000 secret payment received from Cox in connection with the award of the North Strathfield Station building project, for which Watters had instructed Cox to increase RJS Infrastructure's quote to Downer to cover his payment, ... Watters engaged in corrupt conduct pursuant to s 8(2A)(c) of the ICAC Act.*

As noted above, there was no evidence that RJS Infrastructure's quote was increased to cover the payment to Mr Watters.

For the purpose of s 8(2A) of the ICAC Act the relevant public administration is the administration and oversight of tender processes and the oversight of contract administration by TfNSW.

In his submissions in response, Mr Watters contended that his conduct was not conduct that could impair confidence in public administration (because the conduct in question concerned Downer, not TfNSW) and did not involve the payment or application of public funds. These matters have been addressed in the context of chapter 2.

In their further submissions of 26 October 2023, Counsel Assisting expanded on the basis that a corrupt conduct finding should be made against Mr Watters and submitted that:

*...in so far as Watters agreed with Cox that, in exchange for the payment of a bribe or secret commission, he would have RJS Infrastructure Group Pty Ltd (RJS Infrastructure) recommended to TfNSW as the appropriate subcontractor for the North Strathfield Station building package, that agreement resulted in RJS Infrastructure dishonestly obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage: s 8(2A)(c) ICAC Act. It is inconsequential to s 8 (2A)(c) whether RJS Infrastructure obtained or benefited from the public funds, as opposed to Watters directly; all that is required is that there was or could have been a dishonest obtaining of, or benefiting from, the payment or application of public funds for private advantage, and such an advantage can be the commercial benefits flowing to RJS Infrastructure in accordance with the terms of the Approved Subcontractor Agreement.*

The difficulty with this submission is that, as noted above, Mr Watters did not recommend to TfNSW that RJS Infrastructure was the appropriate subcontractor for the work. That recommendation was made by another Downer employee. There was no evidence before the

Commission that Mr Watters indicated that he was proposing to make a recommendation himself; that he took any steps towards arranging for the recommendation to be made; or that he was even aware Downer had any contractual obligation to recommend RJS Infrastructure to TfNSW.

The evidence is that Mr Watters operated as if, and represented that, he was approving RJS Infrastructure's involvement on behalf of Downer. The recommendation from Downer to TfNSW came well after RJS Infrastructure had already been engaged to carry out the work at North Strathfield.

Furthermore, the conduct the subject of the second limb in s 8(2A)(c) (that is, dishonestly obtaining or assisting in obtaining, or directly benefitting from, the payment or application of public funds for private advantage, or the disposition of public assets for private advantage) must be the same conduct that falls within s 9. Consistently with how the evidence was led, the relevant conduct against Mr Watters was a breach of his duties to Downer. It has never been alleged that he breached a duty to TfNSW. Even if the case as now put by Counsel Assisting is made out under s 8(2A)(c), the relevant conduct would not constitute a criminal offence under s 249B(1) of the Crimes Act as the recommendation to TfNSW would not have been "in relation to the affairs or business" of Mr Watters' principal (being Downer). Counsel Assisting did not demonstrate or contend that Mr Watters could be viewed as an agent for TfNSW pursuant to s 294A of the Crimes Act.

In these circumstances, the Commission does not make a corrupt conduct finding on the basis contended for by Counsel Assisting.

## Mr Cox

In early- to mid-2020, Mr Cox made a payment of approximately \$8,000 to Mr Watters as a reward for him arranging for RJS Infrastructure to be awarded a contract for works on the TfNSW North Strathfield Station project.

In light of the position taken by the Commission with respect to Mr Watters, the Commission has decided to exercise its discretion under s 13(2A) of the ICAC Act not to make a finding of corrupt conduct against Mr Cox in relation to the above conduct.

## Mr Nguyen

In early- to mid-2020, Mr Nguyen, on behalf of RJS Infrastructure, made or agreed with Mr Cox to make a payment of approximately \$8,000 to Mr Watters as a reward for him arranging for RJS Infrastructure to be

awarded a contract for works on the TfNSW North Strathfield Station project.

As with Mr Cox, in light of the position taken by the Commission with respect to Mr Watters, the Commission has decided to exercise its discretion under s 13(2A) of the ICAC Act not to make a finding of corrupt conduct against Mr Nguyen in relation to the above conduct.

## Section 74A(2) statements

In relation to the matters examined in this chapter, the Commission considers Mr Watters, Mr Cox and Mr Nguyen are affected persons.

### Kevin Watters

Mr Watters' evidence was the subject of a declaration under s 38 of the ICAC Act and it cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act.

The Commission notes the submission of Counsel Assisting that there is insufficient admissible evidence to prosecute Mr Watters for an offence under s 249B(1) of the Crimes Act, and is, accordingly, not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Watters for an offence arising from the matters examined in this chapter.

### Aidan Cox

Mr Cox's evidence was the subject of a declaration under s 38 of the ICAC Act and it cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act.

The Commission notes the submission of Counsel Assisting that there is insufficient admissible evidence to prosecute Mr Cox for any offence under s 249B(1) of the

Crimes Act and is, accordingly, not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Cox for an offence arising from the matters examined in this chapter.

### Tony Nguyen

Mr Nguyen's evidence was the subject of a declaration under s 38 of the ICAC Act and it cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act.

The Commission notes the submission of Counsel Assisting that there is insufficient admissible evidence to prosecute Mr Nguyen for any offence under s 249B(1) of the Crimes Act and is, accordingly, not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Nguyen for an offence arising from the matters examined in this chapter.

## Chapter 10: Sydney Trains projects

This chapter examines the circumstances in which Sydney Trains project manager Benjamin Vardanega arranged for the engagement of contractors with whom he had a pre-existing relationship to perform works on Sydney Trains projects and whether he received any benefit from any of them in return.

### Mr Vardanega

In early-2011, shortly after the completion of his Bachelor of Engineering degree, Mr Vardanega commenced working as a graduate engineer for what was then the NSW Transport Construction Authority. He was subsequently promoted to site engineer and held that role until around mid-2013. He then held several roles in the private sector, specialising in rail infrastructure projects, including a role as a constructability advisor with consultancy firm Rail Planning Services Pty Ltd (“RPS”). In that role, he worked on secondment to TfNSW on projects including project managing works at Penrith Train Station and, shortly before his departure from RPS in August 2018, briefly on the Sydney Metro project.

In early October 2018, Mr Vardanega commenced in a senior project engineer role with Downer. Mr Vardanega remained at Downer for only five-to-six months, during which time he worked primarily on the TfNSW TAP project at Glenbrook Station. His supervisor was Downer project manager Mr Gayed. It was common ground that they became friends as result of their working together, albeit this did not, according to Mr Vardanega, extend to a social friendship outside their professional relationship.

Also in October 2018, Mr Vardanega established ProjectHQ through which he provided consultancy and project management services.

Shortly after Mr Vardanega finished as an employee at Downer in April 2019, ProjectHQ was contracted by Downer such that, in effect, he continued to work for Downer, albeit on the limited basis described below.

It was Mr Gayed who suggested Mr Vardanega provide a quotation for the proposed engagement of ProjectHQ. Following its receipt, he arranged for ProjectHQ (that is, Mr Vardanega) to be set up in Downer’s internal system.

Under the arrangement with Downer, Mr Vardanega was engaged, through ProjectHQ, as a project engineer supervisor on the Glenbrook Station project. His role was to assist with the supervision of weekend possession works on the project in May and September 2019.

### Mr Vardanega and Sydney Trains

In April 2019, Mr Vardanega commenced work with Sydney Trains (a division of TfNSW) as a project manager. He initially worked full-time with Sydney Trains but, at his request, that changed to part-time in about June 2019. He left in December 2020. His engagement in this role was also through ProjectHQ, via recruitment company Randstad.

In about mid-2019, Mr Vardanega commenced work as an investigation works manager with engineering consultancy firm ARCH Artifex, again through ProjectHQ. That work related to TfNSW’s Paramatta Light Rail Stage 2 project. In about August 2019, his role within ARCH Artifex changed to a constructability manager, in respect of the Sydney Metro City and Southwest line upgrade project.

In November 2019, at which time the ARCH Artifex work was wrapping up, Mr Vardanega (again, via ProjectHQ) successfully tendered for a contract position with TfNSW as an interface manager on the NIF station signalling enabling works (SSEW) project. He commenced in this role in December 2019 on a part-time, two-day per week basis, shortly before taking a period of leave. He returned to the position around March 2020 on a full-time basis until January 2021, when his contract with TfNSW was terminated.

The Commission is satisfied that, in the capacities in which Mr Vardanega worked for Sydney Trains between April 2019 and December 2020 and TfNSW between December 2019 and January 2021, he was a “public official” within the definition of that term in s 3 of the ICAC Act. That definition includes (emphasis added):

*(m) an employee of or **any person otherwise engaged by or acting for or on behalf of**, or in the place of, or as deputy or delegate of, **a public authority** or any person or body described in any of the foregoing paragraphs.*

Notwithstanding that both roles were by way of a contract with his company, ProjectHQ, of which he was the sole director and secretary, the Commission is satisfied that Mr Vardanega was a person “otherwise engaged by” and/or “acting for or on behalf of” a public authority, being Sydney Trains and TfNSW, respectively.

In the case of his work for Sydney Trains, this is notwithstanding that Mr Vardanega was engaged (via ProjectHQ) by Sydney Trains through a recruitment agency, Randstad. As to Mr Vardanega’s subsequent role with TfNSW, ProjectHQ contracted directly with TfNSW under a professional services contract.

## Andrew Gayed and Mansion Building

Mr Gayed was a project manager at Downer during the period under examination and worked on several TfNSW projects for which Downer held a managing contract with TfNSW, including the TAP projects at Glenbrook, Kingswood and Wollstonecraft stations.

In December 2013, Mr Gayed registered Train 24/7 Pty Ltd, which changed its name to Mansion Building in June 2014. He was the sole director and shareholder of the company until September 2018, when the shares were transferred to a new owner and Mr Gayed ceased holding office as a director. Although Mr Gayed’s evidence was somewhat vague on the matter, he essentially stated that he had instructed his accountant to sell the company to one of his accountant’s clients for a nominal sum because “I was working as a full-time employee, and after the issues with the company it was, I no longer wanted to be a director.”

The Commission presumes that the “issues with the company” related to Mansion Building’s involvement in litigation as the respondent in contract dispute proceedings commenced by an aggrieved client in the NSW Civil and Administrative Tribunal. Those proceedings resulted in a judgment adverse to Mansion Building in late 2018 and, ultimately, in the suspension of Mr Gayed’s building licence, effective from 18 December 2018.

## The Penrith, Liverpool and Wollongong station projects

Mr Vardanega gave evidence that, upon his commencement at Sydney Trains in April 2019, he was assigned to project manage works on the Sydney Trains security officer facilities program at Penrith and Liverpool stations. Those works involved the installation of pre-constructed buildings and associated civil works. He was also subsequently assigned to project manage works at Wollongong Station, also under the security officer facilities program.

Mr Vardanega said that, due to budget considerations, works on the Liverpool and Penrith station projects were required to be completed by 30 June 2019.

As at April 2019, the previous project manager had sought quotations from four “pre-approved” building contractors. Those quotations had come in at between \$150,000 and \$200,000. Mr Vardanega told the Commission that Sydney Trains did not have the budget for costs in that range. In any event, he also believed that the quotations greatly exceeded what the works should cost. He therefore went to his supervisor and advised that he believed the work could be done a lot cheaper by “sort of subcontracting or getting smaller people to actually deliver the work”. He told his supervisor that, having just come off the Downer Glenbrook Station project, where a similar approach had been used to save money, he knew people that could undertake the work.

It seems that, in the context of that conversation, Mr Vardanega was informed of the possibility of a “sole-source procurement” whereby a contractor might be engaged directly, on the basis of a single quotation, where the value of the work was less than \$30,000.

Mr Vardanega told the Commission that his supervisor asked him to look into the matter further and come back with something, which Mr Vardanega understood to mean “go get some quotes”. Mr Vardanega said that the only Sydney Trains requirement of which he was made aware was that any contractor must have a building licence (albeit he did not consider that the straightforward nature of the proposed works required one).

## Mr Vardanega approaches Mr Gayed for a quotation

It is common ground that Mr Vardanega approached Mr Gayed to provide a quote for the Liverpool and Penrith station works package and, later, the Wollongong Station work. This was notwithstanding, as Mr Vardanega conceded, that, while he understood Mr Gayed had a building licence and an active building company, he had



no knowledge of the quality of Mr Gayed's building work, nor even as to the types of building work Mr Gayed had previously done.

Mr Vardanega agreed that he had essentially approached Mr Gayed to quote because he was a friend. He said that, although he had informed his Sydney Trains supervisor that he intended to approach Mr Gayed, and of the nature of their relationship, he did not direct his mind to whether he had any conflict of interest.

It appears that Mr Vardanega was unaware that Mr Gayed did not, in fact, hold a valid building licence, nor had any association with Mansion Building as at April 2019.

In his evidence, Mr Gayed conceded that he had no association with Mansion Building in 2019, nor did he have any contact with the new owner of the company. He said that he didn't inform Mr Vardanega of this and that the reason he used Mansion Building to quote for the Sydney Trains work was because it was already set up in the Sydney Trains procurement system as a result of it having previously (unsuccessfully) tendered for work on Sydney Trains projects. Mr Gayed agreed that he had discussed this with Mr Vardanega during a site visit prior to submitting the Mansion Building quotation.

### **Mansion Building submits quotes**

Mr Gayed, using Mansion Building, submitted a quote for the Penrith and Liverpool work. The quote was undated; however, forensic analysis indicates its date of creation as 8 April 2019. The quoted amount for the work was \$29,587.85 (excluding GST), being just short of the \$30,000 limit for sole-source procurement. It was common ground that Mr Vardanega had informed Mr Gayed of the \$30,000 limit.

Upon his receipt of the Mansion Building quote, Mr Vardanega completed a business justification and conflict of interest declaration form, as required by Sydney Trains for the purposes of approval of a non-standard procurement process. In addition to Mr Vardanega declaring on that form that he had no conflict of interest in recommending the Mansion Building quotation, he noted in support of the proposal that: "Mansion Building are being sole sources [sic] as the new Sydney Trains project manager [that is, Mr Vardanega] has previously used the contractor to deliver works on other projects within the rail corridor." The latter statement was, at best, misleading. At the public inquiry, Mr Vardanega conceded that he had never actually worked with Mr Gayed as a contractor (as opposed to him having been Mr Vardanega's supervisor at Downer), and that he had no familiarity with the quality of Mr Gayed's work as a contractor one way or the other.

Also in April 2019, Mr Vardanega became responsible for project managing works on behalf of Sydney Trains

at Wollongong Station. These works, also part of the security officer facilities program, were due to be completed within the same similarly tight timeframe as the Penrith and Liverpool station works; that is, by 30 June.

Mr Vardanega again approached Mr Gayed, on a sole-source procurement basis, to have Mansion Building provide a quote. Mr Vardanega said that, again, Mr Gayed was of the understanding that the quote should not exceed \$30,000.

Mr Gayed emailed a (purported) Mansion Building quote for the Wollongong works to Mr Vardanega on 15 May 2019. Again, the quote was undated and bore Mr Gayed's then-suspended building licence number. Despite the significantly different scope of works on the Wollongong project, the quote was for the same amount as that quoted for the Penrith and Liverpool work: \$29,587.85 (excluding GST).

On 17 May 2019, Mr Vardanega completed the requisite Sydney Trains business justification and conflict of interest declaration form in relation to the Wollongong Station work. On this occasion, the justification for the sole-source procurement was stated as: "Mansion Building are an approved supplier to Sydney Trains and are preferred in this instance due to the ability to deliver the works within a tight timeframe." Mr Vardanega declared no conflict of interest.

### **The Penrith, Liverpool and Wollongong station works**

Mansion Building was awarded the Penrith, Liverpool and Wollongong station works on Mr Vardanega's recommendation.

The actual work at Penrith and Liverpool stations was subcontracted by Mr Gayed to another company, Camlin Constructions Pty Ltd. Camlin Constructions was a building company owned by another (then) Downer employee, Ross Dean, with whom both Mr Gayed and Mr Vardanega had worked. Mr Dean was a site supervisor on the Glenbrook Station project, on which Mr Gayed (as Downer's project manager) and Mr Vardanega (as Downer's project engineer) had also worked. Mr Dean was not called to give evidence to the public inquiry and no allegations are made of any wrongdoing on his part.

Mr Vardanega gave evidence that he personally laboured on the Penrith and Liverpool station sites in order to assist Mr Dean (that is, Camlin Constructions) complete the projects on time. This, he said, was because Mr Gayed wasn't turning up onsite on some days on which Mr Dean required assistance, possibly because Mr Gayed was busy working on the Wollongong Station project.

Mr Gayed told the Commission that he did the work on Wollongong Station, with the assistance of local subcontractors. Although employed full-time by Downer at the time, he said that he completed the works after hours and on weekends over a few months. He said that no one at Downer (aside from Mr Dean) was aware of him carrying out works at any of the stations.

### **Mansion Building invoices Sydney Trains**

Following the completion of the works at Penrith and Liverpool and, subsequently, Wollongong stations, Mr Gayed forwarded invoices to Sydney Trains for payment. These purported to be from Mansion Building.

For Penrith and Liverpool there was an initial invoice dated 27 May 2019 for \$29,588 (excluding GST), being the originally quoted cost of the works, and a second invoice dated 19 June 2019 for an additional \$6,500 (excluding GST) being for “additional works as directed”. The evidence does not establish the nature of these “additional works”, but it appears that they likely related to the removal of old sheds.

In respect of the Wollongong Station works, the invoice, which was dated 21 June 2019, was for \$28,045 (excluding GST), that being the amount shown on the business justification form completed by Mr Vardanega, albeit not the amount shown on the Mansion Building quote for the work.

Significantly, all three Mansion Building invoices requested that the required payments be made to a bank account held not in the name of Mansion Building but in the name of another company, AVCO. AVCO is a company of which Mr Gayed’s father, Wafie Gayed, was, at the relevant time, the sole registered director and shareholder. The Commission is satisfied that Mr Gayed’s use of the AVCO email address and bank account was related to the fact that he no longer had any association with Mansion Building, nor, therefore, its bank account.

Mr Gayed’s use of AVCO is further discussed in the next chapter.

### **Did Mr Vardanega receive any benefits?**

Both Mr Gayed and Mr Vardanega gave evidence that, following the completion of the Sydney Trains works at Penrith and Liverpool Stations, Mr Gayed paid Mr Vardanega \$5,000 in cash.

According to Mr Gayed, the payment to Mr Vardanega was “like a gratuity for...getting the work”. Mr Gayed conceded that the \$5,000 payment was discussed with Mr Vardanega prior to the commencement of the Penrith and Liverpool works, but he could not recall whether he had offered the payment or Mr Vardanega had requested

it. It is not necessary for the Commission to come to a concluded view on whether the suggestion of payment came from Mr Vardanega or Mr Gayed.

Mr Vardanega admitted that he received \$5,000 in cash from Mr Gayed following the completion of the Penrith and Liverpool station works, sometime around August or September 2019. He claimed, however, that it was for the work he did assisting Mr Dean (Camlin Constructions) on the Penrith and Liverpool projects. This is at odds, however, with Mr Gayed’s evidence that he was unaware that Mr Vardanega had worked on the Penrith and Liverpool station projects.

Mr Vardanega disagreed with the proposition that the payment was effectively a “thank you” for having arranged for Mr Gayed to get the work. He agreed, however, that there could be a perception arising from the timing of the payment that it was a kickback for having given Mr Gayed the work.

On the evidence before it, the Commission is unable to reach a concluded view in respect of the money paid by Mr Gayed to Mr Vardanega following the Penrith and Liverpool projects. The Commission notes Mr Vardanega’s willingness to give evidence against his interests in respect of other matters examined in this investigation. Accordingly, the Commission accepts Mr Vardanega’s evidence that, while the payment might be perceived as being a “thank you” from Mr Gayed, it is possible it was, in fact, payment for work he undertook on the project himself.

As to the works at Wollongong Station, Mr Gayed said that, although his memory was “a little bit hazy” he thought he paid Mr Vardanega a further \$5,000. He said that he thought he gave the money to Mr Vardanega at the Wollongong site and that it was of the same nature as that which he had given Mr Vardanega in respect of the Penrith and Liverpool projects. He said the payment had not been discussed beforehand, but was based on an “understanding” at the time Mr Gayed submitted the quote for the Wollongong project that it “would be the same as Penrith and Liverpool”.

Mr Vardanega gave evidence, however, that he did not perform any work on the Wollongong project and that he did not receive any payment from Mr Gayed.

The Commission is not satisfied that Mr Vardanega did receive a further payment from Mr Gayed in respect of the Wollongong Station works. Notwithstanding it was against self-interest, Mr Gayed’s evidence on the issue was unacceptably vague and rose no higher than that he “thought” he did, while conceding that his memory of that payment was “a little bit hazy”. On the other hand, Mr Vardanega’s evidence on the matter was unequivocal, and not controverted by any other evidence

before the Commission. Accordingly, the Commission makes no finding in respect of a further payment of \$5,000 to Mr Vardanega in relation to the Wollongong Station works.

## Macdonaldtown Station works

Between June and December 2019, Mr Vardanega was concurrently employed by both Sydney Trains and ARCH Artifex. Both of these roles were by way of a contractual engagement with Mr Vardanega's company, ProjectHQ.

It was in Mr Vardanega's role contracting to ARCH Artifex that he first met Mr Cox. Mr Cox was also contracting to ARCH Artifex through his company Marble Arch, in addition to his work with Mr Nguyen's company, RJS Infrastructure, in which Mr Cox also became a 50 per cent shareholder in July 2019. Mr Vardanega and Mr Cox worked collaboratively on station upgrades and formed a friendship.

It was in Mr Vardanega's part-time role with Sydney Trains that he initially learnt of the proposed upgrade works to the Macdonaldtown Station stabling yards, which had been contracted to Brodyn Pty Ltd trading as TCQ. TCQ required subcontractors to undertake some of the work.

On 20 September 2019, Stewart Dunlop, the Sydney Trains project manager for the Macdonaldtown Station work, sent an email to Mr Vardanega. The email attached a methodology document for the Macdonaldtown Station work prepared by a TCQ subcontractor and which had been provided to Sydney Trains by TCQ.

Six days later, on 26 September 2019, Mr Vardanega sent the email and attached methodology document from his Sydney Trains email address to his personal Gmail address. A few minutes later he forwarded the email and attached methodology document to Mr Cox's RJS Infrastructure email address.

Mr Vardanega claimed he sent the methodology document to Mr Cox to get "a second opinion on it". There is no email response from Mr Cox indicating any second opinion. In any event, Mr Dunlop's 20 September 2019 email to Mr Vardanega expressly noted that he wanted to sit down with Mr Vardanega that afternoon to review the methodology. Clearly, sending the methodology document to Mr Cox some six days later would not have assisted in such a discussion. That Mr Vardanega did not use his Sydney Trains email address to send the methodology document directly to Mr Cox is also inconsistent with his claim that he was seeking assistance from Mr Cox for the purposes of Mr Vardanega's work at Sydney Trains. That he used his personal email address to send the methodology document

to Mr Cox is, however, consistent with him wanting to keep secret from Sydney Trains that he was sending it to Mr Cox. As discussed below, by 26 September 2019, it was clear to Mr Vardanega that Mr Cox, through RJS Infrastructure, was interested in submitting a quote to TCQ for work at Macdonaldtown Station. Mr Vardanega ultimately agreed that, in sending the methodology document to Mr Cox, he was effectively sharing a competitor's information with him, and that, in doing so, he intended to help Mr Cox get the work. He agreed that, in these circumstances, it was inappropriate for him to have sent the methodology document to Mr Cox.

Mr Cox agreed that he would expect a methodology document would be kept confidential from competitors. He also agreed that it had some potential value to him as he could have used it or parts of it to give him a potential advantage. He said, however, that the methodology set out in the document was "completely different" from the methodology proposed by RJS Infrastructure.

It is not clear from the evidence whether RJS Infrastructure gained any particular advantage from having access to the methodology document. It was sent to Mr Cox at 8:49 am on 26 September 2019, the day after Mr Cox sent the RJS Infrastructure quote to Mr Vardanega and about an hour after he had emailed the quote to TCQ. The RJS Infrastructure quote, however, did not include a methodology, so it does not appear that preparing the quote was dependent upon producing a methodology document at that time. Although Mr Cox conceded it had some potential value, there is no evidence that he relied on it to assist RJS Infrastructure either getting work from TCQ or in performing that work. Nevertheless, the Commission is satisfied that Mr Vardanega's purpose in sending the methodology document to Mr Cox was to assist him with respect to the Macdonaldtown Station work by sharing a competitor's information with him.

On 24 September 2019, two days before sending the methodology document to Mr Cox, Mr Vardanega used his personal Gmail address to send an email to Mr Cox's RJS Infrastructure email address attaching "approved for construction" ("AFC") drawings for Macdonaldtown Station. Although not explicitly stated in the email, it seems that its purpose was to seek a quotation from Mr Cox (on behalf of RJS Infrastructure) for the proposed electrical containment works at Macdonaldtown Station. That this was the case is supported by an email Mr Cox sent to Mr Vardanega later that day asking Mr Vardanega to confirm that was the only containment work he was asking RJS Infrastructure to price.

On 25 September 2019, Mr Cox sent an email to Mr Vardanega's Gmail address attaching an RJS Infrastructure quote of that date for electrical containment

work at Macdonaldtown Station. The quote was addressed to TCQ Construction and was for \$448,209.10 (excluding GST). Mr Cox told the Commission he could not recall why he sent the quote to Mr Vardanega. Although he speculated he may have done so because he did not have contact details for TCQ, he was able, on the following morning, to email the quote to TCQ.

On 10 October 2019, Mr Cox submitted a further quote to TCQ. This was for \$237,900 (excluding GST) and was in respect of an additional package of work on the Macdonaldtown Station containment work. In the email submitting the quote, Mr Cox wrote, “Hopefully this should give you the savings you need to meet Transports [sic] Budget constraints”.

Mr Vardanega denied providing Mr Cox with the “Transport Budget” but said he had provided him with TCQ’s budget for the work. He conceded he did so for the purpose of assisting Mr Cox to get the work. He sent the email using Wickr, which has an encrypted self-deleting application, because he knew it was not appropriate to send such information using his Sydney Trains email.

In his evidence to the Commission, Mr Cox agreed that Mr Vardanega provided him with confidential information relating to what amount he should quote.

Mr Nguyen told the Commission he was involved in putting together the RJS Infrastructure quote but could not recall if he saw any budget information. He understood, however, that Mr Cox had received budget information from Mr Vardanega and he relied on Mr Cox to tell him how much to quote.

On 25 October 2019, TCQ awarded RJS Infrastructure the subcontract to carry out the work for which the 25 September quote related. The value of that contract was \$499,630 including GST (\$454,209 excluding GST). RJS Infrastructure was unsuccessful, however, in respect of its 10 October 2019 quote.

Upon being awarded the contract by TCQ, RJS Infrastructure engaged BH Civil under a labour hire agreement whereby RJS Infrastructure managed the work and BH Civil supplied the plant and labour, for which it was paid \$217,545 (excluding GST) by RJS Infrastructure. After those costs, RJS Infrastructure’s total profit from the Macdonaldtown Station project was around \$192,363, which was shared equally between Mr Cox and Mr Nguyen.

### **Did Mr Vardanega receive a benefit?**

In his evidence at the public inquiry, Mr Vardanega told the Commission that he had received a “finder’s fee” of \$25,000 in cash in respect of assistance he gave

Mr Cox in RJS Infrastructure having been awarded the Macdonaldtown Station work by TCQ. He said the money was paid to him in two separate cash payments. The first, of \$15,000, occurred on 6 March 2020 at a rail industry golf day at Bankstown Golf Course that he and Mr Cox attended. He said that the second payment was made to him by Mr Cox in May 2020.

Mr Cox agreed that he paid money to Mr Vardanega in respect of RJS Infrastructure being awarded the contract by TCQ but was unsure of the amount because Mr Nguyen had given him the cash to pay to Mr Vardanega, and he had not counted it.

Mr Nguyen recalled discussing with Mr Cox that they would pay a finder’s fee to Mr Vardanega for the work RJS Infrastructure was ultimately awarded, and recalled discussing giving him cash to give to Mr Vardanega. He was unable to recall precisely how much they agreed should be paid, but said the figure of \$24,000 “came to mind”. He said the discussion with Mr Cox occurred “probably at the end, when we finished the job” rather than at the outset “because we didn’t know how much we were going to make”. Mr Cox’s evidence was similarly unclear on precisely when he first discussed the prospect of a finder’s fee with Mr Vardanega.

Mr Nguyen agreed, however, that he understood that Mr Cox and Mr Vardanega had discussed payment of a finder’s fee at some time prior to the completion of the works, and that Mr Cox had informed him (Mr Nguyen) that Mr Cox and Mr Vardanega had made “an agreement”.

Although Mr Cox and Mr Nguyen were unsure of the amount paid to Mr Vardanega, neither disputed his evidence that it was \$25,000. In their submissions of 24 July 2023, Counsel Assisting submitted the amount paid was \$25,000. That submission was not disputed by Mr Cox or Mr Nguyen. In these circumstances, the Commission accepts that Mr Vardanega received \$25,000 from Mr Cox, which Mr Cox had, in turn, received from Mr Nguyen.

Both Mr Vardanega and Mr Cox said the finder’s fee was for putting RJS Infrastructure in contact with TCQ.

Mr Cox stated that he did not consider the finder’s fee paid to Mr Vardanega as being a kickback, albeit he ultimately agreed that the payment amounted to a commission paid to Mr Vardanega for finding the work. In his earlier compulsory examination evidence, he told the Commission the agreement to pay Mr Vardanega was reached before the work was awarded to RJS Infrastructure. He said he told Mr Vardanega “...if we get the job and we make money, I’ll, I’ll give you your cut of the profits...”

The Commission rejects the evidence that the payment to Mr Vardanega was a finder's fee for him putting RJS Infrastructure in contact with TCQ. It is clear that Mr Vardanega's role went far beyond that. He provided a competitor's methodology document to Mr Cox to assist him and RJS Infrastructure to get work on the Macdonaldtown Station project. He also provided Mr Cox with confidential TCQ budget information for the same purpose. In each case, Mr Vardanega risked his position at Sydney Trains, should it become aware that he had assisted Mr Cox in those ways. It is reasonable to infer that some form of reward was contemplated in return for the improper assistance Mr Vardanega provided to Mr Cox and RJS Infrastructure. It may be that the precise amount of that reward was not settled on at the time he provided the assistance but was dependent upon RJS Infrastructure securing work on the project and the amount of its profit. However, the Commission is satisfied that it was agreed between Mr Cox and Mr Vardanega that Mr Vardanega would be paid for the improper assistance he provided, and that Mr Nguyen became aware of that agreement either around the time it was made or later, and facilitated its execution by providing the money to Mr Cox with which to pay Mr Vardanega.

In reaching this conclusion, the Commission also takes into account that Mr Vardanega and Mr Nguyen did not make submissions disputing the submission of Counsel Assisting in their submissions of 24 July 2023 that the \$25,000 Mr Vardanega received from Mr Cox was for the assistance Mr Vardanega gave Mr Cox by providing a potential subcontractor's methodology and confidential pricing information.

Submissions on behalf of Mr Cox queried whether Mr Vardanega was in a position to provide assistance to Mr Cox, which the Commission has identified above as the provision of confidential Sydney Trains information. Submissions on behalf of Mr Cox also submit that Mr Cox did not provide the benefit to Mr Vardanega with the intention to influence. However, as outlined above, the Commission finds that there was an agreement between Mr Cox and Mr Vardanega to pay Mr Vardanega a benefit if the work was awarded to RJS Infrastructure.

## Corrupt conduct

### Mr Vardanega

#### Penrith Station, Liverpool Station and Wollongong station projects

Counsel Assisting have submitted that the Commission would be satisfied that Mr Vardanega's conduct in relation to the Sydney Trains projects at Penrith, Liverpool and Wollongong stations constituted corrupt conduct for the

purposes of s 8 and s 9 of the ICAC Act. For the reasons noted in the body of this chapter, the Commission does not accept that submission.

The Commission is of the opinion that it is not open on the available evidence to make a corrupt conduct finding in respect of Mr Vardanega's conduct in relation to the Sydney Trains projects at Penrith, Liverpool and Wollongong stations.

#### Macdonaldtown Station project

In 2019, Mr Vardanega misused his position at Sydney Trains to improperly assist RJS Infrastructure to obtain work at Macdonaldtown Station by providing a competitor's methodology document and confidential pricing information to Mr Cox of RJS Infrastructure, for which he received \$25,000 from Mr Cox in 2020.

This conduct on the part of Mr Vardanega is conduct of a public official that constitutes or involves the dishonest and partial exercise of his official functions and, therefore, comes within s 8(1)(b) of the ICAC Act.

Mr Vardanega's conduct also involved the misuse of information that he acquired in the course of his official functions for the benefit of Mr Cox and RJS Infrastructure and, therefore, comes within s 8(1)(d) of the ICAC Act.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts as found were to be proven on admissible evidence to the criminal standard of proof beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Vardanega had committed an offence under s 249B(1) of the Crimes Act of corruptly soliciting or receiving a benefit as a reward for improperly providing confidential information obtained by virtue of his position with Sydney Trains to Mr Cox of RJS Infrastructure. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Vardanega had committed a criminal offence under s 249B(1) of the Crimes Act of corruptly soliciting or receiving a benefit as a reward for improperly providing confidential information obtained by virtue of his position with Sydney Trains to Mr Cox of RJS Infrastructure. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct because

it involved a serious criminal offence and the receipt by Mr Vardanega of a substantial improper payment.

### Mr Gayed

The Commission is of the same opinion as for Mr Vardanega in respect of Mr Gayed's conduct in relation to the Sydney Trains projects at Penrith, Liverpool and Wollongong stations; namely, that it is not open on the available evidence to make a corrupt conduct finding in respect of Mr Gayed's conduct.

Mr Gayed was not involved in the Macdonaldtown Station project.

### Mr Cox

Submissions received on behalf of Mr Cox contend that Mr Cox was acting at the direction of Mr Nguyen in respect of his interactions with Mr Vardanega on the Macdonaldtown Station project. The Commission rejects this submission noting that the evidence outlined above demonstrates that it was Mr Cox who formed a friendship with Mr Vardanega when they were both working collaboratively as contractors for ARCH Artifex, which led to RJS Infrastructure's involvement on the Macdonaldtown Station project. Additionally, documents obtained by the Commission show that Mr Vardanega and Mr Cox directly emailed each other in relation to the Macdonaldtown Station project, without any inclusion of Mr Nguyen in those communications.

Submissions received on behalf of Mr Cox also contend that Mr Vardanega was not in a position to provide assistance to Mr Cox and therefore Mr Cox's actions did not adversely affect the honest and impartial exercise of Mr Vardanega's official functions as a public official. As outlined above, Mr Vardanega engaged in dishonest and partial conduct when he sent Mr Cox confidential Sydney Trains documents and, as conceded by Mr Cox, provided him with confidential pricing information. This resulted in RJS Infrastructure securing the Macdonaldtown Station subcontract, for which Mr Cox and Mr Nguyen paid Mr Vardanega a benefit of \$25,000. The Commission rejects this submission.

In 2020, Mr Cox, in concert with Mr Nguyen, paid \$25,000 to Mr Vardanega as a reward for Mr Vardanega misusing his position at Sydney Trains to improperly assist RJS Infrastructure to obtain work at Macdonaldtown Station, which assistance involved Mr Vardanega providing a competitor's methodology document and confidential pricing information to Mr Cox and RJS Infrastructure.

This conduct on the part of Mr Cox is conduct that adversely affected the honest and impartial exercise of

official functions by Mr Vardanega and, therefore, comes within s 8(1)(a) of the ICAC Act.

For the purpose of s 9(1)(a) of the ICAC Act, the Commission is of the opinion that, if the facts as found were to be proven on admissible evidence to the criminal standard of proof beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Cox had committed an offence under s 249B(2) of the Crimes Act of corruptly giving a benefit to Mr Vardanega as a reward for improperly providing confidential information obtained by virtue of his position with Sydney Trains to Mr Cox and RJS Infrastructure. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

Submissions on behalf of Mr Cox contend that Mr Cox was a "one time delivery man" and that his role was limited and isolated in nature so as not to warrant a finding that it was "serious corrupt conduct". The Commission rejects this submission, as it significantly understates the evidence as to Mr Cox's conduct in his interactions with Mr Vardanega, in which he obtained confidential information from Mr Vardanega to benefit RJS Infrastructure and which resulted in the awarding of the Macdonaldtown Station subcontract to RJS Infrastructure.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proven on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Cox had committed a criminal offence under s 249B(2) of the Crimes Act of corruptly giving a benefit to Mr Vardanega as a reward for improperly providing confidential information obtained by virtue of his position with Sydney Trains to Mr Cox and RJS Infrastructure. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct because it involved a serious criminal offence and the making of a substantial improper payment.

### Mr Nguyen

In 2020, Mr Nguyen, in concert with Mr Cox, arranged for \$25,000 to be paid to Mr Vardanega as a reward for Mr Vardanega misusing his position at Sydney Trains to improperly assist RJS Infrastructure to obtain work at Macdonaldtown Station, which assistance involved Mr Vardanega providing a competitor's methodology document and confidential pricing information to Mr Cox and RJS Infrastructure.

This conduct on the part of Mr Nguyen is conduct that adversely affected the honest and impartial exercise of

official functions by Mr Vardanega and, therefore, comes within s 8(1)(a) of the ICAC Act.

For the purpose of s 9(1)(a) of the ICAC Act, the Commission is of the opinion that, if the facts as found were to be proven on admissible evidence to the criminal standard of proof beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that Mr Nguyen had committed an offence under s 249B(2) of the Crimes Act of corruptly giving a benefit to Mr Vardanega as a reward for improperly providing confidential information obtained by virtue of his position with Sydney Trains to Mr Cox and RJS Infrastructure. His conduct, therefore, comes within s 9(1)(a) of the ICAC Act.

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of proof of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Nguyen had committed a criminal offence under s 249B(2) of the Crimes Act of corruptly giving a benefit to Mr Vardanega as a reward for improperly providing confidential information obtained by virtue of his position with Sydney Trains to Mr Cox and RJS Infrastructure. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

The Commission is satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct because it involved a serious criminal offence and the making of a substantial improper payment.

## Section 74A(2) statements

In relation to the conduct dealt with in this chapter, the Commission considers that Mr Vardanega, Mr Gayed, Mr Cox and Mr Nguyen are affected persons.

### Benjamin Vardanega

Mr Vardanega's evidence was the subject of a declaration under s 38 of the ICAC Act and cannot, therefore, be used against him in criminal proceedings, except in relation to the prosecution of an offence under the ICAC Act. The Commission accepts the submission of Counsel Assisting that there is insufficient admissible and available evidence to prosecute Mr Vardanega for any offence.

### Andrew Gayed

Mr Gayed's evidence was the subject of a declaration under s 38 of the ICAC Act and cannot, therefore, be used against him in criminal proceedings, except in relation

to the prosecution of an offence under the ICAC Act. The Commission accepts the submission of Counsel Assisting that there is insufficient admissible and available evidence to prosecute Mr Gayed for any offence.

### Aidan Cox

Mr Cox's evidence was the subject of a declaration under s 38 of the ICAC Act and cannot, therefore, be used against him in criminal proceedings, except in relation to the prosecution of an offence under the ICAC Act. The Commission accepts the submission of Counsel Assisting that there is insufficient admissible and available evidence to prosecute Mr Cox for any offence.

### Tony Nguyen

Mr Nguyen's evidence was the subject of a declaration under s 38 of the ICAC Act and cannot, therefore, be used against him in criminal proceedings, except in relation to the prosecution of an offence under the ICAC Act. The Commission accepts the submission of Counsel Assisting that there is insufficient admissible and available evidence to prosecute Mr Nguyen for any offence.

# Chapter 11: TAP Tranche 3 projects – Wollstonecraft, Banksia and Birrong stations

This chapter examines the circumstances in which RJS Infrastructure was awarded by Downer the contracts for three packages of works on the Wollstonecraft Station project. The total value of those contracts was in excess of \$4.6 million.

It also examines the circumstances in which Maize Group Pty Ltd (“Maize”), a company with which Downer project manager Mr Gayed had an association, was awarded the contract for the fourth package of works on the Wollstonecraft Station project, as well as those in which another company associated with Mr Gayed, AVCO, was engaged to provide services at a highly inflated cost.

This chapter also examines the circumstances in which contracts for works on the Banksia and Birrong station projects were awarded to Dalski, a company with which Downer project manager Mr Stanculescu had an association.

## Background

In mid-2020, preparations were underway for the commencement of a third tranche of the TAP projects (“TAP 3”) in respect of which Downer had been awarded managing contractor contracts by TfNSW. This third tranche of projects consisted of upgrade works at Wollstonecraft, Banksia, Birrong and Roseville stations.

The upgrade works at Wollstonecraft Station were the final project awarded by Downer to RJS Infrastructure. The works commenced in mid-October 2020 and involved the installation of two elevators and two bridges; raising and strengthening of the station platforms; and drainage and conduit installation works in and around the station.

The project manager assigned by Downer to the Wollstonecraft Station project was Mr Gayed.

The corresponding project manager for TfNSW was Mr Panagakis. Downer’s construction manager for the TAP 3 projects was Mr Watters.

## The Wollstonecraft Station TAP project

### Mr Gayed seeks Mr Vardanega’s “planning assistance”

As a result of his role with TfNSW, Mr Vardanega became aware of the upcoming TAP 3 projects. Mr Vardanega had, by early-2020, been engaged as a contractor by TfNSW (through his company, ProjectHQ) to work on TfNSW’s NIF program. While the TAP projects were not a part of that program, Mr Vardanega said that it was via conversations with TfNSW colleagues assigned to the TAP that he first learnt of the next tranche of the TAP works.

It is common ground that Mr Vardanega and Mr Gayed, had, by that time, become friends. That friendship initially commenced when both worked at Downer, and was the basis upon which Mr Vardanega had, in his subsequent role, awarded Sydney Trains work to Mr Gayed’s (then) company, Mansion Building, in return for which Mr Gayed subsequently engaged Mr Vardanega to work for Downer on the Glenbrook Station works.

On 15 May 2020, using his personal Gmail address, Mr Gayed sent Mr Vardanega an email that attached architectural drawings for the proposed Wollstonecraft Station works. Mr Gayed told the Commission that he only vaguely recalled sending those documents to Mr Vardanega, but couldn’t recall why he did so, or why he sent them from his personal email address. He said that he did not believe the architectural drawings to be confidential information.



Mr Gayed did, however, recall that, at the time he commenced on the Wollstonecraft Station project, he had some discussions with Mr Vardanega “about using ProjectHQ” on the project “in one capacity or another”. He was unable to recall the exact conversation but told the Commission that he thought ProjectHQ may have been suitable to tender for one of the packages on the Wollstonecraft Station project.

Mr Vardanega told the Commission that the purpose of receiving the architectural drawings from Mr Gayed was to enable him to assist Mr Gayed in the planning of the Wollstonecraft Station works. He said he was “looking through what the station upgrade looked like to try and help out in terms of planning the project”, which he said he had done for the Glenbrook Station project when he worked at Downer. He said that he thought the documents Mr Gayed had sent him were not confidential, albeit he agreed that they would not have been publicly available.

On 18 May 2020, Mr Vardanega responded to Mr Gayed’s email with various recommendations for Mr Gayed to consider in planning for the Wollstonecraft Station project. Mr Vardanega’s response also attached a number of rail-related documents including various diagrams.

As to the documents he sent Mr Gayed in response, Mr Vardanega said some were publicly available and the rest he sourced through Sydney Trains (as noted elsewhere in this report, Mr Vardanega was, at this time, still also working for Sydney Trains on a part-time basis).

Mr Vardanega told the Commission that, at that stage, his interest in coming on board for the Wollstonecraft Station project was in some sort of planning resource capacity, rather than with the intention of ProjectHQ tendering for one of the packages of works. It appears, however, that Mr Vardanega’s initial intention was short-lived.

On 27 May 2020, Mr Gayed sent, again via his personal Gmail address, an email to Mr Vardanega with the subject line “TAP EASU Wollstonecraft BOQ Breakdown”. Attached to that email was a document entitled “BOQ Continuous Listing Wollstonecraft – Initial issue–RC 27.5.20 Spilt Packages.xls”, being the bill-of-quantities document (“BOQ”) for the Wollstonecraft Station project.

Mr Gayed told the Commission that his reason for sending that document to Mr Vardanega was to give him “an appreciation of the breadth of work involved... So that he could get his head around it and determine whether or not he wanted to tender.” As such, Mr Gayed conceded that he forwarded Mr Vardanega the BOQ for the purpose of assisting Mr Vardanega to tender for works on the Wollstonecraft Station project.

Mr Gayed admitted that he also sent a copy of the BOQ to another contractor with whom he had a prior association, also for the purpose of assisting in the preparation of a tender. That contractor was Maize. Mr Gayed’s association with Maize is discussed later in this chapter.

Mr Gayed said that he did not consider the BOQ to be confidential information but agreed that the only other way Mr Vardanega (and, presumably, Maize) could have obtained the BOQ was through the formal tender channels, which had not yet been opened.

He denied, however, that in sending the documents to Mr Vardanega and to Maize he was favouring them over other potential tenderers. This is notwithstanding that he agreed that providing the documents as and when he did was not something he afforded to anybody other than Mr Vardanega and Maize. He ultimately agreed that, in providing the BOQ to Mr Vardanega and Maize, he was providing them with an advantage that other potential tenderers did not have.

Mr Gayed said that he could not recall why he used his personal Gmail address to send the document to Mr Vardanega. He agreed, however, that it could be perceived as being intended to conceal from Downer that he had sent the documents to Mr Vardanega. Mr Gayed denied that was his intention and maintained, essentially, that he was merely seeking to obtain the best price for the works.

### Mr Vardanega considers tendering for Wollstonecraft Station works

On 3 July 2020, a week after he had sent the BOQ, Mr Gayed sent Mr Vardanega a further email from his Gmail address, which attached the procurement register for the Wollstonecraft Station project. That document provided detailed budget information for the various packages of works on the Wollstonecraft Station project and included TfNSW's TBE and Downer's corresponding project manager budget, which Mr Gayed explained was the budget he was obliged to "stick to as a project manager".

It appears that, in the intervening week, Mr Vardanega had formed the intention to tender, via his company, ProjectHQ, for works on the Wollstonecraft Station project, rather than merely assisting Mr Gayed in a planning resource capacity.

Mr Vardanega told the Commission that the procurement register that Mr Gayed had sent him went "hand in hand" with the BOQ he had received the week prior, and contained information as to how the various packages of works on the project were to be divided up, and the budgets for those packages. The Wollstonecraft Station project had, by this time, been split into four packages of works; namely, piling, platform, civil and building. Mr Vardanega conceded that the procurement register could be, and ultimately was, of use to anybody seeking to tender for the Wollstonecraft Station project.

Mr Vardanega said that, following his receipt of the documents from Mr Gayed, he came to the conclusion that he would be unable to deliver a package of works because he lacked the necessary experience and resources.

### Mr Gayed's compulsory examination evidence

Prior to the public inquiry, Mr Gayed had given evidence in a compulsory examination on 22 August 2022, in which he denied sending the BOQ for the Wollstonecraft Station project to Mr Vardanega. When, during his compulsory examination, he was shown the email of 27 May 2020 he gave the following evidence:

*[Counsel Assisting]:* What does that email relate to, Mr Gayed?

*[Mr Gayed]:* So it relates to the bill of quantities for Wollstonecraft. I remember him asking me if I can send it, but I, I absolutely did not send it, but it seems like in this email it looks like I did send it.

*[Q]:* What's your explanation as for an email, leaving your email address and being received in Mr Vardanega's that has this attachment?

*[A]:* I can only speculate that someone jumped onto my laptop and sent it off my personal email, which was rarely locked, foolishly, and had, had this sort of information on my desktop quite regularly.

*[Q]:* I see. And where would they have accessed your laptop from?

*[A]:* The Wollstonecraft office. There was a site shed. I had a, a room and a desk that was never locked.

In the public inquiry, Mr Gayed conceded that his compulsory examination evidence in relation to having forwarded the BOQ to Mr Vardanega was contrary to his public inquiry evidence. He said, however, that his compulsory examination evidence was not knowingly false, but that he had since had more time to think about what had occurred than he had prior to his compulsory examination, and since realised that his compulsory examination evidence was wrong. He said that his "speculation" in the compulsory examination that someone else must have sent the email and attachment to Mr Vardanega without his knowledge was, at the time, a correct answer. He denied having knowingly given false evidence in his compulsory examination.

### Mr Vardanega forwards documents to Mr Cox

On 8 July 2020, Mr Vardanega sent an email to Mr Cox with the subject heading "Wolly". That email attached the procurement register and a Dropbox link to the other documents Mr Vardanega had received from Mr Gayed. Mr Vardanega's email proposed that he and Mr Cox meet two days later. Mr Cox on-forwarded that email and attachments to his RJS Infrastructure partner, Mr Nguyen, the same afternoon.

Mr Vardanega told the Commission that, having realised that he would not be able to deliver any of the packages himself (that is, through ProjectHQ), he “was meeting up with Aidan to see if RJS Infrastructure could deliver a package of works” with a view to preparing a quote. He conceded that the documents he provided to Mr Cox contained confidential Downer information that he should not have had in his possession.

As to whether he had spoken to Mr Gayed about passing on the documents to anyone else, Mr Vardanega said merely that he told Mr Gayed that he had been looking to team up with RJS Infrastructure to deliver.

Mr Gayed was unable to recall precisely when he became aware that Mr Vardanega had abandoned the idea of tendering for work on the Wollstonecraft Station project himself (that is, via ProjectHQ) and instead proposed to team up with another contractor. He said that he vaguely recalled Mr Vardanega telling him of his decision not to tender for the project, and instead to come on board with RJS Infrastructure. He thought that occurred sometime after he had sent the procurement register to Mr Vardanega in early July, and believed it was around the time that he was making the tender recommendations for approval by TfNSW in early September.

In any event, the Wollstonecraft Station project had already come to the attention of Mr Cox independently of Mr Vardanega. Mr Cox told the Commission that he first learnt of the TAP 3 projects in early-2020 through his consultancy work for an engineering design firm that had been engaged to undertake site investigation works on the then-upcoming TAP 3 projects. Mr Cox was involved in those works at several of the proposed TAP 3 stations, albeit Wollstonecraft Station was not among them.

Mr Cox said that Mr Vardanega had initially contacted him for assistance with a possible tender by ProjectHQ for the Wollstonecraft Station works. According to Mr Cox, Mr Vardanega had initially proposed that he (Mr Cox) join ProjectHQ to work on the project.

It is common ground that Mr Cox and Mr Vardanega did meet at Club Burwood on 10 July 2020. According to Mr Vardanega, the pair discussed the information sourced from Mr Gayed that Mr Vardanega had sent to Mr Cox, and were “just working out which packages to have a ... go at.”

It appears, however, that the discussion covered somewhat more ground than Mr Vardanega suggested. In the course of Mr Cox’s evidence, a lawfully intercepted telephone call between himself and Mr Nguyen the following day, 11 July 2022, was played, in which the pair discussed at length the previous day’s conversation between Mr Cox and Mr Vardanega. In essence, Mr Cox described to Mr Nguyen how he had dissuaded Mr Vardanega from tendering for a package himself

(that is, via ProjectHQ) and instead enlisted his help as a conduit to Mr Gayed for the purposes of ensuring that RJS Infrastructure would be awarded the works. The following extract from that call is illustrative:

COX: ... So I said this is – I said ‘I tell you this is what we want. We want you to get Andrew Gayed on board’. He said ‘he’s on board’. I said ‘well he’s not really’. He’s on board when the four of us – the four of us are sitting on a table talking about how we can maximise profit on – on this station and – and he’s on board when we’re using him to fuckin’ manipulate the tenderer. To put things in the scope and scare everybody off and then take them out but, um, that’ll be doing, taking the budget out or something. You know he needs to be doing that sort of thing, um, to – to make it worth everybody’s while otherwise I just price this job myself and not worry about (UNDECIPHERABLE).

NGUYEN: And what did he say (LAUGHS)?

COX: He’s like, he agreed to it. He said he was going to get it happen – he was going to make it happen. So – but that’s the good thing. If he does great and if he doesn’t, great.

NGUYEN: Yeah, yeah, if he does then yeah – either way we’ll make money like –

COX: Yeah well if it’s just me and you we’ll make money and if he can’t – if he can’t do what he’s saying he’s going to do...

### Mr Vardanega sends further information sourced from Mr Gayed to Mr Cox

On 20 August 2020, Mr Vardanega sent a further email to Mr Cox that attached a spreadsheet containing confidential information in relation to pricing and budgets for the Wollstonecraft Station project. Mr Vardanega agreed that he had prepared the document using the Downer information that Mr Gayed had previously sent him on 27 May, and that it was for the purpose of assisting RJS Infrastructure to tender for the Wollstonecraft Station project.

As proposed by Mr Vardanega in that email, he and Mr Cox had a telephone conversation later that day

in which the two discussed the information that Mr Vardanega had sent to Mr Cox. Mr Vardanega told the Commission that the purpose of that discussion was no longer merely to assist Mr Gayed with the planning of the project, but that the context had “definitely moved on to me being as a tenderer, yes”.

Mr Vardanega said that he did not know what Mr Gayed’s reason was for assisting with his proposed tender, but resisted the suggestion that it was as a favour to him. He said that he did not believe Mr Gayed stood to gain anything from his assistance beyond ensuring that the project would be delivered by competent people within the allocated budget. Mr Gayed had not previously worked with RJS Infrastructure and was, therefore, as Mr Vardanega seemed to suggest, relying on Mr Vardanega’s advocacy on RJS Infrastructure’s behalf as to its suitability for the project. This was notwithstanding that Mr Vardanega himself knew little about RJS Infrastructure other than being aware that it had worked on a project in the Blue Mountains and “some works on the NIF projects before my time”. He was unaware as to how RJS Infrastructure was awarded those projects or how they were delivered; he knew only that “they worked on them and delivered them”.

Mr Vardanega and Mr Cox had a subsequent conversation later in the evening of 20 August 2020 in which they discussed Mr Cox’s observation that the proposed budget for the Wollstonecraft Station works appeared skewed toward the building package which, it appears, the two were at that time already aware was going to be awarded to another tenderer with whom Mr Gayed had a prior association. The awarding of the contract for the building package is detailed later in this chapter.

On 2 September 2020, Mr Vardanega sent to Mr Cox further confidential Downer information that he had received from Mr Gayed. This was a copy of the entire tender submission and pricing schedules of Brefni Pty Ltd, a competing tenderer for the Wollstonecraft Station project.

Commission investigators located in the email account of Mr Nguyen a copy of the Brefni submission, and details of the relevant email chain that show that, upon Mr Gayed legitimately receiving a copy of the submission on 2 September, he promptly sent a copy from his Downer email address to his personal Gmail address. He then forwarded a copy to Mr Vardanega’s ProjectHQ address one minute later. Mr Vardanega forwarded the documents to Mr Cox later that evening, a copy that Mr Cox then forwarded Mr Nguyen.

In his evidence to the Commission, Mr Gayed admitted that he had sent the Brefni tender document to Mr Vardanega. He said that he had done so because Mr Vardanega had asked him for “the price” in order to

“see where he was sitting in terms of the competitor”. Mr Gayed said that he “didn’t object” to Mr Vardanega’s request, and agreed that he had sent more than merely the price; he had sent the entire tender submission. Mr Gayed further agreed that he had not sent any other tenderer’s document to a competitor, but disagreed that his intent was to give Mr Vardanega, and, through him, RJS Infrastructure, an advantage. The Commission rejects that evidence and is satisfied that Mr Gayed provided the Brefni tender document to Mr Vardanega in order to advantage Mr Vardanega.

Mr Nguyen told the Commission that, although the Brefni tender documents did not greatly assist RJS Infrastructure’s tender because it was already over budget, the budget information provided by Mr Vardanega assisted him and Mr Cox in preparing quotes for the four packages at Wollstonecraft Station.

## Mr Nguyen receives confidential information from Mr Abdi, sourced from Mr Panagakis

Around the same time that Mr Cox was liaising with Mr Vardanega in relation to the Wollstonecraft Station tender, Mr Nguyen was similarly liaising with Mr Abdi. Evidence before the public inquiry established that Mr Abdi obtained confidential budget information for the Wollstonecraft Station project from his TfNSW colleague (and the TfNSW project manager assigned to Wollstonecraft Station), Mr Panagakis, and passed that information on to Mr Nguyen for the purpose of assisting RJS Infrastructure to tender for works on that project.

On 6 August 2020, Mr Abdi sent to Mr Nguyen, via the WhatsApp messaging platform, “TBE as BOQ” documents for the TAP 3 projects at Wollstonecraft and Banksia stations. The following day, he sent Mr Nguyen a BOQ for the project at Roseville Station. These were further to Mr Abdi having already sent Mr Nguyen the BOQ for the Birrong Station project on 25 June 2020.

Mr Nguyen agreed in evidence that Mr Abdi had sent him the Downer budget documents for the purpose of assisting RJS Infrastructure to win the projects. He said that, although RJS Infrastructure ultimately focused on the Wollstonecraft Station project, the initial interest had been in the Banksia Station project.

Having shifted focus to the Wollstonecraft Station project, Mr Nguyen agreed that the Downer budget information he received from Mr Abdi related to each of the individual packages for Wollstonecraft Station, and assisted him in the preparation of RJS Infrastructure’s pricing for the Wollstonecraft Station packages. RJS Infrastructure tendered for the packages and was

ultimately awarded three of the four packages of works.

Mr Nguyen said that the budget information he received from Mr Abdi was the same information that Mr Cox had received from Mr Vardanega. He said he had assumed Mr Abdi had sourced the budget information for the Wollstonecraft Station project from Mr Pilli, but understood from Mr Abdi that Mr Panagakis, who had been appointed as the TfNSW project manager for Wollstonecraft Station, would be assisting RJS Infrastructure's tender by way of influencing the tenderer selection process. Mr Nguyen recalled Mr Abdi saying to him words to the effect of "Don't worry, George has got you covered". Mr Nguyen took this to mean that Mr Panagakis would speak in favour of RJS Infrastructure being awarded the tender.

Mr Abdi confirmed to the Commission that it was, in fact, Mr Panagakis from whom he had obtained the confidential budget information for the Wollstonecraft Station project (and the other TAP 3 projects) in order to pass that information on to Mr Nguyen.

Mr Panagakis agreed that he had obtained the information at Mr Abdi's request and passed it on to him. He was rather more vague, however, as to whether he was aware of Mr Abdi's intention to pass that information on to Mr Nguyen for the purpose of assisting RJS Infrastructure's tender. Mr Panagakis said that Mr Abdi eventually told him of his involvement in RJS Infrastructure, but couldn't recall when, beyond saying that it "was somewhere in mid-2020". He said that it "remained a mystery" to him as to how RJS Infrastructure was able to get work with Downer on TfNSW projects or "how they got embedded in there" and that Mr Abdi never disclosed to him how he was actually making money as a silent partner in RJS Infrastructure.

Mr Panagakis told the Commission that Mr Abdi never offered him money for doing things for Mr Abdi or RJS Infrastructure, nor did he ever ask for any. Mr Panagakis did, however, give evidence that "at times" he would "jovially" say to Mr Abdi, "what's in it for me?" but would then qualify it and say, "Look, Nima, I don't want anything. All I want is just to be, have a PM job and, and be responsible for it."

It was submitted on behalf of Mr Panagakis that the Commission would find that he did not seriously ask for a fee in return for his assistance to Mr Abdi or RJS Infrastructure, nor received any such payment. That submission was in response to a submission by Counsel Assisting to the contrary, drawing on evidence given by Mr Nguyen that Mr Abdi had told Mr Nguyen that Mr Panagakis had asked for a fee in return for his assistance.

Mr Abdi, however, later gave evidence that Mr Panagakis did not, in fact, ask him for a fee in return for his assistance, nor did Mr Panagakis ever tell him that he wanted or needed money. Mr Abdi conceded that he had merely "made it up" when he told Mr Nguyen that Mr Panagakis had requested a fee and was "desperate for paper [that is, money]". Mr Abdi said that the deception was an effort on his part to persuade Mr Nguyen that he (Mr Abdi) "was still on board" with RJS Infrastructure.

The Commission accepts that Mr Panagakis and Mr Abdi's evidence on this issue is likely to be truthful, and, accordingly, in the absence of any other evidence to the contrary, accepts Mr Panagakis' submission that he did not seriously request a fee from Mr Abdi (or RJS Infrastructure) in return for his assistance. The Commission notes, incidentally, however, that Mr Panagakis' own evidence that he "at times" "jovially" asked Mr Abdi "what's in it for me?" at least tends to suggest that he must have been aware of the possibility that Mr Abdi was willing to engage in improper conduct.

Mr Panagakis said that Mr Abdi never asked him to assist RJS Infrastructure specifically in relation to TfNSW projects, albeit he conceded that Mr Abdi had asked him to find out the preferred contractor for the Wollstonecraft Station project. Mr Panagakis agreed that he did have "a few conversations with Andrew Gayed" and subsequently passed the information he had obtained from Mr Gayed back to Mr Abdi "maybe late-2020".

On 25 June 2020, Mr Panagakis sent from his TfNSW email address to his personal Hotmail email address an email that attached TfNSW BOQ documents for the TAP 3 works on Wollstonecraft, Banksia, Birrong and Roseville stations. Mr Panagakis agreed in evidence that, while he probably had an interest in the Wollstonecraft Station BOQ, he had no real interest in the other three, and hence no reason to send them to himself. He could not recall whether he had done so and then sent them on to Mr Abdi at Mr Abdi's request, but ultimately agreed that must have been the case. This concession was largely on the basis of evidence put to him that showed that Mr Abdi had sent Mr Nguyen a copy of the budget document for the Birrong Station project nine minutes after Mr Panagakis had sent it to himself, along with a lawfully intercepted telephone conversation between Mr Nguyen and Mr Cox later on the same date (25 June) in which they discussed the document received from Mr Abdi:

COX: *Who gave you this?*

NGUYEN: *It was Nima.*

COX: *And did he just give you this one or did he give you all five?*

- NGUYEN: *He, no, no, he gave me this one for now. He said yeah. This one came from George.*
- COX: *George.*
- NGUYEN: *George – George, eh, the bimbo that you dealt with at Canley.*
- COX: *Oh yeah.*
- NGUYEN: *From Transport, yeah.*
- COX: *How did he get it off him?*
- NGUYEN: *I don't know. He made him download it, that guy, he got them so if anything does come back, it goes back to George.*

The Commission is satisfied that Mr Panagakis sent the TfNSW BOQ documents to Mr Abdi.

On 3 August 2020, Mr Panagakis forwarded from his TfNSW email address to his Hotmail email address an apparently updated copy of the TfNSW BOQ for Wollstonecraft Station. As noted above, three days later, on 6 August 2020, Mr Abdi sent to Mr Nguyen a copy of that document, along with the other documents he had obtained from Mr Panagakis on 25 June.

Mr Abdi admitted that he had asked Mr Panagakis to obtain these documents for him, and that his purpose for doing so was to benefit RJS Infrastructure. He told the Commission that he did not tell Mr Panagakis that he could expect to be paid for assisting RJS Infrastructure in this way, nor did Mr Panagakis ask for any money from Mr Abdi.

Mr Panagakis agreed that Mr Abdi had asked him to obtain the BOQ documents and send them to Mr Abdi. He conceded that he was aware at the time that it was improper of him to have done so.

The Commission is satisfied that Mr Panagakis was, by August 2020, aware of Mr Abdi's interest in RJS Infrastructure, and that RJS Infrastructure intended to tender for the Wollstonecraft Station works in respect of which the documents and information he provided to Mr Abdi would be of benefit.

The Commission is additionally satisfied that the nature of the relationship between Mr Panagakis and Mr Abdi was one in which Mr Panagakis' personal circumstances had led to an "unhealthy" (as Mr Panagakis described it) attachment to Mr Abdi that Mr Abdi exploited to his own benefit. This is notwithstanding Mr Abdi's denial that he saw Mr Panagakis as someone vulnerable who he could exploit.

It was submitted on behalf of Mr Panagakis that, at the time he forwarded the documents (relating to

Wollstonecraft Station and other TAP 3 projects) to Mr Abdi, he had no knowledge of the purposes for which Mr Abdi had requested them. The Commission agrees with that submission to the extent that it appears likely that Mr Abdi did not tell Mr Panagakis of his intended purpose for the BOQ documents. Nonetheless, the Commission notes Mr Panagakis' own concession as to the impropriety of him having provided them. The Commission is satisfied that, at the very least, Mr Panagakis would have been sufficiently aware that Mr Abdi was, in Mr Panagakis' words "up to something" that involved RJS Infrastructure.

It was further submitted that, if the Commission finds that Mr Panagakis provided Mr Abdi the documents for the purpose of assisting him and RJS Infrastructure, then the Commission would also find that Mr Abdi, as an employee of TfNSW, would have had access to those same documents independently of Mr Panagakis, and was thus able to have obtained them himself, and that Mr Panagakis had in fact advised him of that.

The Commission acknowledges the likely correctness of that submission but notes that it only appears to support an observation that it was unnecessary for Mr Panagakis to have obtained and provided the documents to Mr Abdi, given that Mr Abdi could have obtained them himself. The Commission is of the view that the fact that Mr Panagakis ultimately did so in those circumstances weighs against Mr Panagakis, rather than in his favour.

A related submission on behalf of Mr Panagakis was that the Commission would find in any event that the BOQ documents that Mr Panagakis obtained and provided to Mr Abdi would not have assisted Mr Abdi or RJS Infrastructure in any meaningful way. As noted above, the Commission is satisfied Mr Panagakis understood the documents and information he provided to Mr Abdi would be of benefit.

The Commission acknowledges Mr Panagakis' further submission that he was vulnerable and used by Mr Abdi in obtaining the documents so that no link could be traced back to Mr Abdi. As noted above, however, the Commission is satisfied that Mr Panagakis was not so influenced by Mr Abdi as to fail to appreciate the impropriety of his conduct.

## Mr Gayed and the awarding of the building package to Maize

As noted earlier in this chapter, Mr Gayed gave evidence that, in addition to providing a copy of the Wollstonecraft Station project budget documents to Mr Vardanega around May 2020, he also sent a copy of those documents to another contractor, Maize.

Mr Gayed said that he and the director of Maize, Malik Helweh, were acquaintances prior to establishing a working relationship, on the basis of their wives being friends. He said that their working relationship commenced when he engaged Maize to work on the project at Glenbrook Station, and agreed that he assisted Maize in the tender process for that project by disclosing confidential information to Mr Helweh. The rationale for having done so, according to Mr Gayed, was that he had great difficulty in finding builders willing to travel to the Blue Mountains to do that work. He agreed, however, that, on that occasion, he had provided Mr Helweh with more assistance than merely providing an overall budget figure to confirm that Maize might work within; he had also provided an itemised BOQ, assisted Mr Helweh in putting the quote together and reviewed it prior to Maize submitting it to Downer. He had also advised Mr Helweh on obtaining more favourable terms in contracting with Downer.

Mr Gayed maintained, however, that in seeking to “foster relationships with subcontractors” he thought that he was acting in Downer’s best interests, and saving money for the TAP. He said that, given that the project came under budget and was completed on time, he didn’t think that his superiors at Downer would have had “an adverse reaction” to his methods. He conceded, however, that he had not made Downer aware of his assistance to Mr Helweh, and agreed that he, in fact, appeared to have sought to conceal those dealings from Downer. He said that the potential for a conflict of interest did not occur to him at the time.

The tendering process for the Wollstonecraft Station project commenced shortly after the Glenbrook Station project, by which time it appears that Mr Gayed already intended to favour Maize in awarding the building works package.

In the course of Mr Vardanega’s evidence, a lawfully intercepted telephone call was played between him and Mr Cox on 20 August 2020 in which they discussed (on the basis of the budget documents Mr Cox had received from Mr Vardanega) which packages RJS Infrastructure would tender for. In respect of the building package, the following exchange occurred:

- COX: *I reckon all the money is in the building.*
- VARDANEGA: *You reckon?*
- COX: *Um, I’m only going by your original, you know the original spreadsheet you sent?*
- VARDANEGA: *Mm.*

COX: *I’m going by that there. Let me have a look at that, cause there’s money in it you need to be pricing something. Even though you’re not going to get it.*

VARDANEGA: *Just to make it hard for him?*

COX: *No, not just to make it hard. Um, well –*

VARDANEGA: *Yeah, to make it hard for him.*

COX: *Well, is that really fuckin’, you know what’s the point of me pricing a job, wasting all my fucking time and effort and at the end of a day, that’s my living, yeah.*

VARDANEGA: *Yeah totally and then he’s just – he just whacked it into another – another fuckin’ um – into another package, all the cream.*

COX: *Is that the package that he’s going to give to his mate.*

VARDANEGA: *Yeah.*

Mr Vardanega said, that at the time of that conversation, he understood from Mr Gayed that he (Mr Gayed) intended to recommend Maize for the building package. Although in a subsequent conversation with Mr Cox a few days later the two speculated about whether Mr Gayed was receiving a benefit from Maize, Mr Vardanega gave evidence that he was not aware of whether Mr Gayed was expecting to, or did, receive any benefit from Maize in return for being awarded the building package.

Both Mr Nguyen and Mr Cox said that, although RJS Infrastructure was interested in also tendering for the building package, they were told by Mr Gayed that RJS Infrastructure wouldn’t be awarded the building package in addition to the civil packages. Mr Nguyen said that he could not recall if Mr Gayed had suggested that RJS Infrastructure would be successful on the other packages if they withdrew from the building package. Mr Cox said he thought they were told that RJS Infrastructure “weren’t going to get the building works on top of everything else, so just put in a throwaway price”.

For his part, Mr Gayed said that he did not recall discussing RJS Infrastructure’s tender for the building package with Mr Vardanega, albeit he did recall saying to him “words to the effect” that RJS Infrastructure shouldn’t bother with the building package. His recollection of the context in which those words were

“thrown around” was that any one contractor would not be awarded more than 25 per cent of the total value of works on the project. He denied that it was because of an intention to ensure that Maize would be awarded the building works package. This is notwithstanding that Mr Gayed agreed that he had provided assistance in relation to the Wollstonecraft Station project budget documentation to Mr Helweh in the same way as he had with Mr Vardanega in respect of RJS Infrastructure, and that they were the only two contractors to whom he had provided assistance.

Mr Helweh was not called to give evidence in the public inquiry and there is no evidence that he engaged in any impropriety. Accordingly, the Commission makes no findings in relation to him.

### **Mr Gayed’s recommendations for proposed building package tenderers sent to TfNSW for approval**

The building package was the first of the four packages of works on the Wollstonecraft Station project for which tenderer recommendations were proposed by Downer to TfNSW for approval. The total budget estimate for the building works package was \$1,716,999.

On 24 August 2020, Downer TAP project director, Andrew Bedwani, sent a letter to his TfNSW counterpart, Brendan Wakim, that recommended five subcontractors for TfNSW’s approval for tender. That letter was copied to Mr Gayed, as Downer project manager, and Mr Patel, Downer’s commercial manager. The contractors recommended by Downer were:

- AVCO
- Maize
- ProjectHQ
- RJS Infrastructure
- Ultra Building Works Pty Ltd.

By Mr Wakim’s response dated 11 September 2020, TfNSW approved each of the proposed subcontractors as tenderers.

Mr Gayed gave evidence that the list of recommended tenderers was compiled by Downer in consultation with him. He told the Commission he recalled considering Maize, RJS Infrastructure and Ultra Building Works as being appropriate subcontractors for inclusion on the list. Mr Gayed was, however, unable to explain, or recall, how his father’s company, AVCO, made its way onto the list, nor could he recall having had any discussion with Mr Bedwani about AVCO potentially being a tenderer. Similarly, he said that he could not recall considering

Mr Vardanega’s company, ProjectHQ, as an appropriate tenderer for inclusion on the list. He ultimately conceded, however, that “it seems like” it must have been he who had recommended that both be included in the list of proposed tenderers.

Mr Gayed said that he recalled discussing with Mr Bedwani that they needed more contractors on the list, and suggesting “something along the lines” of adding both AVCO and ProjectHQ, even though they won’t be submitting prices. He said that he could not recall Mr Bedwani’s response to that suggestion, but that “it appears” that he agreed to it, given that ProjectHQ and AVCO did ultimately end up on the list. He said that he had not mentioned to Mr Bedwani his association with AVCO as “it was implied he knew”.

Mr Bedwani, however, told the Commission that he had no such discussion with Mr Gayed. He also said that, prior to the public inquiry, he was unaware of Mr Gayed’s association with AVCO or Maize.

Mr Gayed said that neither he nor his father had any intention of AVCO tendering for the Wollstonecraft Station building works. The Commission further notes that, by late August 2020, Mr Gayed was also aware that ProjectHQ would not be tendering for the building works, and (as discussed above) that RJS Infrastructure was also aware that it would not be awarded the building package.

As to the fifth proposed tenderer on the list, Ultra Building Works, Mr Gayed said that he did expect them to put in a price, albeit he had never worked with them before and had only approached them after having noticed them working on a Sydney Trains project while he was on a train one day. Although Mr Gayed said that he “gave them a ring” to gauge their interest in tendering, he subsequently said that he could not recall having any discussions with Ultra Building Works about tendering, in terms of the requirements of the building package at Wollstonecraft Station, nor could he recall whether they ultimately did submit a tender for the works.

As noted above, Maize was ultimately successful in its tender for the Wollstonecraft Station building works package.

Taking all the evidence into account, the Commission infers that Mr Gayed’s recommendations for the building works package, in addition to the information and assistance he provided to Maize in respect of its tender, were structured so as to ensure that Maize was the ultimately successful tenderer for the Wollstonecraft Station building package. His motive for doing so is unclear.



## Kevin Watters weighs in

Mr Watters was elevated to the position of construction manager for the TAP 3 projects at Wollstonecraft, Banksia, Birrong, Roseville, and Canley Vale stations, having previously worked as the project manager on the Kingswood and North Strathfield station projects. Mr Watters explained to the Commission that the construction manager's role is to look after multiple teams and/or project sites, whereas a project manager looks after a single site or project team.

As discussed previously in this report, Mr Watters initially met Mr Nguyen and Mr Cox while he was Downer's acting project manager on the Kingswood Station project, on which RJS Infrastructure had been contracted. Following the Kingswood Station project, Mr Watters engaged RJS Infrastructure to undertake works on the North Strathfield Station project, in the absence of a formal procurement process. As detailed in chapter 9 of this report, the Commission is satisfied that, following the completion of those works, Mr Watters received a cash payment of around \$8,000 from RJS Infrastructure.

Early in their consideration of tendering for the Wollstonecraft Station works, Mr Cox and Mr Nguyen discussed the prospect of approaching Mr Watters (along with another Downer project manager, Mr Stanculescu) to assist RJS Infrastructure in winning the tender for the Wollstonecraft Station project. Telephone conversations between Mr Cox and Mr Nguyen lawfully intercepted by the Commission in May and June 2020 confirm this. Mr Cox also gave evidence that the \$8,000 payment made to Mr Watters following the North Strathfield Station project created a degree of expectation that Mr Watters would assist RJS Infrastructure win future work from Downer.

Over the ensuing two months, the information that Mr Cox and Mr Nguyen had received from Mr Vardanega (via Mr Gayed) and Mr Abdi (via Mr Panagakis), was sufficient for RJS Infrastructure to be able to prepare its quotations without the additional assistance of Mr Watters such that Mr Gayed ultimately recommended that RJS Infrastructure be awarded the relevant contracts by Downer. That recommendation, however, remained subject to sign-off by Mr Watters.

On 10 September 2020, Mr Watters called Mr Cox to advise that Downer's final recommendation for the first of the four packages – the station platform works – was imminent. That conversation was lawfully intercepted by the Commission and extracts of it were tendered in evidence in the public inquiry as follows:

### Extract 1 (emphasis added):

WATTERS: ... Ah, just giving you a quick call about Wollstonecraft so I think you guys got a price in for the platform works there, um, for the, for Andrew Gayed yeah?

COX: Yeah, that's correct, yeah.

WATTERS: Ah, look, um, should be, ah, should be, we should be making our final recommendations tomorrow, um, you guys are, you guys are looking pretty good at this stage, um, it's kind of between you and one other at this stage **but, um, just making sure that we've all got coverage on that**, and if we have then we'll be able to get the signatures on that tomorrow and hopefully get a contract out to you.

COX: Yeah, yeah, we should be able to look towards something um –

WATTERS: Yeah, okay.

COX: There's, I got screwed down by – a lot to, to get in to, you know, to the number that it was at, but as long as everything goes well like I don't know at the end of the first possession whether I've made money on those or not to be honest with you.

WATTERS: Yeah, yeah, I know, yeah.

COX: You know like, (UNINTELLIGIBLE) you know, you know yourself like it's, one man's profit is another man's risk, um, um, **as long as everything goes well and, do you know we can all, we can all eat...**

Mr Cox gave evidence that he interpreted Mr Watters' reference to "just making sure we've all got coverage on that" as probably being a reference to Mr Watters looking for a benefit. Mr Cox further conceded that he and Mr Watters had probably discussed Mr Watters receiving a benefit at some time prior to the telephone conversation, albeit he was unable to be certain of that.

Mr Watters, however, said that what he meant, essentially, was that RJS Infrastructure should ensure that, given the complexity of the project, they had not under-quoted the works and left themselves unable to properly deliver the project. He said he was seeking to ensure that

“you’re covered, and if you’re covered and you’ve got what you need in there, then that will cover Downer as well and we won’t be left looking, looking foolish after the first possession”. He said that, in saying to Mr Cox “just making sure that we’ve all got coverage on that”, what he meant was “you know, make sure, you know, got all coverage that you need to deliver this critical scope, and that will actually keep Downer covered as well”.

As to Mr Cox’s subsequent comment “as long as everything goes well ... we can all eat”, Mr Cox said he wasn’t sure who the “all” to whom he was referring actually were. He said that this was on the basis that he “wasn’t really sure who wanted what”. Mr Watters said that he interpreted Mr Cox’s reference to “all” was a reference to RJS Infrastructure only. He disagreed with the suggestion that the “we” to whom Mr Cox referred included himself or Downer.

**Extract 2** (emphasis added):

COX: *I can't see why we're not gonna fucken knock it out of the park to be honest with you.*

WATTERS: *Yep, yep, yep.*

COX: *Well...*

WATTERS: *Nah, that's fine, yeh, **just making sure I can influence, I can influence it one way or another- I suppose. It's...I can... the recommendations came through, a couple of options, but **obviously have to try and pitch it your way keep all of us, keep all of us comfy, then that's good.*****

Mr Watters agreed that Mr Cox’s comments were in relation to the first possession of the Wollstonecraft Station works, and that his (Mr Watters’) reference to “just making sure I can influence, I can influence it one way or another” was in the context of his seeking to ensure that RJS Infrastructure could actually deliver the works as they proposed, and that what he intended by that comment was “If you can’t give me confidence, that I’m confident that you’ve, you know, you’ve got this, got this covered, then I, I can influence it in such a way that I wouldn’t, you know, endorse the recommendation that is coming through”. He said that his intention was to act in Downer’s best interests by ensuring that a subcontractor (in this case, RJS Infrastructure) could carry out a project that it had bid for.

As to his comment that he would “...obviously have to try to pitch it your way...”, Mr Watters told the Commission that his intent was to convey to Mr Cox that

his recommendation was essential to RJS Infrastructure being successful in its bid for the works. His further comment “...keep us all comfy...” meant “...comfortable that, you know, you’ve got what you need on the project and that Downer are not going to be let down by, you know, giving this contract to RJS Infrastructure and that we have confidence in them”.

Mr Watters agreed that his reference to “us” included Downer also, as in “make sure that RJS Infrastructure are not, you know, in a bad position and also that Downer are going to have a contractor that will go out and perform”. Mr Watters agreed that this is not the kind of detailed discussion he would ordinarily have had with other contractors.

**Extract 3** (emphasis added):

WATTERS: *Yeah, yeah, got it. **Well once, once all that comes through I can, I can shape that one as well, because it comes up to the project team.** Then essentially comes, now comes to me for sign off, and once it gets signed off then it kind of flows through the upper levels quite easily. I'm the last – **I suppose I'm the last one of the road block for these things,** for the guys at the moment –*

COX: *Yeah, yeah.*

WATTERS: *I can, I can, I can try and, **I can try and shape that one, um, once it gets to that point.***

COX: *That's good. Nah- that'll... this will keep us busy for a while like, um, this is, you know this is – I'm excited about this one, because it'll be the one that puts us on the map hopefully.*

WATTERS: *Puts you on the map, yeah, yeah. Okay leave it with me I should be getting something sorted out tomorrow and I'll let you, ah, **I'll let you come up then an idea later on of what it's worth. But, ah, it's all good we can figure that one out.***

COX: *I will work, you here, **have I let you down in the past?***

WATTERS: *Nah, you have not, no. You know, you know... you know... you know the madness, so it's all good (LAUGHS).*

COX: Very good (LAUGHS). Well like I said that first possession is key (LAUGHS).

WATTERS: (UNINTELLIGIBLE)...anyway so that's all good. That's, that ... (UNINTELLIGIBLE).

COX: Oh, yeah, yeah.

Mr Watters explained that this portion of the conversation related to the additional packages of works for which RJS Infrastructure had tendered but which were still at the project-team assessment stage. Mr Watters explained that, on the basis that RJS Infrastructure had tendered for multiple packages on the Wollstonecraft Station project, there were discussions within Downer as to seeking a discount on RJS Infrastructure's quotations in the event RJS Infrastructure was recommended for multiple packages. Other evidence before the Commission confirmed that this was indeed the case. Mr Watters said that this was the context of his comments to Mr Cox that "once all this comes through I can shape it" and "I'll let you come up [with] an idea later on of what it's worth. But it's all good, we can figure that one out."

He said that his reference to being "one of the last roadblocks for these things" was again intended to remind Mr Cox that he (Mr Watters) needed to have confidence that RJS Infrastructure was capable of performing the works.

Counsel Assisting put to Mr Watters that an alternative interpretation of his conversation with Mr Cox might be, essentially "if you pay me a bribe I will do the things you want to get RJS Infrastructure the contract at Wollstonecraft". Mr Watters denied that was the intent of the conversation.

Mr Cox, on the other hand, told the Commission that he understood Mr Watters' comment "I'll let you come up [with] an idea later on of what it's worth" was a reference to how much RJS Infrastructure was to pay him for his assistance in RJS Infrastructure being awarded the work.

As to Mr Cox's comment in response, "I will work with you here. Have I let you down in the past?", Mr Cox said that he was "probably basically referring to the money that I gave him at North Strathfield".

### Further text messages from Mr Watters

On 11 September 2020, the day after the telephone conversation discussed above, Mr Watters sent Mr Cox an SMS text message from his personal mobile telephone number in the following terms (emphasis added):

*Hey mate, Kev at Downer here (personal number). Approved the first \$2.8M for you guys this morning, have the rest in my approval queue.*

*Good result for RJS. **Make sure we're looked after well!** 😊*

Mr Cox recalled that he understood from the message that Mr Watters "wanted money". He said that the part of the message that conveyed that meaning to him was the words "make sure we're looked after well".

For his part, Mr Watters told the Commission that by the words "make sure we're looked after well" he intended to convey "Make sure that Downer are looked after well. You've got a significant contract from us. Don't let us down."

As to the winking smiley face, Mr Watters said that he included that to "soften the message and, you know, not make it look like it's, you know, 'You better look after us'". He explained his reasoning as being that "if RJS go out, deliver and do better than even they have committed to, then Downer will ultimately look good as a result because it's our project".

Mr Watters said that it was not unusual to have a discussion with a contractor along these lines, albeit not by way of text messages. He said that he felt comfortable in using informal language in his SMS message to Mr Cox on the basis that he had developed a good relationship with him, and had trust in Mr Cox being "really good at what he did and could really deliver on things". He conceded that that contents of his communications with Mr Cox did not look good but maintained that he never sought to take advantage of his relationship with Mr Cox. He said that the only advantage he wanted to get was to "really impress onto him that he needed to go out and perform for us because it'll help him out".

As to why he used his personal telephone to send Mr Cox the SMS message, Mr Watters conceded that he shouldn't have sent that type of "heads-up" message to a contractor prior to the execution of a contract as it was a breach of Downer's formal procedures. He was, therefore, concerned as to how a message like that on his work telephone might be viewed by Downer.

Mr Watters also conceded he sent a further "heads-up" SMS message to Mr Cox 10 days later, on 22 September 2020, by which he informed Mr Cox that Downer had now approved RJS Infrastructure for all three packages of works at Wollstonecraft Station (that is, all but the building works package, as discussed elsewhere in this chapter). That SMS message read:

*All approvals sent through the system this morning for all 3 packages at WLS. Keep it under your hat for now until the letter is sent out. 👍*

Mr Watters said that his suggestion that Mr Cox should keep that information “under his hat for now” was merely to suggest that they should await the formal execution of the relevant contracts before they “go out and put it on social media and things”. He said that Downer would suggest the same to any contractor in the circumstances.

It was submitted on behalf of Mr Watters that, on the basis of his explanation as to the meaning of the SMS messages with Mr Cox, the Commission would find that Mr Watters had no underlying nefarious intent. In addition to suggesting an unreliability of Mr Cox’s evidence as to his understanding of Mr Watters’ comments (and, indeed, his evidence generally), those submissions suggested a number of alternative, innocuous interpretations of the SMS messages, notwithstanding Mr Watters’ concession that they likely breached Downer’s internal policies or procedures. Central among these was the submission that, in light of the commercial context in which Mr Watters was operating, it was not implausible that Mr Watters had a genuine and legitimate desire to get RJS Infrastructure and, in particular, Mr Cox, given his good reputation, onto the project. The essence of the submission was that, notwithstanding Mr Watters’ unconventional approach in “cultivating a good relationship with a good contractor”, his intention was merely to ensure that Downer’s interests in the timely completion of the project to the highest standard were served. Thus, it is in this light that the contents of his communications with Mr Cox should be understood, rather than demonstrating, as Counsel Assisting has submitted, an attempt to secure a benefit for himself from RJS Infrastructure.

While the Commission acknowledges the premise of that submission, it does not accept the conclusion. It may well have been Mr Watters’ intention to ensure that Downer secured what he considered to be the best contractor for the project. That, however, does not preclude a concurrent motivation on the part of Mr Watters to seize an opportunity to obtain a personal benefit for himself in doing so.

Rather, the Commission agrees with the submission of Counsel Assisting that, when compared with the contents of his SMS messages to Mr Cox, Mr Watters’ evidence as to the meaning and intent of those SMS messages defies credibility. Having regard to the broader context of the circumstances in which those communications occurred, the Commission is satisfied that the SMS messages reflected a desire on the part of Mr Watters to seek a benefit in return for his showing favour to RJS Infrastructure in relation to the awarding of works on the Wollstonecraft Station project. The Commission is, however, satisfied that no such benefit was ultimately paid to Mr Watters by RJS Infrastructure.

## RJS Infrastructure is recommended to TfNSW by Downer for three packages of works on Wollstonecraft Station

Mr Nguyen gave evidence that he submitted RJS Infrastructure’s initial tender documents for all four packages of works via Downer’s then-newly established ARCUS tender system. He admitted that, in completing the relevant questionnaires required by Downer, he had not read the relevant terms and conditions and code of conduct documents, but had merely downloaded them “just to tick the box”. He agreed that he had falsely declared on those documents that RJS Infrastructure had not engaged in any collusion with other tenderers or employees of Downer, or engaged in any other uncompetitive behaviour, despite being aware of the collusion between RJS Infrastructure and Mr Gayed (through Mr Vardanega) and of the information that Mr Abdi had obtained from Mr Panagakis and then passed on to him for the purpose of assisting RJS Infrastructure with its tender.

RJS Infrastructure submitted its tender to Downer around 30 August 2020. It appears that there was, thereafter, a delay in Downer finalising and sending to TfNSW its recommended tenderers such that TfNSW only received those recommendations for its approval on the evening before RJS Infrastructure was due to commence works on the project. This did not go unnoticed by TfNSW’s nominated representative for the TAP contract, Mr Wakim who, on 20 October 2020, two days after completion of the first possession on the Wollstonecraft Station project, sent an email to several TfNSW staff involved in the project that read:

*Downer have awarded a number of large contracts for Wollstonecraft station to RJS Projects, prior to seeking TfNSW endorsement to do so.*

*I can’t find much about this company, it does not have a website and the company address is a residential house.*

*I asked Andrew Bedwani about the company, what the past experience is and what connection they have to Downer and he seemed very defensive.*

*Please be aware of this on the weekend, please check if this company is just sub-contracting the work out to other firms. It may be an example of pyramid contracting.*

*The contracts awarded are for over \$4.5 million in value, and are for piling, platform, civil and FRP works.*

*The sub-contractor recommendation for this company came though at 5pm on Friday night, literally hours before they were due to start on site.*

*I might be feeling paranoid, but something seems very odd about all this.*

*I have requested formally that Downer supply further information about this company and previous work they have undertaken.*

Mr Wakim told the Commission that his primary concern was that he had not heard of RJS Infrastructure before. He agreed that this was an example of time pressures being placed on TfNSW by Downer that were effectively forcing TfNSW to make decisions in sub-optimal circumstances. Indeed, he said that, upon making an enquiry with the TfNSW project manager for Wollstonecraft Station (whom he did not identify by name but the Commission presumes to have been Mr Panagakis), he was advised that RJS Infrastructure had already been working onsite for a number of weeks, and thus that “my approval was somewhat superfluous at that point”.

While, on the evidence heard by the Commission, it appears that Mr Wakim’s concerns were well-founded, he told the Commission that, around the time of his email, it had been suggested to him by TfNSW’s then-project director that he lacked trust in Downer. Mr Wakim said that he was aware at the time (having been informed of same by the TfNSW project director to whom he reported) that the Downer team had complained to the TfNSW executive that Mr Wakim had been questioning Downer’s decisions and integrity. He said that, a couple of weeks later, while preparations were underway to hold a barbecue with the Downer TAP staff at Birrong Station, he and other TfNSW staff received an email from the TfNSW TAP project director “talking about the importance for us to build trust in our, between ourselves and Downer and that was the secret ingredient to how to manage the managing contractor roles”.

Having been awarded the contracts for the three packages of works, RJS Infrastructure subcontracted BH Civil to supply labour and plant for the project, as well as putting together a work crew to work for RJS Infrastructure directly. Mr Nguyen had resigned from his position at IWC by September 2020, and project managed the Wollstonecraft Station project on behalf of RJS Infrastructure, along with Mr Cox.

The total amount ultimately paid to RJS Infrastructure for the three packages of works on Wollstonecraft Station was \$4,686,728 (excluding GST), which yielded a profit to RJS Infrastructure of around \$900,000, which Mr Nguyen and Mr Cox split evenly.

## **RJS Infrastructure completes the first possession at Wollstonecraft Station – further conversation between Mr Cox and Mr Watters**

The first of the three packages of works ultimately awarded to RJS Infrastructure upon Mr Gayed’s and, subsequently, Mr Watters’ recommendations were carried out over a weekend possession in mid-October 2020. Following the successful completion of those works, Mr Cox and Mr Watters had a telephone conversation on 28 October 2020, during which the following exchange occurred:

COX: *I think we made a bit of money.*

WATTERS: *Good.*

COX: *Could be here yeh.....I’ll, ah, I’ll look after you, um –*

WATTERS: *Good to hear.*

COX: *– so I will – um, I’ll sort you out maybe at Christmas time or something, um –*

WATTERS: *Oh, look you’ll get something before Christmas, you’ll have your (UNINTELLIGIBLE) ones for us at least.*

COX: *I put something in, alright so, um, I put it in –*

WATTERS: *Good cheer. That’s the best one, you’ll get a good bulk of it.*

COX: *Yeah, hopefully next month goes alright as well. I was looking at that... like I’m hoping, I’m gonna, I’m gonna try and get the two lifts built this side of Christmas so –*

WATTERS: *Ah, okay.*

COX: *So that’s not too bad, yeah.*

That conversation was put to both Mr Cox and Mr Watters in the course of their respective evidence before the Commission.

Mr Cox conceded that his references to “I’ll look after you” and “I’ll sort you out maybe at Christmas or something” reflected his intention “to give [Mr Watters] some money”. He said that, following his initial communications with Mr Watters in relation to tendering for the Wollstonecraft Station works, he and Mr Nguyen had discussed paying money to Mr Watters in return for any assistance he might provide to RJS Infrastructure winning the contracts.

The two of them tried to figure out what Mr Watters' expectation might have been, but ultimately did not arrive at a final conclusion.

Mr Nguyen told the Commission that he thought Mr Watters was merely taking an opportunity to seek a benefit in circumstances where he hadn't actually done anything to assist RJS Infrastructure in winning the contracts with Downer. He said that Mr Cox had shown him the "make sure we're looked after well, wink emoji" SMS message that Mr Cox had received from Mr Watters on 11 September 2020 and formed the view that Mr Watters was looking for something "...just like North Strathfield".

While the Commission has some reservations as to the value of Mr Nguyen's evidence on this issue, there is no evidence that they ultimately paid anything to Mr Watters in respect of the Wollstonecraft Station project.

For his part, Mr Watters did not agree that this conversation with Mr Cox, in particular, Mr Cox's suggestion that "I will look after you", was in respect of a proposed financial benefit to him personally. He said he took that as being Mr Cox suggesting that "RJS would have put on a day out, a function, a lunch, something for Downer as a team, particularly given that they had, you know, been very successful through that first possession period. It was quite common around Christmas-time for contractors to take us out." He said that he thought the "you" to whom Mr Cox referred was "you and your team at Downer".

Mr Watters further suggested that, alternatively, Mr Cox could have been suggesting that he would "drop off a bottle of wine or a bottle of whisky at Christmas-time, that was quite common for contractors to do as well".

As in respect of the SMS messages between Mr Watters and Mr Cox discussed above, the Commission is similarly satisfied that the conversation between Mr Watters and Mr Cox following the completion of the first possession on the Wollstonecraft Station project further reflected an understanding between the two of Mr Watters' expectation of receiving a benefit in return for his assistance to RJS Infrastructure being awarded those works.

## RJS Infrastructure also tenders for the Birrong Station project

As discussed above, in addition to those for the Wollstonecraft Station project, Mr Abdi (via Mr Panagakis) had also provided Mr Nguyen with the BOQ documents for the TAP projects at Birrong, Banksia and Roseville stations. In addition to tendering for the works at Banksia Station, for which it was unsuccessful,

RJS Infrastructure also tendered for a package of building works on the Birrong Station project.

Mr Cox told the Commission that he initially had a conversation with Mr Watters about RJS Infrastructure tendering for works on both Birrong and Canley Vale Stations around November 2020. He said that RJS Infrastructure subsequently submitted to Downer tenders for both Birrong and Canley Vale Stations, albeit they decided afterwards to pull out of both of those tenders following the execution of search warrants at Mr Cox and Mr Nguyen's residences by Commission officers on 2 December 2020. It appears from the evidence that, in the meantime, Mr Watters improperly assisted Mr Cox in the preparation of the RJS Infrastructure quotation for the Birrong Station works.

On 26 November 2020, Mr Watters sent an SMS text message to Mr Cox that read (emphasis added):

*Ok I can almost guarantee the Birrong package now. I know Jason wants an improvement on price, don't drop much, you don't have to, keep it and **cover you and me.*** 😊

Mr Cox replied to Mr Watters 10 minutes later, saying:

*Shit, we put a provision sum in for floor removal based on timber. Its concrete, confirmed today. We were going to increase price by 6k. Will this knock us of [sic] pole position*

Mr Watters responded:

*Not quite but will be very very close. If it goes up 6k would be good to sharpen a little elsewhere to soften the blow.*

Mr Cox told the Commission that he understood the "Jason" to whom Mr Watters' text referred was the Downer project manager of the Birrong Station project. He said that he further understood Mr Watters' reference to "cover you and me" in his initial SMS message to mean "give him some money". Mr Cox agreed that he and Mr Nguyen had discussed the possibility of giving Mr Watters some money for the Birrong Station project.

As to his response to Mr Watters' email, Mr Cox agreed that he was asking Mr Watters to give him confidential information by reference to prices that other tenderers had submitted for the works. He said, further, that Mr Watters' response did influence the tender ultimately submitted by RJS Infrastructure.

For his part, Mr Watters told the Commission that he had previously spoken with the project manager for the Birrong Station project and had recommended RJS Infrastructure on the basis of previous work RJS Infrastructure had done for Downer. Hence, he said,

his reference to “cover me” in the initial SMS message to Mr Cox meant, essentially: “Cover me. Don’t leave me, you know, exposed here if you go out there and make a mess of doing this job. Keep what you need in, in your price and make sure that you do the things well and make sure that I’m not left looking, looking like a fool because I’ve, I’ve recommended you to this team and then you don’t perform.”

Mr Watters denied that the intent of his message was to suggest to Mr Cox that whatever amount RJS Infrastructure kept could be split between RJS Infrastructure and himself, or that the proper inference that arises from his messages is that he was taking bribes from Mr Cox and he wanted that to continue. He further denied that he was giving knowingly false evidence on the matter.

Mr Watters did, however, agree that his second SMS message (in which he said “not quite but it will be very close” in response to Mr Cox’s query) amounted to him giving Mr Cox confidential information inside the tender window. He conceded that this was likely a breach of Downer’s procurement policy.

The Commission does not accept Mr Watters’ evidence as to the nature of the SMS messages between him and Mr Cox regarding RJS Infrastructure’s tender for the Birrong Station works. As Mr Watters rightly conceded, it was clearly inappropriate of him to have provided Mr Cox with the confidential information as he did. The Commission infers that his intent in doing so was to give RJS Infrastructure an unfair advantage in the tender process. While, of itself, Mr Watters’ reference to “keep it and cover you and me” is ambiguous, in the broader context, the Commission is satisfied that Mr Watters was referring to his expectation of receiving a benefit in return for having provided RJS Infrastructure with that unfair advantage.

## Mr Gayed recommends AVCO to Downer

Mr Gayed was Downer’s project manager on the Glenbrook Station project. In early March 2020, prior to moving onto the Wollstonecraft Station project, he asked Downer site engineer Ryan Camilleri to arrange the setting up in Downer’s procurement system of his father’s company, AVCO, as a supplier to Downer for storage of building materials left over from the Glenbrook Station project. Subsequently, the materials were stored in shipping containers at Mr Gayed’s residence. Mr Gayed subsequently approved AVCO’s invoices for the storage costs for payment by Downer. The costs would be sought to be reimbursed by TfNSW.

In respect of those arrangements, Mr Gayed failed to disclose to Downer management his association with AVCO, nor the potential conflict of interest in respect of his recommendation that AVCO be engaged by Downer as a supplier. Indeed, evidence before the Commission, including the use by Mr Gayed of the alias “Ray Alphonse” (purportedly, his father’s anglicised name) in emails between AVCO and Downer, strongly suggests that Mr Gayed actively took measures to conceal from Downer his association with AVCO. This is notwithstanding evidence given by Mr Gayed, which the Commission finds implausible, that he believed that Downer would have known of his association with AVCO by way, essentially, of cross-matching AVCO’s ASIC records with its records of Mr Gayed’s residential address.

The AVCO invoices, which totalled \$27,900 for around six months’ storage (and which Mr Gayed conceded he had probably prepared and sent to Downer, using the name Ray Alphonse), were initially approved for payment by Mr Gayed. They were, however, subsequently considered to be “very excessive” by Downer’s commercial manager and, ultimately, rejected by TfNSW such that Downer itself became obliged to absorb the costs of what might otherwise have been reimbursed by TfNSW from public funds.

Following his appointment as project manager on the Wollstonecraft Station project, Mr Gayed again engaged AVCO to supply services to Downer without disclosing his association with that company, nor the obvious conflict of interest to which that association gave rise.

On this occasion, AVCO was engaged by Downer, at Mr Gayed’s instigation, to supply lighting towers for the first possession on the Wollstonecraft Station project in mid-October 2020.

Mr Gayed told the Commission that his suggestion that Downer use AVCO arose in the context of Downer requiring the lighting towers from a specific company at short notice. He said that, given Downer’s procurement processes took weeks to set up new companies, he suggested to Downer’s commercial manager for the project, Mr Patel, that AVCO be used to hire the lighting towers, given that AVCO was already set up in Downer’s systems. He acknowledged that he did not mention to Mr Patel his association with AVCO, but that “it was implied” on the same basis as referred to previously (that is, the assumption that Downer would cross-match AVCO’s ASIC records with its records of Mr Gayed’s residential address).

AVCO hired the lighting towers from another company, Access Hire Pty Ltd, for a total of \$4,678 (excluding GST) and subsequently invoiced Downer a total of \$12,000 (excluding GST) for the supply of the lighting towers.

The communications by AVCO with both Access Hire and Downer in the course of the transactions were in the name “Ray Alfonse”, using an AVCO email address. In respect of the use of that name and email address, Mr Gayed again gave barely plausible evidence as to his father’s involvement in the process of AVCO hiring and supplying the lighting towers to Downer. When conflicting evidence that he had previously given in a compulsory examination on 22 August 2022 was put to him, Mr Gayed ultimately conceded that his initial compulsory examination evidence was correct to the extent that it was indeed he who had used his father’s (anglicised) name, Ray Alfonse, and acted on his father’s behalf in negotiating the lighting tower hire and supply so as to avoid the appearance that he was involved in AVCO. He attributed the anomalies in his evidence to a faulty recollection of the events.

### Payment for ice creams?

As to the inflation of the price that AVCO charged Downer for the lighting towers it hired from Access Hire, which netted an apparent profit to AVCO of \$7,322 (or approximately 156 per cent), Mr Gayed told the Commission that the profit was not that much. He said that this was because the AVCO invoice to Downer included an amount of around \$6,000 that Mr Gayed said he paid in cash to the owner of a small newsagency at Wollstonecraft Station as compensation for the spoilage of frozen goods that occurred as the result of a power outage during the station works.

He conceded, however, that the AVCO invoice to Downer did not make reference to that payment, and agreed that Downer could not, therefore, have known that it was paying for anything other than the supply of the lighting towers. He claimed that “Downer knew” of the arrangement on the basis that “everyone who visited the site that weekend had ice cream from that shop”, including the management that visited. He was unable to recall, however, having had any discussion with Downer management about the payment for the ice creams, nor could he recall the reason why the AVCO invoice did not itemise that expense.

Mr Gayed suggested that AVCO made no profit at all from the supply of the lighting towers, beyond a 10 per cent margin he included “for overheads, or whatever”, and that the remainder of the costs that AVCO invoiced Downer were paid to the shop owners.

When queried as to what the payment of compensation had to do with AVCO, Mr Gayed said, “it had nothing to do with AVCO. It was just a method of paying the shop owners.” He agreed that it was simply him making the payment as a gesture of goodwill on his own behalf, which he then recouped by way of the AVCO invoice

to Downer. As to the cash with which he paid the shop owners, Mr Gayed said that he “pulled that out from the account”. Notwithstanding his reference to “the” account, he was subsequently unsure as to precisely what account he was referring, but agreed that “it might have been an AVCO account to show where the money went, yeah”.

Mr Gayed claimed that he had received from the shop owners a document and receipt relating to the compensation for the ice cream, which he scanned and saved on his Downer-issued laptop, albeit he never provided a copy of those documents to anyone at Downer. A forensic examination of the laptop in question (produced to the Commission by Downer) conducted by Commission officers did not locate a copy of the receipt or any other document relating to a payment by Mr Gayed to the shop owners.

As had similarly been the case with the AVCO invoices for the storage following the Glenbrook Station project, following Downer’s receipt of the AVCO invoice for the lighting towers dated 26 October 2020, Downer commercial manager Mr Patel raised a query with Mr Gayed as to the high cost of the lighting hire, and requested that Mr Gayed look for an alternative option. Mr Gayed replied merely, “Yes, we won’t be using this option going forward.”

In his evidence, Mr Gayed acknowledged that he had made no reference to the amount paid to the shop owners in his response to Mr Patel because “at the time, it didn’t come to mind”. He disagreed with Counsel Assistings’ suggestion he did not do so for the reason that the invoice reflected only profits derived by AVCO and not also a component for payment for the ice creams.

Mr Bedwani, Downer’s project director for the TAP 3 projects to whom Mr Gayed reported, told the Commission that he recalled being informed of a power outage at the Wollstonecraft Station site by Downer’s community liaison manager. He said that, while the outage to the Sydney Trains network was anticipated, the loss of power to the business was not. Accordingly, it was proposed that the Wollstonecraft Station site team purchase the ice creams in order to avoid spoilage, rather than as compensation for items already spoiled. Mr Bedwani said that, had Mr Gayed paid for the items, he would have been reimbursed by Downer. He was unaware as to whether that occurred, but there would be records of the reimbursement within Downer if it did. He said that Mr Gayed never mentioned the prospect of AVCO absorbing the cost of paying for the ice creams.

Commission investigators identified the Wollstonecraft Bookstall as being the small newsagency to which Mr Gayed’s evidence referred and obtained a statement



from its owner, Yan (Shirley) Huang. Ms Huang stated that she recalled a number of power shutdowns during the Wollstonecraft Station works, including the main shutdown in October 2020, during which there was no power for an entire weekend (which the Commission infers was the first weekend possession for which AVCO supplied Downer with the lighting towers). Ms Huang stated, however, that she was never paid any compensation for the shutdown periods or for any spoilage of food or ice creams. She said that some workers did come and take some ice creams and drinks for which one worker later came in and paid around \$200, and for which she did not issue a receipt. Ms Huang also stated that the total value of all stock (including non-perishable items) in her store at any given time is only around \$3,000 at the most.

A statement was also obtained by the Commission from Leanne Curtis, who is the project services financial manager in the infrastructure project division of Downer. Ms Curtis' statement details a number of broad-ranging searches of Downer's financial systems conducted at the Commission's request. The result of those searches was that no records were located that identified any payment by Mr Gayed or AVCO being made to a Wollstonecraft newsagency or kiosk, nor of any reimbursement to Mr Gayed or AVCO by Downer for any such payment.

It was submitted on behalf of Mr Gayed that, on the basis that Ms Huang and Ms Curtis' statements were tendered in evidence subsequent to the public inquiry hearings, and hence that neither were made available for examination, the Commission should be cautious in relying on their statements in forming an opinion as to whether consideration should be given to referring to obtaining the advice of the DPP with respect to the prosecution of Mr Gayed for specified criminal offences. It was submitted that this is especially so in circumstances in which it is urged (by Counsel Assisting) that such evidence can be used as proof to establish a *prima facie* case against Mr Gayed and it is inconsistent with Mr Gayed's sworn evidence.

The Commission well appreciates the need for caution. In any event, the Commission is satisfied with the sufficiency of the evidence of both Ms Huang and Ms Curtis given by way of their statements. Indeed, the Commission notes that the contents of Ms Curtis' statement actually accords with Mr Gayed's evidence that he never provided anyone within Downer copies of the receipt he purportedly received from the shop owners, nor did he formally seek reimbursement (other than by way of the AVCO invoice) from Downer of the \$6,000 that he said he paid as compensation.

The Commission is of the opinion that, even without the benefit of the statements of Ms Huang and

Ms Curtis, Mr Gayed's evidence as to having paid \$6,000 in "compensation" to the shop owners for spoilt (or yet to be spoilt) ice creams is inherently implausible. While the evidence indicates that someone (possibly Mr Gayed) did pay the shop owner around \$200 for ice creams at some point during the Wollstonecraft Station works, the Commission infers that Mr Gayed essentially "borrowed" and embellished those circumstances in order to invent an alternative explanation for the highly inflated price that AVCO charged Downer for the lighting tower hire. The Commission is satisfied that, by giving that evidence, it was Mr Gayed's intention to knowingly mislead the Commission.

The Commission is additionally satisfied that Mr Gayed's recommendation of his father's company, AVCO, as a supplier of services to Downer in circumstances in which Mr Gayed deceptively failed to disclose to Downer his association with AVCO was for the purpose of dishonestly obtaining, by way of grossly over-inflated AVCO invoices subsequently issued to Downer, a benefit from the application of public funds (being the funds payable by TfNSW to Downer as reimbursement for the costs of those AVCO invoices).

## The Downer 2020 Christmas function

A further matter examined in the public inquiry concerned RJS Infrastructure (that is, Mr Nguyen and Mr Cox) being approached to contribute to the costs of the Downer TAP project team 2020 Christmas function.

Evidence before the Commission established that the proposal of holding a harbour cruise Christmas function for the TAP teams was raised internally within Downer around October 2020, but was initially rejected by senior management on the basis that it would have been too expensive and that a cheaper option should be found.

Laura Inglis provided the Commission with a statement. Ms Inglis worked for Downer in a project administration role for the TAP project teams and was responsible for organising the Christmas function. She stated that, following being advised by Mr Bedwani (who had responsibility for approving the Christmas function expenditure) that the proposed harbour cruise function would be impermissibly expensive, she was approached by Mr Gayed, who told her that he would "sort it out". Mr Gayed gave evidence that it was Ms Inglis who approached him with a proposal to source funding for the function from Downer subcontractors; however, the Commission agrees with the submission of Counsel Assisting that Mr Inglis' evidence should be preferred over that of Mr Gayed on this point, on the basis of its view as to her greater credibility on the issue, and her status as a relatively independent witness.

A few days after their initial conversation on the subject, Mr Gayed told Ms Inglis to send the invoices for the boat hire to Mr Nguyen of RJS Infrastructure. Ms Inglis said that she thought that unusual as Downer had always paid for its own Christmas functions in the past. On 6 November, in Mr Gayed's presence and on his behalf (as she stated in the call), Ms Inglis telephoned Mr Nguyen to discuss RJS Infrastructure funding the Downer Christmas function. In that context, Ms Inglis mentioned to Mr Nguyen, presumably at Mr Gayed's suggestion, the number of contracts that Downer had awarded to RJS Infrastructure and that "you love us greatly", plainly suggesting that RJS Infrastructure's contribution would be a quid pro quo for the contracts it had been awarded by Downer. Mr Nguyen jokingly suggested to Ms Inglis that she was doing Mr Gayed's "dirty work" for him, but agreed to RJS Infrastructure assisting with funding the Christmas function, subject to discussing it with his RJS Infrastructure partner, Mr Cox.

Mr Nguyen and Mr Cox both gave evidence that, subsequent to Ms Inglis' telephone call, Mr Gayed discussed with each of them the prospect of RJS Infrastructure contributing to the costs of the Christmas function. Mr Nguyen said that he didn't think too much of it, but that he and Mr Cox viewed it as "a sacrifice we'll make just to improve the relationship [with Downer]." Mr Cox said that Mr Gayed raised the Christmas function with him a number of times over the ensuing weeks, including during a telephone conversation on 23 November 2020, lawfully intercepted by the Commission, in which Mr Gayed suggested that RJS Infrastructure might inflate an invoice to Downer to cover its cost of funding the function. Mr Cox told the Commission that RJS Infrastructure did not do so, as is also apparent from his comments in that conversation with Mr Gayed.

Ultimately, the proposed harbour cruise Christmas function did not go ahead, nor did RJS Infrastructure contribute any funding to the Christmas function. The Commission executed search warrants at Mr Nguyen and Mr Cox's residences on 2 December 2020). Mr Bedwani gave evidence that, upon his subsequently learning in early December 2020 of the arrangements that had been made in respect of the harbour cruise, and of RJS Infrastructures' proposed contribution to its cost, he "mulled it for a little while" before ultimately instructing Ms Inglis that it was not appropriate for Downer to have subcontractors paying for the Christmas party, and that, accordingly, it was not something he was willing to approve. The function was subsequently held at a different venue, funded by Downer.

While pursuant to s 13(3)(a) of the ICAC Act, the Commission finds as a matter of fact that Mr Gayed sought to have Mr Nguyen and Mr Cox of RJS Infrastructure fund the Downer TAP project team

Christmas function, the Commission is of the view that this conduct falls outside the scope of s 8 and s 9 of the ICAC Act. Accordingly, the Commission makes no findings of corrupt conduct in relation to this aspect of the public inquiry; it is included in this report for the sake of completeness.

## The Banksia and Birrong station projects – Mr Stanculescu and Dalski

### Mr Stanculescu

Mr Stanculescu commenced employment at Downer in March 2008 as a graduate engineer. His educational background was in computer science and engineering management. He left Downer temporarily in June 2010, returned in February 2014 as a senior project engineer and advanced to project manager in May 2017. Alongside his project manager role, he also acted as commissioning manager for multiple projects until Downer recruited a new commissioning manager in 2021.

Mr Stanculescu tendered his resignation from Downer on 17 November 2021 and was terminated shortly thereafter as the result of an internal investigation into his alleged breach of Downer policies. He thereafter commenced employment with Dalski as a project manager in February 2022.

### Mr Stanculescu awards work to Dalski

Mr Stanculescu told the Commission that, prior to commencement of tranche 3 of the TAP projects (which commenced around mid-2020) Downer had relied on an informal list of various contractors – referred to as the procurement register—from which Downer selected potential tenderers. He said that, effectively, anybody within Downer could add contractors to that list, and agreed that he had done so with Dalski. He said that, later, around the time of the commencement of the TAP 3, a more rigid process for selecting contractors was introduced at Mr Bedwani's instigation.

Mr Stanculescu was Downer's project manager for the Mortdale Maintenance Facility project ("Mortdale") in 2017. In that position, he awarded work on the project to Dalski without obtaining the three quotes required by Downer policy. Mr Stanculescu said that he did not know of the requirement at the time, being a new project manager also juggling other roles and motivated to progress the works.

In 2019, Downer subcontracted Dalski to carry out hoarding work on the Kingswood Station project. Mr Stanculescu had been appointed as Downer's project

manager for the Kingswood Station project but told the Commission that he taken leave during the early stages of the project and so was not involved in issuing tenders nor in supervising Dalski's work.

One of Mr Stanculescu's reports at Downer would go on to work for Dalski as an operations manager, a move in which Mr Stanculescu denied having any involvement. He did, in 2018, refer a close friend to a director of Dalski, which led to Dalski employing his friend as its business development manager. In this role, he was responsible for sourcing work for Dalski.

When asked by Counsel Assisting whether his friend had been employed by Dalski as a favour to Mr Stanculescu, Mr Stanculescu said that it was possible, but he did not think it was the case. He denied, at least, that he had asked the Dalski director for such a favour.

### **Mr Stanculescu's involvement with Dalski**

From at least 2018, Mr Stanculescu was assisting Dalski with obtaining work and with technical expertise to deliver the work. By at least April 2020, and without declaring any potential conflict of interest to Downer, he had effectively integrated into Dalski's management – representing himself as part of Dalski in emails, involving himself in its decision making and attending site meetings for Dalski projects. He acknowledged, with what he claimed was the benefit of hindsight, that he should have discussed his assistance in the management of Dalski with somebody at Downer.

When asked by Counsel Assisting whether he was motivated to get involved in the management of Dalski to help his friend perform in his job or be perceived to be performing well in his job, Mr Stanculescu said "there will be parts of that". The only other reason he gave for getting involved with Dalski's operations was because he found the work "interesting" and enjoyed the challenge. He was not paid for his work at Dalski.

The work Mr Stanculescu found "interesting" at Dalski involved project-related tasks to project-related tasks, albeit he said that his assistance to Dalski was "ad hoc" and that he "filled gaps". Those "gaps" included tasks such as IT design and support, leveraging his computer science background, and event booking. Mr Stanculescu gave evidence that his work for Dalski was time consuming, in the order of hundreds of hours, but that he managed to "juggle" both his work for Dalski and his role with Downer at the same time. Other evidence heard by the Commission, however, suggested that, during the Kingswood Station and Banksia Station projects in 2019 and 2020, Mr Stanculescu had been frequently absent from site and unavailable by telephone, and delegated disproportionate responsibilities to site engineer Mr Pilli.

Mr Stanculescu's relationship with Dalski appears to have been a close one. On 17 November 2021, the same day as he tendered his resignation from Downer, Mr Stanculescu advanced a loan of \$50,000 to Dalski. This loan was followed by a further \$50,000 loan on 1 December 2021.

Mr Stanculescu told the Commission that he made the loans of \$100,000 to Dalski as a favour to a Dalski director who had informed him of cashflow issues that Dalski was experiencing at the time. Both loans were without documentation, interest or security. Mr Stanculescu told the Commission that it was merely coincidence that the timing of the loans to Dalski coincided with his departure from Downer, and denied that the payments in fact represented him "buying in" to Dalski in advance of him formally joining the company.

The Commission has no evidence to suggest that Mr Stanculescu had a financial interest in Dalski prior to his employment with the company, and makes no findings in relation to his payments to the company in November and December 2021.

### **Dalski's tender for the Banksia Station TAP project**

Dalski had difficulties in delivering the initial works it was awarded on the Kingswood Station project such that it was removed from the project (which occurred, according to Mr Stanculescu, prior to his commencement on the Kingswood Station project). As a result, there were discussions within Downer about dropping Dalski as a potential future subcontractor. Mr Stanculescu told the Commission that he believed that the criticism of Dalski had been unfair, and that he successfully advocated to keep Dalski on Downer's list of potential subcontractors.

Subsequently, around September 2020, Dalski was invited by Downer to tender for a package of building works on the Banksia Station project, for which Mr Stanculescu was to be Downer's project manager.

In his evidence to the Commission, Mr Stanculescu frankly conceded that he had provided assistance to Dalski with its bid for the Banksia Station works, including authoring the company's organisation chart and the pricing schedule (quotation) Dalski put forward and other documents specific to the Banksia Station project tender and/or of general use to Dalski in other tenders. Mr Stanculescu further conceded that he had access to, and had used, Downer's internal budget documents relating to the Banksia Station project in order to determine how Dalski should price its tender for the works.

Mr Stanculescu further assisted Dalski's tender response by way of his access to Downer's ARCUS electronic procurement system. Downer's ARCUS access records

show that, on 6 October 2020, user profile “Vlad Stanculescu” had changed the status of Dalski’s tender submission from being locked against further editing to being able to be edited. On the same day, the profile “Jackson Sensicle” made several new submissions on ARCUS. Both the “Vlad Stanculescu” and “Jackson Sensicle” profiles were recorded as operating from the same IP address. When shown these records in the public inquiry, Mr Stanculescu accepted that he must have been the one operating both profiles that day, making the Dalski submissions editable using the “Vlad Stanculescu” profile and submitting documents on Dalski’s behalf using the “Jackson Sensicle” profile. In this context, Mr Stanculescu agreed the purpose was to amend Dalski’s pricing to keep it consistently lower than that of its main competitor. He agreed this fundamentally corrupted Downer’s procurement process in relation to the Banksia Station project.

Mr Stanculescu continued to create documents on behalf of Dalski in the tender clarification process that followed its initial tender submission, lodged on 6 October 2020.

In evidence before the Commission were documents sourced from Downer’s internal investigation of Mr Stanculescu, including a graph that plotted Dalski’s tender price and its main competitor’s tender price over October 2020. During the tender clarification process, Dalski’s main competitor twice lowered its price. On both occasions, Dalski shortly thereafter submitted a lower price. When shown this graph during the public inquiry, Mr Stanculescu agreed that it reflected him having access to the competitor’s pricing and undercutting it on behalf of Dalski. He agreed that he had access to the pricing of Dalski’s competitors, which information he passed on to Dalski so that it might lower its price accordingly.

Following completion of the tender submission process, Mr Stanculescu, as project manager for Banksia Station, participated in the scoring of the tender submissions received by Downer. Mr Stanculescu told the Commission that he did not, at the time, turn his mind to informing anyone at Downer that he had been involved in preparing Dalski’s tender but in hindsight should have. In any event, he ultimately scored Dalski higher than its main competitor. Mr Stanculescu’s evidence was that his logic for doing so was because he had worked with the competitor before and judged it to not have the same level of experience as Dalski. He accepted, however, that his conflict of interest regarding Dalski also clouded his judgment, and that he couldn’t have provided an impartial view of Dalski in any event.

Ultimately, Dalski was awarded and completed the works at Banksia Station.

## Dalski tenders for the Birrong Station TAP project

While Mr Stanculescu had no decision-making role in the Birrong Station project, Downer had not found a replacement commissioning manager at the time and he remained in the role for that project as well.

Downer’s investigation, which Mr Stanculescu broadly accepted, included records that showed that Mr Stanculescu saved the Birrong Station BOQ, an internal Downer document, to his OneDrive account at 11:37 am on 22 November 2020. Metadata of the pricing sheet (quotation) for Birrong Station submitted by Dalski to Downer showed last authorship of the document was by Mr Stanculescu the next day at 12:32 pm. Upon Counsel Assisting putting to Mr Stanculescu that this timing suggested he had used the BOQ to prepare Dalski’s pricing submission, Mr Stanculescu opined that the timing was too close and, though he did not recall specifically, he suggested that Dalski’s pricing sheet appeared to him to have been put together “genuinely”.

Upon Counsel Assisting putting to Mr Stanculescu that certain line items were priced identically in both the BOQ and Dalski’s pricing sheet, Mr Stanculescu conceded he did not know. He agreed with Counsel’s suggestion that he, or somebody else at Dalski, had used the Downer BOQ information to prepare Dalski’s pricing submission for Birrong Station but professed no positive recollection of it.

The Commission is satisfied that Mr Stanculescu misused his position within Downer to improperly assist Dalski, a company with which he had an undeclared association, tender for contracts with Downer for works on the Banksia and Birrong station projects. That assistance included providing confidential budget and competitor’s pricing information, and manipulation of Downer’s ARCUS tender system, in order to favour Dalski. While Mr Stanculescu’s conduct in these respects clearly benefitted Dalski, the evidence does not establish to the Commission’s satisfaction that Mr Stanculescu received a financial, or other, benefit from Dalski in return, or that anyone from Dalski was knowingly involved in any impropriety.

## Corrupt conduct

### Mr Nguyen

Between June and September 2020, Mr Nguyen, in concert with Mr Cox, dishonestly used confidential TfNSW budget information he had received from Mr Abdi (who had received the information from Mr Panagakis), along with other confidential Downer budget information sourced from Mr Vardanega via Downer project manager Mr Gayed, for the purpose of securing for their company,

RJS Infrastructure, contracts with Downer for works on the Wollstonecraft Station project.

Counsel Assisting submitted that, while such conduct may potentially come within the scope of s 8(2A)(c) of the ICAC Act, it is not clear that Mr Nguyen's conduct could constitute or involve a criminal offence nor satisfy any of the other criteria in s 9(1). While Mr Nguyen and Mr Cox discussed paying Mr Vardanega a finder's fee for his assistance in relation to the Wollstonecraft Station project, they ultimately did not do so, nor is it clear that they offered to make such a payment. Similarly, neither Mr Abdi nor Mr Panagakis were paid for the information they provided, nor did Mr Nguyen or Mr Cox make an offer to pay them. Mr Nguyen and Mr Cox also discussed making a payment to Mr Gayed: however, the evidence does not suggest that they ultimately did so.

In these circumstances, the Commission agrees with Counsel Assisting's submission that it is not open on the available evidence to make a corrupt conduct finding in respect of Mr Nguyen's conduct in relation to the Wollstonecraft Station TAP project.

### **Mr Cox**

The Commission is of the same opinion as for Mr Nguyen in respect of Mr Cox's conduct in relation to the Wollstonecraft Station project.

### **Mr Abdi**

Notwithstanding that the Commission finds that it was Mr Abdi who influenced Mr Panagakis to obtain information relating to the Wollstonecraft Station and other TAP station upgrades that Mr Abdi subsequently passed on to Mr Nguyen for the benefit of RJS Infrastructure, the Commission is not sufficiently satisfied that the information was acquired in the course of Mr Abdi's official functions for TfNSW such as to bring that conduct within the scope of s 8(1)(d) of the ICAC Act, nor of any other limb of s 8.

Accordingly, the Commission makes no finding of corrupt conduct on the part of Mr Abdi in respect of the awarding of contracts on the Wollstonecraft Station TAP project.

### **Mr Panagakis**

Between June and September 2020, Mr Panagakis misused his position within TfNSW to disclose to his TfNSW colleague, Mr Abdi, the TfNSW BOQ and other confidential information relating to the Wollstonecraft, Birrong, Roseville and Banksia station projects for the purpose of assisting RJS Infrastructure obtain TfNSW work knowing that Mr Abdi was a silent partner, or at least had a financial interest, in RJS Infrastructure.

The Commission is satisfied that this conduct on Mr Panagakis' part was corrupt conduct for the purposes of s 8(1)(d) of the ICAC Act on the basis that it was conduct of a public official that involved the misuse of information or material that he had acquired in the course of his official functions, whether or not for his benefit or for the benefit of any other person.

The Commission is satisfied for the purposes of s 9(1)(b) and 9(1)(c) of the ICAC Act that, if the facts were to be proved on admissible evidence to the requisite standard of proof of the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could conclude that Mr Panagakis committed substantial breaches of the requirements of the prevailing TfNSW code of conduct (clauses 3,6,15,16), such as to constitute disciplinary offences, and/or other conduct constituting reasonable grounds for his dismissal.

His conduct, therefore, comes within the scope of s 9(1)(b) and/or 9(1)(c) of the ICAC Act, regardless of whether proceedings or action for such a disciplinary offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken (s 9(2) of the ICAC Act).

For the purpose of s 13(3A) of the ICAC Act, the Commission is satisfied that, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that Mr Panagakis committed substantial breaches of the TfNSW code of conduct, such as to constitute disciplinary offences and/or other conduct constituting reasonable grounds for his dismissal. Accordingly, the jurisdictional requirement of s 13(3A) of the ICAC Act is satisfied.

While the Commission acknowledges that Mr Panagakis may have been acting under the influence and/or manipulation of Mr Abdi, it is nonetheless satisfied for the purposes of 74BA of the ICAC Act that Mr Panagakis' conduct amounted to serious corrupt conduct given his awareness of the obligation to comply with the TfNSW code of conduct, the serious impropriety of his actions, and that he took measures to conceal them.

### **Mr Gayed**

#### **Collusive tendering**

Between May and September 2020, Mr Gayed colluded with Mr Vardanega (whom he knew to be acting on behalf of, or in concert with, RJS Infrastructure) in relation to the awarding of contracts for works on the Wollstonecraft Station TAP project.

This conduct on the part of Mr Gayed comes within s 8(2A)(a) of the ICAC Act; that is, any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve collusive tendering (s 8(2A)(a)).

However, while Mr Gayed's conduct could constitute grounds for disciplinary action under Downer's standards of business conduct (pages 7, 26–29) and/or anti-bribery and corruption policy, (namely, misconduct in the form of collusion with prospective tenderers with whom Mr Gayed had an undeclared conflict of interest), it would not satisfy the definition of "disciplinary offence" in s 9(3) of the ICAC Act on the basis that any disciplinary action under Downer's standards of business conduct would not amount to "disciplinary action under any law". Hence, any such breach falls outside the definition of "disciplinary offence" set out in s 9(3) of the ICAC Act and would, therefore, not satisfy the criteria in s 9(1)(b) of the ICAC Act.

As Mr Gayed was not relevantly a public official, s 9(1)(c) of the ICAC Act need not be considered.

Accordingly, the Commission makes no finding of corrupt conduct on the part of Mr Gayed in relation to his dealings with Mr Vardanega and Maize in respect of the awarding of contracts on the Wollstonecraft Station TAP project.

### The AVCO invoice

In October 2020, Mr Gayed dishonestly orchestrated obtaining a payment from Downer of \$13,200 to AVCO, a company with which he was associated, in relation to the hire of lighting towers at Wollstonecraft Station, which payment was ultimately reimbursable by TfNSW and which resulted in a profit to AVCO of \$7,322.

For the reasons discussed in chapter 2 and elsewhere in this report, the Commission is unable to be satisfied that the money paid to AVCO by Downer properly constituted "public funds" for the purposes of s 8(2A)(c) of the ICAC Act.

Accordingly, and on the basis that Mr Gayed's conduct does not otherwise fall within the scope of s 8 of the ICAC Act, the Commission makes no finding of corrupt conduct against Mr Gayed in respect of the AVCO invoice to Downer for the lighting hire at Wollstonecraft Station.

### Mr Vardanega

In respect of Mr Vardanega's collusion with Mr Gayed in relation to the awarding of contracts with Downer for works on the Wollstonecraft Station TAP project, the Commission is of the same opinion as for Mr Gayed, discussed above. That is, while Mr Vardanega's conduct similarly appears to come within the scope of s 8(2A)(a)

of the ICAC Act, it would not satisfy any of the criteria in s 9(1) of the ICAC Act.

Accordingly, the Commission makes no finding of corrupt conduct on the part of Mr Vardanega in respect of his dealings with Mr Gayed in relation to the awarding of contracts on the Wollstonecraft Station TAP project.

### Mr Watters

The Commission is sufficiently satisfied that the SMS messages between Mr Watters and Mr Cox discussed in this chapter referred to Mr Watters' intention to seek (or, at least, his willingness to receive) a benefit from Mr Cox in return for his assistance in securing RJS Infrastructure contracts for works with Downer.

In the absence, however, of cogent evidence that Mr Watters' conduct involved the improper expenditure of public funds, or, indeed, that any such benefit was ultimately paid to Mr Watters by RJS Infrastructure in relation to the Wollstonecraft or Birrong station projects, the Commission is not sufficiently satisfied that Mr Watters' conduct falls within the scope of s 8 nor, in any event, s 9 of the ICAC Act.

Accordingly, the Commission makes no finding of corrupt conduct on the part of Mr Watters in respect of his SMS text messages with Mr Cox in relation to the Wollstonecraft Station TAP project.

### Mr Stanculescu

On the basis of his favouritism towards Dalski in relation to the Banksia and Birrong station projects, including providing Dalski with confidential budget information and a competitor's pricing information, and his manipulation of Downer's electronic tender system to ensure Dalski could undercut its competitor, Mr Stanculescu's conduct could come within s 8(2A)(a) of the ICAC Act.

However, conduct falling within s 8 of the ICAC Act will not amount to corrupt conduct unless it could also constitute or involve one of the matters within s 9(1)(a)-(d) of the ICAC Act.

While, as he accepted, Mr Stanculescu's conduct involved at least a failure to avoid and declare a conflict of interest and thus a breach of the Downer standards of business conduct and workplace behaviour, breaches of Downer's standards of business conduct would not constitute a "disciplinary offence" for the purpose of s 9(1)(b) of the ICAC Act on the basis that any disciplinary action under Downer's standards of business conduct would not amount to "disciplinary action under any law". Hence, any such breach falls outside the definition of "disciplinary offence" set out in s 9(3) of the ICAC Act.

The evidence does not indicate that Mr Stanculescu received a financial benefit from Dalski during the time he was employed at Downer, notwithstanding the significant work he performed on Dalski's behalf. Nor is there evidence of other conduct by Mr Stanculescu that could constitute or involve a criminal offence such as would satisfy s 9(1)(a). Sections 9(1)(c) and (d) do not arise in the circumstances.

As such, the Commission makes no findings of corrupt conduct in relation to Mr Stanculescu.

## Section 74A(2) statements

In relation to the matters examined in this chapter, the Commission considers Mr Nguyen, Mr Cox, Mr Panagakis, Mr Abdi, Mr Vardanega, Mr Gayed, Mr Watters and Mr Stanculescu are affected persons.

### Tony Nguyen

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Nguyen for any offence in relation to the Wollstonecraft Station project.

### Aidan Cox

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Cox for any offence in relation to the Wollstonecraft Station project.

### Nima Abdi

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Abdi for any offence in relation to the Wollstonecraft Station project.

As Mr Abdi's employment with TfNSW has been terminated, the question of whether consideration should be given to the taking of action against him for a disciplinary offence, or the taking of action with a view to his dismissal, does not arise.

### George Panagakis

The Commission is not satisfied that Mr Panagakis' conduct in relation to the Wollstonecraft Station project could constitute or involve a criminal offence. The Commission is, therefore, not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Panagakis for any offence in relation to the Wollstonecraft Station project.

As Mr Panagakis' employment with TfNSW has been terminated, the question of whether consideration should

be given to the taking of action against him for a disciplinary offence, or the taking of action with a view to his dismissal, does not arise.

### Andrew Gayed

Mr Gayed's evidence was the subject of a declaration under s 38 of the ICAC Act and cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible and available evidence, including the Access Hire invoice records; the AVCO invoices presented to Downer; and the statements of Ms Curtis and Ms Huang.

It was submitted on behalf of Mr Gayed that there is insufficient evidence that Mr Gayed engaged in fraudulent conduct such that an offence under s 192E of the Crimes Act may have been committed in respect of the AVCO invoice to Downer, or an offence under s 87(1) of the ICAC Act may have been committed in relation to the evidence Mr Gayed gave to the Commission concerning payment for ice creams to the newsagency (that is, the Wollstonecraft Bookstall). Accordingly, it was submitted that the Commission would not form the opinion, as recommended by Counsel Assisting, that consideration be given to obtaining the advice of the DPP with respect to the prosecution for specified criminal offences.

The Commission does not accept that submission and is instead of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Gayed for the following criminal offences:

- Section 192E of the Crimes Act (fraud) in relation to the \$13,200 payment made by Downer to AVCO in respect of lighting hire for the Wollstonecraft Station project, proof of which is established to a *prima facie* level by the Access Hire invoice records; the invoices presented to Downer; and the statements of Ms Curtis and Ms Huang.

The Commission notes that Counsel Assisting submitted that this proposed offence be limited to a \$6,000 component of the \$13,200 paid by Downer to AVCO. In the circumstances in which that \$13,200 payment was invoiced by AVCO, however, the Commission is of the view that consideration should be given to seeking the advice of the DPP in relation to the entirety of the amount of the AVCO invoice.

- Section 87(1) of the ICAC Act in relation to Mr Gayed's compulsory examination evidence that he did not send Mr Vardanega the BOQ for the Wollstonecraft Station project.

- Section 87(1) of the ICAC Act in relation to Mr Gayed's evidence that \$6,000 of the amount included on AVCO's invoice in relation to lighting hire related to (undisclosed) reimbursement of expenses he incurred in paying cash to the owners of a small newsagency at Wollstonecraft Station for ice cream when the power was cut off to their store during a planned outage.

### **Benjamin Vardanega**

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Vardanega for any offence in relation to the Wollstonecraft Station project.

### **Kevin Watters**

Mr Watters' evidence was the subject of a declaration under s 38 of the ICAC Act and cannot be used against him in criminal proceedings, except in relation to prosecution for an offence under the ICAC Act.

The Commission agrees with Counsel Assistings' submission that there is insufficient admissible evidence to make out a *prima facie* case against Mr Watters for an offence against s 249B(1) of the Crimes Act beyond reasonable doubt in relation to the Wollstonecraft and Birrong station projects.

Counsel Assisting further submitted that consideration should, nonetheless, be given to obtaining the advice of the DPP with respect to the prosecution of Mr Watters for the following criminal offences:

- Section 87(1) of the ICAC Act in relation to Mr Watters' evidence that he did not seek payment in the form of a bribe from Mr Cox in connection with the award of the tender and making of progress payments to RJS infrastructure in relation to the Wollstonecraft Station packages.

- Section 87(1) of the ICAC Act in relation to Mr Watters' evidence that he did not seek payment in the form of a bribe from Mr Cox in connection with the potential award of the Birrong Station package to RJS Infrastructure.

It was submitted on behalf of Mr Watters that the Commission would not be satisfied that consideration should be given to seeking the advice of the DPP in respect of possible offences against s 87 of the ICAC Act arising from Mr Watters' evidence as to the meaning and intent of his SMS messages to Mr Cox in relation to the Wollstonecraft and Birrong Station projects; that is, that he gave knowingly untruthful evidence to the effect that they were not in furtherance of Mr Watters seeking a bribe or kickback from RJS Infrastructure.

Mr Watters submitted that there is no tenable basis upon which his evidence as to the meaning of the relevant communications could be disproved beyond a reasonable doubt. In the circumstances, the Commission agrees with this submission.

Accordingly, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Watters for an offence under s 87 of the ICAC Act.

### **Vlad Stanculescu**

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Stanculescu for any offence in relation to the Banksia and Birrong station projects.



## Chapter 12: Money for nothing?

This chapter examines the circumstances surrounding Mr Aziz's recruitment, through Chandler Macleod, of TfNSW employee Mr Panagakis and the wife of TfNSW employee Mr Abdi, Jessica Tosh, to perform work for Downer in relation to the TfNSW NIF program for which they were paid wages despite not doing any work.

It also examines the circumstances in which a company controlled by Mr Abdi, JTG Services, received payment from Downer for work purportedly done on the TfNSW NIF project at Hexham when, in fact, no such work had been done by JTG Services.

### Mr Aziz requests Chandler Macleod to employ Mr Panagakis and Ms Tosh

Around September 2019, Mr Aziz was appointed as Downer's project manager on the NIF program.

On 8 September 2019, Mr Aziz submitted a request to recruitment agency Chandler Macleod to hire two "new starters" for the purpose of performing work for Downer on the NIF project at Hexham. By the terms of Mr Aziz's request, Mr Panagakis was to be hired on a casual basis as a "Design Manager" on a rate of \$160 per hour. Ms Tosh was to be similarly hired as a "Design Coordinator" on a rate of \$96 per hour.

Evidence from Chandler Macleod obtained by the Commission confirms that both "candidates" were referred directly to Chandler Macleod by Mr Aziz with the request that they be engaged under his employ. Chandler Macleod was not given a job brief to fill, and no details of the job requirements were provided. Nor was Chandler Macleod requested by Mr Aziz to obtain qualification certificates for either candidate.

Mr Aziz advised Chandler Macleod the two were to commence in the respective roles on 10 September 2019. Evidence obtained by the Commission confirms that the

casual employment arrangement remained in place for a total of six weeks in Mr Panagakis' case, and eight weeks in Ms Tosh's case.

In respect of the six weekly timesheets submitted to Chandler Macleod, each approved by Mr Aziz, Mr Panagakis was paid a total of \$25,571 (plus \$2,429.25 in superannuation). In the case of Ms Tosh, eight timesheets were submitted, each also approved by Mr Aziz, resulting in a total payment of \$22,263.41 (plus \$2,115.02 in superannuation).

The arrangements between Chandler Macleod and Downer were such that Mr Panagakis and Ms Tosh were paid directly by Chandler Macleod, which subsequently invoiced Downer for each at a higher "charge rate". Downer was unable to locate any documents evidencing the performance of work by either Mr Panagakis or Ms Tosh in relation to the NIF project.

### The evidence

In his evidence, Mr Aziz admitted that the purported employment of Mr Panagakis and Ms Tosh was, in fact, a sham, and that Mr Aziz had submitted the request for their employment to Chandler Macleod in the knowledge that neither would undertake any actual work for Downer. He agreed that the underlying reason for the sham employment arrangement was in order that he and Mr Abdi might "enrich" themselves by sharing in the wages purportedly earned by Mr Panagakis and Ms Tosh. Mr Aziz said that he and Mr Abdi had conceived the idea following Mr Panagakis expressing to Mr Abdi his interest in seeking alternative employment with Downer.

Mr Aziz said that he never spoke to either Mr Panagakis or Ms Tosh about the proposed "employment" via Chandler Macleod, and that the arrangement was made by Mr Abdi, who had informed Mr Aziz that Mr Panagakis was "onboard with it". He said that he assumed that Mr Abdi had filled out Mr Tosh's Chandler

Macleod registration form and that, to his understanding, Ms Tosh was not aware of the scheme.

Mr Aziz said that the false timesheets for Mr Panagakis and Ms Tosh that were submitted to Chandler Macleod were prepared by either Mr Panagakis, Mr Abdi or himself. He admitted that the timesheets for both Mr Panagakis and Ms Tosh were falsely approved for payment by himself.

For his part, Mr Abdi admitted his role in orchestrating, with Mr Aziz, the fictitious employment of his wife and Mr Panagakis. He admitted that he used his wife's identity to "set up her up with Chandler Macleod" and that he had given copies of her identity documents to Mr Aziz for that purpose without her knowledge.

Mr Abdi told the Commission that the Chandler Macleod payments were made directly into a bank account that he had told his wife to open. He said that his wife was unaware of the true nature of the payments and that he had told her lies to the effect that they related to his own business and/or work that he was doing, and that she shouldn't pay any attention to them. Ms Tosh was not called to give evidence at the public inquiry, and the Commission makes no findings in relation to her.

As to Mr Panagakis' involvement in the scheme, Mr Abdi told the Commission that it was he who had initially approached Mr Panagakis. He could not recall the specific conversation beyond suggesting it would have been along the lines of "we've got this thing if you're interested". He said that, aside from Mr Panagakis expressing some concerns about the income tax implications, he did not recall Mr Panagakis expressing particular concerns about being involved in submitting false timesheets.

Mr Panagakis also admitted to his involvement in the fraudulent Chandler Macleod employment scheme. He agreed that Mr Abdi had approached him with an idea that, without having to do anything, he could be "signed up for a contract in a technical manager role but receiving the income and splitting to him [Mr Abdi] and Mr Aziz". He conceded that he had filled out the relevant Chandler Macleod application documents himself, and had submitted with them the requisite identification documents, albeit he was unable to recall the exact details.

Mr Panagakis admitted that he received money from Chandler Macleod for work he never did, on the basis of timesheets that he believed Mr Aziz must have altered. He said that he had provided Mr Abdi with his Chandler Macleod password to pass on to Mr Aziz, who had requested it on the basis that "he [Mr Aziz] just wants to keep control".

As to who actually prepared the false timesheets submitted to Chandler Macleod, Mr Abdi's evidence conflicted with the evidence of Mr Aziz noted above.

Mr Abdi said that he gave the Chandler Macleod passwords assigned to Ms Tosh and Mr Panagakis to Mr Aziz, and that it was solely Mr Aziz who had prepared the false timesheets and submitted them to Chandler Macleod. He said that Mr Aziz had told him that he needed to prepare the timesheets because "he knows the hours and stuff." Mr Panagakis also gave evidence that he thought it must have been Mr Aziz who had submitted the false timesheets to Chandler Macleod.

The Commission considers the evidence of Mr Abdi and Mr Panagakis as being the more plausible in this respect, given that, as the relevant Downer officer responsible for approving the timesheets, Mr Aziz would have been better placed to ensure the hours falsely submitted as having been worked by Ms Tosh and Mr Panagakis would not appear anomalous or otherwise arouse suspicion within Downer.

It was common ground between Mr Aziz and Mr Abdi that they shared equally between them the wages that were paid to Ms Tosh, and that the wages paid to Mr Panagakis were apportioned 50 per cent to Mr Panagakis and 25 per cent each to Mr Aziz and Mr Abdi. Mr Aziz told the Commission that Mr Abdi paid him his share of the Chandler Macleod wages in cash.

Mr Panagakis, however, told the Commission that he in fact withdrew 85 per cent of the wages paid by Chandler Macleod, which he gave to Mr Abdi in cash, and that he did not know what Mr Abdi then did with the money.

On the basis of banking records tendered in evidence there is some support for Mr Panagakis' claim that he withdrew 85 per cent of the Chandler Macleod wages. That evidence, however, does not establish how much of that withdrawn cash Mr Panagakis actually gave to Mr Abdi.

It was submitted on behalf of Mr Panagakis that the Commission would find as a matter of fact that Mr Panagakis did indeed pay to Mr Abdi 85 per cent of the wages he was paid by Chandler Macleod. It is unnecessary for present purposes for the Commission to make a finding in relation to the exact amounts split between Mr Panagakis, Mr Abdi and Mr Aziz. It suffices merely to note that, on the evidence before it, the Commission finds that each of the three were willing and active participants in the scheme and shared in the proceeds.

It was submitted by Mr Aziz that he never, in fact, received any funds from the Chandler Macleod scheme. This is notwithstanding that Mr Aziz agreed in evidence, twice, that he received his share of the bogus Chandler Macleod wages from Mr Abdi in cash. According to that submission, Mr Aziz incorrectly admitted to having received those cash payments from Mr Abdi because he was panicked in the witness box. The Commission acknowledges that, aside from relevant admissions, there

was no objective evidence of this cash being received from Mr Abdi. Mr Aziz was legally represented, and no attempt was made to correct or clarify the clear admissions that he made.

It follows that the Commission does not accept that Mr Aziz's own evidence on this matter was given in error.

### Mr. Panagakis' compulsory examination evidence

The evidence Mr Panagakis gave in the public inquiry was in stark contrast to evidence he had previously given in a compulsory examination on 19 October 2022.

During his compulsory examination, Mr Panagakis denied any impropriety in relation to his employment by Chandler Macleod. He said that he received his full income from Chandler Macleod and denied that either Mr Aziz or Mr Abdi received any part of that income.

Shortly prior to his appearance at the public inquiry, Mr Panagakis informed the Commission, via his solicitor, that he wished to clarify aspects of the evidence he had given during his compulsory examination. Upon Mr Panagakis' initial appearance before the public inquiry on 11 April 2023, he sought, and was granted, leave to read into evidence a statement he had previously prepared. In that statement, Mr Panagakis agreed that he had done no work for Chandler Macleod.

Upon further questioning by Counsel Assisting, Mr Panagakis confirmed that he had been untruthful in his compulsory examination evidence in:

- denying that anyone was receiving a portion of his Chandler Macleod income as a kickback for having provided him with the "work" in the first place
- denying that Mr Aziz was taking a cut from his Chandler Macleod income

- denying that Mr Abdi was taking a cut from his Chandler Macleod income
- stating that he received his full income from Chandler Macleod and had not transferred any of it to anybody else.

Mr Panagakis asserted that this was the reason why he wanted to qualify his compulsory examination evidence by way of the statement he read at the commencement of his public inquiry evidence. He attributed his earlier untruthfulness to being influenced by feelings of fear and paranoia about retributions from other people. He agreed, however, that, aside from the password issue noted above, he had not previously raised this issue in either his compulsory examination nor in his public inquiry evidence.

The Commission notes that Mr Panagakis did not seek to correct his evidence in relation to the Chandler Macleod scheme until after Mr Abdi and Mr Aziz had both given their evidence as to the fraudulent scheme. In submissions, he supplemented his response by adding health issues as an explanation for his false evidence. All these explanations came a significant time after he gave false evidence to the Commission. His concerns as to paranoia and fear of retribution also have to be viewed in a context where restrictions existed under s 112 of the ICAC Act in relation to dissemination of his compulsory examination evidence.

### JTG Services' invoices to Downer

Shortly after the Chandler Macleod false employment scheme came to an end, Mr Aziz and Mr Abdi devised another scheme to obtain money.

In the first half of 2020, three invoices totalling \$207,353 (excluding GST) were issued to Downer by JTG Services, the company controlled by Mr Abdi, for car-marker design services purportedly carried out by JTG Services for the purposes of the TfNSW NIF project. Details of these are set out in the following table:

**Table 5: JTG Services sham invoices for NIF SSEW projects**

Date	Invoice No	Narration on invoice	Value (excluding GST)
15/01/2020	2147	CM CAD services, survey and set-out for NIF SSEW Project Northern Sites (Portion 1)	\$37,611
25/05/2020	2274	CM As Built surveys for NIF SSEW Project Portion 2 incl. update of GIS data and coordinates	\$81,414
23/06/2020	2305	CM As Built survey coordinates for NIF SSEW Project Portion 3 South Line (Illawarra) stations including update of GIS data and ASDO data correlation	\$88,328

Both Mr Aziz and Mr Abdi admitted in their evidence to the Commission that these invoices were a sham, and that no work or services were, in fact, provided to Downer by JTG Services in respect of them.

### How did the scheme come about?

Mr Aziz told the Commission that he and Mr Abdi jointly agreed that JTG Services, which Mr Abdi controlled, would issue the fraudulent invoices that Mr Aziz would subsequently approve for payment by Downer.

Mr Abdi's evidence in relation to the fraudulent invoices generally accorded with that of Mr Aziz, although there were some aspects as to which their evidence conflicted.

It was common ground that the agreement between Mr Aziz and Mr Abdi was that they would each take a 50 per cent share of the total amount paid by Downer to JTG Services in payment of the false invoices, and that Mr Aziz would receive his 50 per cent share of those funds by way of his company, Tresca, falsely invoicing JTG Services for the relevant amount.

For each of the three JTG Services invoices, Mr Aziz agreed that a fair degree of planning was involved, including ensuring that appropriate narrations appeared on the invoices to ensure payment of the invoices by Downer without undue enquiry. Mr Aziz said that the invoices had to refer to work that was already completed, so that JTG Services could essentially claim that work as its own. According to Mr Aziz, the money used by Downer to pay these three invoices was derived from a "healthy" budget funded by TfNSW.

As to how Mr Aziz could be so confident that the false JTG Services invoices would not be queried internally within Downer, he attributed it in part to the lack of internal controls at Downer. Mr Aziz's confidence was also due to the fact that, in all three cases, the work falsely invoiced by JTG Services had already been carried out in-house by Downer employees (in the case of the second and third invoices dated 25 May 2020 and 23 June 2020, respectively), or had been rendered unnecessary (in the case of the first invoice dated 15 January 2020). Mr Aziz said that he and Mr Abdi had discussed that, if asked by anybody whether JTG Services had performed the work, Mr Abdi would falsely state that he performed car markings on rail platforms.

### The JTG Services invoices

In his evidence to the Commission, Mr Aziz implied that it was Mr Abdi who had prepared the false JTG Services invoices and issued them to Downer, albeit he did not give that evidence explicitly. Mr Abdi, however, said that it was not he who had drafted the invoices and submitted them

to Downer; rather, he thought it was Mr Aziz who had done so. He said that he thought Mr Aziz may have told him that he had prepared the invoices, but wasn't sure.

As to how Mr Aziz might have had a copy of the JTG Services invoice template, and access to the `steve.johnson@jtgservices.com.au` email address from which the invoices were sent to Downer, Mr Abdi said that he assumed Mr Aziz must have obtained a copy of the template, and access to the JTG Services email address, from Mr Nguyen. As noted elsewhere in this report, it was Mr Nguyen who, in 2019, had initially set up JTG Services for Mr Abdi, and who had created the JTG Services invoice template, in relation to IWC projects.

Mr Abdi told the Commission that Mr Nguyen was not a party to the false invoicing to Downer, nor did he receive any share of the money paid by Downer in respect of those invoices. He doubted that Mr Nguyen would have received a cut from Mr Aziz without him being aware of it. Neither Mr Aziz nor Mr Nguyen mentioned, in their evidence, any involvement of Mr Nguyen in the scheme.

On the evidence of both Mr Aziz and Mr Abdi, and in the absence of evidence to the contrary, the Commission is satisfied that Mr Nguyen was not involved in the scheme.

Additionally, it appears likely that the notations on each of the JTG Services invoices describing the purported works for which payment by Downer was required could only have come from Mr Aziz, given his far greater familiarity with the relevant project, and hence the means by which to ensure the works quoted on the false invoices would go undetected. The Commission is satisfied that it is probable that Mr Aziz did draft the invoices, or, at the least, actively contributed to their drafting in conjunction with Mr Abdi.

### The splits

Mr Aziz told the Commission that he did not initially take the entirety of his agreed 50 per cent share. He agreed that he used Tresca to invoice JTG Services for the amount of \$29,486, being his share of the first of the three false invoices paid by Downer. As to the two subsequent JTG Services invoices, Mr Aziz said that he had "a change of heart" and told Mr Abdi that he didn't want to be paid the rest of it. He attributed this change of heart to a realisation that "it was just wrong. I was not comfortable with it".

Mr Aziz said, however, that later, in 2021, Mr Abdi wanted to pay him the remainder of his share of the false JTG Services invoices. He said that he told Mr Abdi that he wasn't interested in taking the money for doing nothing, but that if Mr Abdi had work that he wanted done on his farm (being Mr Abdi's property at Glenorie)

then he (Mr Aziz) would be happy to do it, if Mr Abdi was concerned about having that money in his account and wanted to spend it.

Mr Aziz said that he subsequently worked on Mr Abdi's farm and thereafter Tresca invoiced JTG Services for his remaining share of the profits which had been obtained from Downer by way of the false JTG Services invoices. Those funds were received into Tresca's bank account, which Mr Aziz controlled.

Contrary to the evidence outlined above, it was submitted on behalf of Mr Aziz that he did not receive any benefit of any kind from Mr Abdi by way of the false JTG Services invoices. This was put on the basis that there was no evidence upon which the Commission would be satisfied otherwise. The Commission does not accept that submission, particularly in light of its earlier expressed findings as to Mr Aziz's involvement.

## Public funds?

A further question arose during the submissions process querying whether the Commission's jurisdiction pursuant to s 8(2A)(c) of the ICAC Act extended to some payments made by Downer to third parties.

Counsel appearing for Downer submitted that it should not be assumed that any payments made by Downer to third parties were reimbursed by TfNSW, for those amounts may have been paid out of Downer's lump sum design fee or preliminaries fee, not reimbursable costs. In those circumstances, the money would have come out of the lump sums already required to be paid by TfNSW to Downer under the MCC, which was in respect of non-reimbursable work. It was contended that this "assumption" was arguably evident in the course of the evidence relating to, first, the invoices issued by JTG Services for NIF work (which were approved by Mr Aziz) and, secondly, payments to Chandler Macleod in respect of payments made to Mr Panagakis and Ms Tosh.

The Commission has taken Downer's submission into account and has treated with caution instances where Downer has made payments to those third parties. For the reasons set out below, the Commission is not satisfied that it has jurisdiction pursuant to s 8(2A)(c) of the ICAC Act to make any corrupt conduct findings in relation to:

- invoices issued by JTG Services for NIF work, which were approved by Mr Aziz
- payments to Chandler Macleod in respect of payments made to Mr Panagakis and Ms Tosh

because the relevant funds as paid by Downer would not constitute "public funds".

The background to these payments is as follows:

- As set out in this chapter, the three invoices that JTG Services submitted to Downer purportedly related to design documents for car markers. The car-marking design documentation referred to in JTG Services' invoices to Downer would, if in fact created, comprise design work or preliminaries under the NIF MCC. Separately, the physical installation of car markers was reimbursable work.
- As set out in this chapter, Chandler Macleod purportedly employed on behalf of Downer both Ms Tosh as a design coordinator and Mr Panagakis as a design manager in respect of the NIF MCC at Hexham Station.

It is important to understand the scope of "Reimbursable Work". In this case, it is necessary to consider a different MCC, specifically the NIF MCC at Hexham Station. The contractual terms relating to "Reimbursable Work" and "Reimbursable Costs" under the NIF MCC, and payment from TfNSW to Downer in these respects, are materially identical to those contained in the MCC for North Strathfield Station referred to above. The following provisions are noted:

- "Reimbursable Work" is defined in clause 1.1 as the entirety of the contractor's activities other than the design work and the preliminaries.
- "Design Work" under the NIF MCC means the design work to be carried out by the contractor (that is, Downer) in designing the works, including the completion of any of the initial design documents and (if applicable) the development of the preliminary design: clause 1.1.
- "Preliminaries" means that part of the contractor's activities other than the design work or the reimbursable work, including those tasks or matters specified in Schedule 18, which relevantly includes "providing the Contractor's ... site survey staff...".
- Under clause 11.1, Downer may invoice TfNSW for the costs of reimbursable work, meaning the amounts properly and actually incurred and payable by Downer to subcontractors in accordance with the subcontract. These "Reimbursable Costs" are separate from the design fees, preliminaries fees and management fees. The definition of each of these under the NIF MCC is set out below (clause 1.1):
  - a) "Design Fee" means the lump sum payable by TfNSW to Downer for performing the Design Work set out, and described as such in Schedule 2, as adjusted by any Design Fee Adjustment;

- b) *“Management Fee” means the lump sum amount payable by TfNSW to Downer set out in Schedule 2, as adjusted by any Management Fee Adjustment;*
  - c) *“Preliminaries Fee” means the lump sum payable by TfNSW to Downer for performance of the Preliminaries, set out and described as such in Schedule 2, as adjusted by any Preliminaries Fee Adjustment.*
- “Design Fee Adjustment” is defined to mean (clause 1.1 NIF MCC):
    - a) *an increase or decrease to the Design Fee valued in accordance with clause 6.4(c) in respect of any of the following:*
      - (i) *a Rail Transport Agency’s exercise of its statutory functions or powers, within the meaning described in clause 1.6(c);*
      - (ii) *any Change in Codes and Standards, within the meaning described in clause 2.2(b);*
      - (iii) *any Change in Law, within the meaning described in clause 2.2(c);*
      - (iv) *the discovery of Latent Conditions on the Site within the meaning described in clause 3.5(c)(iii)B;*
      - (v) *any Valuable Find within the meaning described in clause 3.7(c);*
    - and*
    - b) *any Variation, which will be valued in accordance with clause 6.4.*
  - Similar definitions are provided in the NIF MCC in relation to the terms “Management Fee Adjustment” and “Preliminaries Fee Adjustment”: clause 1.1.
  - The NIF MCC imposed no obligation on Downer to account for and/or return any money comprising the lump sums for the design fee or the preliminaries fee. The only obligation on Downer was to confirm by way of statutory declaration that employees and subcontractors (including subcontractors and consultants) had been paid: clause 11.6(a)(iii)(A) and Schedule 12, Annexure A NIF MCC.
- JTG Services – Mr Aziz said the design work for the three JTG Services invoices was either performed in-house by Downer, or “mitigated” as an alternative strategy had been developed that rendered one of the surveys and plans no longer necessary. Consequently, there was money left over in a “healthy” budget, which Mr Aziz fraudulently appropriated to pay the amounts claimed in JTG Services’ three invoices.
  - Ms Tosh and Mr Panagakis – Other than by saying it was part of the NIF budget and that no concerns were raised with him in respect of these payments, Mr Aziz was not asked to elaborate as to how it was that Ms Tosh and Mr Panagakis were able to receive payment following their submission of timesheets in respect of un-performed work. The answer probably lies in the fact that Mr Aziz was the approver of Ms Tosh and Mr Panagakis’ timesheets.

While Downer was required to submit the statutory declaration in accordance with clause 11.6(a)(iii)(A) of the NIF MCC, it was not required to obtain TfNSW’s prior approval with respect to the employees and consultants it engaged, nor did it have to show separately any amounts claimed by way of payment from TfNSW on account of employees or consultants (see clause 11.2(c)(ii)(A) in respect of subcontractors). The utmost good faith warranty and contractual obligations concerning ensuring probity also did not apply to Downer’s administration of its subcontracts and tendering processes (if any) with consultants: see clauses 2.1, 7.1, 7.15.

The combination of these contractual provisions suggests that, while TfNSW required proof that Downer had made all relevant payments to employees and subcontractors (including consultants), the level of interest it took in respect of Downer’s arrangements with its employees and consultants was significantly less than with respect to subcontractors in relation to reimbursable work.

Contrary to the arrangement that applied in respect of reimbursable costs, it seems the objective intention of the parties in relation to the design fee and the preliminaries fee was that, if Downer was able to complete these works within their lump sum budgets, it was able to keep any remaining money. Alternatively, if Downer had to expend more money than was allocated by way of the lump sum payment to complete the design work and preliminaries (other than in respect of variations for design work or design fee adjustments), it would have to bear that additional cost.

Since the payments referred to above relate to non-reimbursable costs, the Commission is not satisfied that s 8(2A)(c) provides a basis for it to make any corrupt

During the public inquiry, Mr Aziz gave the following evidence in relation to the money used to pay:

conduct findings in relation to the people identified below because those funds as paid by Downer would not constitute “public funds”.

## Corrupt conduct

### Mr Abdi

The Commission finds that, in late-2019/early-2020, Mr Abdi colluded with Mr Aziz to register Ms Tosh and Mr Panagakis with the employment agency Chandler Macleod to enable payments by Chandler Macleod to Ms Tosh and Mr Panagakis for work for Downer on TfNSW projects that was never performed. Mr Abdi filled out the registration forms and provided the necessary personal information for Ms Tosh, had her open a bank account to receive proceeds of the scheme, and entered false information in timesheets in relation to her non-existent work.

In the first half of 2020, Mr Abdi issued to Downer and Mr Aziz approved for payment three “sham” JTG Services invoices, in the amount of over \$207,000, in relation to which no work was performed. Mr Abdi and Mr Aziz jointly decided on the appropriate narration to ensure payment without undue inquiry.

In relation to s 8(2A)(c) of the ICAC Act, for the reasons stated in chapter 2, the Commission cannot be satisfied that the funds as paid by Downer would constitute “public funds” for the purpose of that section.

In these circumstances, the Commission does not make a finding of corrupt conduct in relation to Mr Abdi for his involvement in this conduct.

### Mr Aziz

The Commission finds that, in late-2019/early-2020, Mr Aziz colluded with Mr Abdi to register Ms Tosh and Mr Panagakis with the employment agency Chandler Macleod to enable payments by Chandler Macleod to Ms Tosh and Mr Panagakis for work for Downer on TfNSW projects that was never performed. Mr Aziz arranged for Ms Tosh and Mr Panagakis to be registered with Chandler Macleod, acted as a fictitious referee for each of them, entered false information in their timesheets and approved their wage payments.

In the first half of 2020, Mr Aziz approved for payment three “sham” JTG Services invoices, in the amount of over \$207,000, in relation to which no work was performed. Mr Abdi and Mr Aziz jointly decided on the appropriate narration to ensure payment without undue inquiry.

In relation to s 8(2A)(c) of the ICAC Act, for the reasons stated in chapter 2, the Commission cannot be satisfied

that the funds as paid by Downer would constitute “public funds” for the purpose of that section.

In these circumstances, the Commission does not make a finding of corrupt conduct in relation to Mr Aziz for his involvement in this conduct.

### Mr Panagakis

The Commission finds that, in late-2019/early-2020, Mr Panagakis was registered with the employment agency Chandler Macleod to enable payments by Chandler Macleod to him for work for Downer on TfNSW projects that was never performed. Mr Panagakis entered personal information on the registration form and false information on his timesheets, and agreed with Mr Abdi to pay Mr Panagakis a proportion of his earnings.

In relation to s 8(2A)(c) of the ICAC Act, for the reasons stated in chapter 2, the Commission cannot be satisfied that the funds as paid by Downer would constitute “public funds” for the purpose of that section.

In these circumstances, the Commission does not make a finding of corrupt conduct in relation to Mr Panagakis for his involvement in this conduct.

## Section 74A(2) statements

In relation to the conduct dealt with in this chapter, the Commission considers that Mr Aziz, Mr Abdi and Mr Panagakis are affected persons.

### Abdal Aziz

Mr Aziz’s evidence was the subject of a declaration under s 38 of the ICAC Act and cannot, therefore, be used against him in criminal proceedings, except in relation to the prosecution of an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible and available evidence including:

- the false JTG Services invoices
- the evidence of other witnesses
- Downer’s business records showing Mr Aziz’s involvement in the scheme
- the Tresca invoice to JTG Services at or around the time that payments were made in connection with the JTG Services invoices by Downer
- evidence from Downer that no records exist in respect of the works itemised on the three invoices on the JTG Services letterhead submitted to, and paid by, Downer.

In respect of Mr Aziz’s conduct in relation to the Chandler Macleod false employment scheme, the Commission

is satisfied that other admissible evidence is available, including the evidence of other witnesses; Downer and Chandler Macleod business records; and the evidence from Downer that no records exist in respect of any works purportedly carried out on Downer's behalf by Ms Tosh and/or Mr Panagakis.

It was submitted on behalf of Mr Aziz, essentially, that there is insufficient admissible evidence that would be available in relation to both the Chandler Macleod scheme and the subsequent JTG Services false-invoicing scheme upon which the Commission might form the opinion that consideration be given to obtaining the advice of the DPP with respect to the prosecution of Mr Aziz for a specified criminal offence. The Commission does not accept that submission.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Aziz for the following criminal offences:

1. An offence(s) under s 192E (fraud) of the Crimes Act in relation to the payments obtained from Downer by JTG Services for work that was never performed.
2. An offence(s) under s 192E (fraud) of the Crimes Act (by way of joint criminal enterprise with Mr Abdi and Mr Panagakis) in relation to the payments obtained from Chandler Macleod for Ms Tosh and Mr Panagakis for work that was never performed.

Counsel Assisting further submitted that the Commission should also express an opinion that consideration should be given to obtaining the advice of the DPP with respect to prosecution for an offence under s 156 of the Crimes Act (larceny by a clerk or servant). The Commission declines to do so, accepting submissions on Mr Aziz's behalf that the conduct in question does not readily satisfy the element of stealing by a clerk or servant.

### Nima Abdi

Mr Abdi's evidence was the subject of a declaration under s 38 of the ICAC Act and cannot, therefore, be used against him in criminal proceedings, except in relation to the prosecution of an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible evidence that would be available including:

- the false JTG Services invoices
- the evidence of other witnesses
- Downer's business records showing Mr Abdi's involvement in the scheme

- the Tresca invoice to JTG Services at or around the time that payments were made in connection with the JTG Services invoices by Downer
- evidence from Downer that no records exist in respect of the works itemised on the three invoices on the JTG Services letterhead submitted to, and paid by, Downer.

In respect of Mr Abdi's conduct in relation to the Chandler Macleod false employment scheme, the Commission is satisfied that other admissible evidence is available, including the evidence of other witnesses; Downer and Chandler Macleod business records; and evidence from Downer that no records exist in respect of any works purportedly carried out on Downer's behalf by Ms Tosh and/or Mr Panagakis.

It was submitted on behalf of Mr Abdi that the Commission would not be of the opinion that there would be sufficient admissible evidence in respect of which the Commission would be satisfied that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Abdi for specified criminal offences in relation to either the Chandler Macleod false employment scheme or the false JTG Services invoices. It was further submitted that the Commission would have some concerns as to the credibility and/or reliability of the evidence of Mr Aziz on the issues.

The Commission acknowledges Mr Abdi's submission in relation to the reliability of Mr Aziz's evidence (and, indeed, the submission of Counsel Assisting to similar effect). The Commission does not, however, accept the overarching submission as to the sufficiency of other evidence that would be available.

Accordingly, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Abdi for the following criminal offences:

1. An offence(s) under s 192E of the Crimes Act in relation to the payments obtained from Downer by JTG Services for work that was never performed.
2. An offence(s) under s 192E of the Crimes Act (by way of joint criminal enterprise with Mr Aziz and Mr Panagakis) in relation to the payments by Chandler Macleod to Ms Tosh and Mr Panagakis for work that was never performed.

Counsel Assisting further submitted that the Commission should also express an opinion that consideration should be given to obtaining advice of the DPP with respect to prosecution for an offence under s 156 of the Crimes Act (larceny by a clerk). The Commission declines to do so, accepting submissions on Mr Abdi's behalf that the



conduct in question does not readily satisfy the element of stealing by a clerk or servant.

## George Panagakis

Mr Panagakis' evidence was the subject of a declaration under s 38 of the ICAC Act and cannot, therefore, be used against him in criminal proceedings, except in relation to the prosecution of an offence under the ICAC Act. However, the Commission is satisfied that there is other admissible evidence that would be available including the evidence of other witnesses; financial records of Chandler Macleod payments to Mr Panagakis; and evidence from Downer that no records exist in respect of any works purportedly carried out on Downer's behalf by Mr Panagakis.

It was submitted on behalf of Mr Panagakis that the Commission should exercise its discretion to not consider obtaining the advice of the DPP with respect to the prosecution of Mr Panagakis for a specified criminal offence. This was put on the basis that the Commission "would have regard to the honest and frank cooperation provided by Mr Panagakis, his limited role in the scheme, his vulnerabilities, and the limited benefit he received".

The Commission is unable to accept that submission. While it is acknowledged that Mr Panagakis appears to have played a lesser role in the scheme than Mr Aziz and Mr Abdi, and that he may have been under a degree of influence by Mr Abdi, the Commission is nonetheless satisfied that Mr Panagakis was a willing participant in the scheme.

The Commission is, therefore, of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Panagakis for an offence under s 192E (fraud) of the Crimes Act (by way of joint criminal enterprise with Mr Aziz and Mr Abdi) in relation to the payments by Chandler Macleod to Mr Panagakis for work that was never performed.

As to the false compulsory examination evidence in relation to the Chandler Macleod scheme that Mr Panagakis ultimately admitted to having given, Counsel Assisting submitted that, although Mr Panagakis corrected the record in respect of that false evidence, he did not do so until after both Mr Abdi and Mr Aziz had given their evidence in the public inquiry, some six months after Mr Panagakis had given the false evidence. Counsel Assisting submitted that these factors detract from the value of Mr Panagakis' correction such that he should not be afforded the benefit of those parts of the Commission's cooperation policy by which the Commission may give consideration to exercising its discretion to not obtaining the advice of the DPP for the prosecution of a witness for a specified offence.

The Commission accepts that submission and, accordingly, is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Panagakis for an offence under s 87(1) of the ICAC Act in relation to giving false evidence, namely:

- (i) having performed actual work in exchange for the money paid to him on behalf of Downer by Chandler Macleod; and
- (ii) not providing any of the money he received from Chandler Macleod to Mr Abdi and/or Mr Aziz.

Counsel Assisting further submitted that the Commission should also express an opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Panagakis for an offence under s 156 of the Crimes Act (larceny by a clerk). The Commission declines to do so, accepting that the conduct in question does not readily satisfy the element of stealing by a clerk or servant.

# Chapter 13: Corruption prevention – Inner West Council

This investigation has uncovered serious corrupt conduct by public officials and contractors at IWC.

This chapter sets out the weaknesses in relevant processes and oversight at IWC that failed to prevent or detect this conduct, which included:

- poor enforcement of procurement rules
- deficiencies in the management of building projects and personnel
- poor oversight of conflicts of interest between IWC officers and contractors.

IWC has already made various enhancements to relevant systems to improve corruption prevention. However, the Commission makes several recommendations to IWC aimed at resolving issues not yet addressed and/or ensuring any enhancements are implemented effectively.

## Procurement

The corrupt conduct observed at IWC occurred with respect to the procurement of contractors to undertake building and renovation projects for local civic buildings and community amenities. For such projects, Mr Nguyen corruptly used his position as a public official to benefit both himself and contractors with which he was associated. He awarded projects to these contractors at inflated prices while concealing relevant associations.

At IWC, as with many public authorities, procurement controls were set out under a framework that included policies and procedures aimed at ensuring fairness and value for money in procurement, as well as the prevention of corrupt conduct. For example, the IWC procurement framework included a requirement that public officials undertake a competitive process to select contractors, which reduced the risk of favouritism. Similarly, mandating independent assessment of contractor proposals aimed to ensure adequate scrutiny over pricing and the credentials of supplier businesses.

However, the Commission frequently observes in its investigations that corrupt schemes involve the circumvention of such requirements. This can occur because the procurement framework is not properly enforced and/or is lacking in certain respects. This investigation has revealed issues with IWC's framework, namely:

- poor enforcement of process requirements
- poor enforcement of the use of pre-approved supplier panels
- poor processes for receiving contractor quotations
- insufficient evaluation of contractor quotations
- insufficient review of contractor quotations
- insufficient supplier due diligence
- insufficient oversight of contract variations.

These weaknesses effectively afforded Mr Nguyen end-to-end control over procurement decision-making, enabling him to award IWC contracts for corrupt benefit.

## Poor enforcement of process requirements

At IWC, the procurement procedures manual in force at the time of the corrupt conduct (the procurement manual) required the procuring officer to:

- obtain at least one quotation for procurements between \$5,000 and \$10,000
- obtain at least three quotes for procurements between \$10,000 and the tender threshold (which was \$150,000 prior to 24 June 2019 and \$250,000 thereafter)
- conduct a public tender or select tender for procurements valued above the tender threshold.

However, Mr Nguyen avoided compliance with these requirements by:

- order splitting, that is, reducing the value of procurements by splitting them into smaller orders
- simply ignoring them.

### Order splitting

Mr Nguyen circumvented rules relating to the procurement method by splitting procurements into smaller orders. The IWC procurement policy in force at the time specifically prohibited this order splitting, yet Mr Nguyen's conduct was never detected.

For example, in 2019, Mr Nguyen split painting work at Leichhardt Oval into three separate procurements, each valued at under \$10,000. This allowed him to award each job to Constructicon on the basis of one quotation, when three quotations would have been required had the work been treated as one job. The details of each job were:

- scoreboard painting totalling \$5,445 (awarded 13 February)
- miscellaneous painting totalling \$8,646 (awarded 19 February)
- changeroom painting totalling \$5,478 (awarded 19 February).

Similarly, Mr Nguyen split projects valued above the tender threshold into smaller component jobs to avoid having to undertake a tender process. For example, with respect to the refurbishment of Mervyn Fletcher Hall in Haberfield, Mr Nguyen split the project into three separate procurements awarded to two favoured companies:

- On 12 July 2019, Marble Arch was awarded accessible-ramp and external works totalling \$81,373.

- On 19 July 2019, Constructicon was awarded hall-refurbishment work totalling \$133,940. This was followed by 12 variations totalling \$40,904, which was 30 per cent of the original order.
- On 23 July 2019, Constructicon was awarded roof-restoration and external works totalling \$81,607.

If rightly considered as one project, the hall refurbishment was valued over the \$250,000 tender threshold. The more rigorous requirements of a tender process would have restricted Mr Nguyen's capacity to manipulate quotation amounts, as these quotations would have been received centrally (as discussed in the "Poor processes for receiving contractor quotations" section below). A tender process also would have seen Mr Nguyen's recommended contractors subjected to more scrutiny by a three-member tender evaluation committee, likely preventing him from so easily engaging favoured suppliers.

Mr Nguyen confirmed to the Commission that he deliberately split orders:

*[Counsel Assisting]: And I think you said yesterday there were some jobs where you kept things small, is that right, to be able to – ?*

*[Mr Nguyen]: To keep it under the, the one quote system, yes.*

*[Q]: Right. And did you also break projects up until [sic] stages to enable that to happen?*

*[A]: I would have, yes. Yes.*

The capacity for a public authority to detect order splitting can be enhanced by basic procurement expenditure analysis. The Commission understands that IWC has developed real-time dashboards to provide oversight of its

procurement spend, including a specific dashboard that aims to assist in detecting potential order splitting.

If properly implemented, such a dashboard would address the issues outlined above. Consequently, the Commission does not make a recommendation on this issue. However, as part of Recommendation 7, IWC should obtain assurance that this new measure is working as intended.

Detection and prevention of order splitting is also enhanced where there is adequate project oversight (as discussed in the “Oversight of projects” section below). Enforced centralised oversight of procurements can also assist (as discussed in the “Poor processes for receiving contractor quotations” section below).

### Ignoring process requirements

On two occasions, Mr Nguyen simply ignored relevant process requirements. On the first occasion, he failed to obtain the required number of quotations and on the second he failed to conduct a mandated tender process.

In April 2018, Constructicon was engaged on the May Murray Childcare Centre external renewal works project on the basis of only two written quotes. This was despite the project being valued at over \$45,000, which was well above the \$10,000 threshold for obtaining three quotes.

This assisted Mr Nguyen’s corrupt scheme as he had to manipulate fewer quotes. More generally, poor enforcement of a three-quotation requirement assists any corrupt actor, as it reduces the competition between contractors and could more easily enable collusion.

In April 2018, Mr Nguyen was able to engage Marble Arch on another project to upgrade the toilet at War Memorial Park in Leichhardt without the procurement going to public tender. This occurred even though the project budget and one of the quotations received exceeded the then tender threshold of \$150,000. Again, this reduced competition and thus helped facilitate Mr Nguyen’s corrupt favouritism.

IWC has advised that all quotations for non-tendered procurements over \$10,000 must now be submitted via a centralised system managed by the procurement team, giving this team oversight of the quotations received, something which was lacking in the examples referred to in this section. This oversight should help ensure adherence to threshold rules.

The Commission has been further advised that the procurement team will have clear authority to refuse to progress procurements where rules and guidance relating to thresholds and quotes have not been met and for which an exemption has not been approved. Consequently, the Commission does not make a recommendation on this issue.

### Use of pre-approved panels

If implemented properly, the use of supplier panels reduces the risk of favouritism by restricting the pool of contractors to those that have been adequately vetted, usually on quality and price-based criteria.

The procurement framework at IWC mandated that, for procurements over \$10,000 but under the tender threshold amount, the use of supplier panels was to be considered “wherever practicable and considering best value for money”.

However, the requirement was never enforced. Mr Nguyen never considered whether contractors were on a relevant panel and was never asked to. Furthermore, he did not have to advise why the selection of contractors that were not on a panel was preferable in terms of practicality or value for money.

Had the use of supplier panels been better enforced at IWC, Mr Nguyen would have had to ensure that either:

- his favoured contractors could validly be appointed to a supplier panel; or
- his engagement of a supplier that was not listed on any authorised panel was justified in terms of practicality and value for money.

Either of these may have curtailed Mr Nguyen’s corrupt scheme, as, variously, his favoured contractors:

- had limited or unverified experience in the sector; or
- were newly established; or
- did not have relevant insurance.

While there is value in IWC simply improving enforcement of its rules regarding panel suppliers, Mr Nguyen also gave evidence that the reason panels were generally not used in his work team was because it was understood that the contractors listed were often not of sufficient quality:

*[Counsel Assisting]: All right. Did anybody ever suggest to you that you might give consideration to using council’s approved suppliers?*

*[Mr Nguyen]: – Oh, what I can recall is that there’s been bad feedback on that portal ’cause anyone can go on that portal and you can pick anyone, pick any contractors, and then they could be, you know, worst-performing contractors and you might be, you might be stuck with them.*

- [Q]: So that was the Vendor Panel portal?
- [A]: – It’s the Vendor, yeah. So then we would, I guess personnel would view to say stick with people I worked with before who can perform the job.
- [Q]: And that’s advice that you recall being given?
- [A]: – No, no, as in it’s what happened to be, as in it just happened to be that way. It wasn’t any advice from anyone, it’s just I kept using the same, I guess, same subcontractors because they kept performing.

The Commission notes that the benefits of supplier panels are only realised when the listed suppliers can adequately meet business needs and public officials engaged in procurement feel confident to use them. Otherwise, off-panel expenditure is normalised and corrupt officials such as Mr Nguyen can more easily engage untested contractors without question.

## RECOMMENDATION 1

**That IWC reviews its management of supplier panels to ensure that:**

- panels address business needs
- panelled suppliers are skilled and experienced
- the operation and membership of panels is periodically reviewed.

In its submissions, IWC accepted this recommendation and advised that the recommendation will be implemented through the introduction of a new procurement procedure that provides guidelines on establishing and managing supplier panels. The Commission notes that the new procedural arrangements will only be effective if compliance is considered as part of implementation. To this end, as part of Recommendation 7, IWC should obtain assurance that this new measure is working as intended.

Further, the Commission notes that Recommendation 1 refers to IWC’s use of both internal panels established by IWC and the external panels referred to in the procurement manual.

## Receiving contractor quotations

Requiring bids to be submitted to a central repository outside the relevant business area reduces the risk that confidential information will be misused. This is because the official managing the process does not have access to competing bids prior to the close of bidding.

While the procurement manual recommended that quotations for non-tendered procurements be received centrally by the procurement team, this was not mandated.

Because of these loose arrangements, quotations were sent directly to Mr Nguyen’s IWC email. This allowed him to see them before submissions closed, and then liaise with his associates to ensure they lodged a lower price:

- [Counsel Assisting]: ...you say in green there, “Only got one price in at 101K”.
- [Mr Nguyen]: That’s, that’s correct.
- [Q]: So is that an instance of you providing information in relation to a competitor’s tender price---
- [A]: That, that’s correct. Yes, that’s correct.
- [Q]: To Monty?
- [A]: That’s, that’s correct.
- [Q]: And was that a process that you typically engaged in in instances where you wanted Innocon to be the successful bidder in relation to a process that you were running?
- [A]: That’s correct, yes.

Since June 2020, IWC has improved the way quotes are received by mandating the use of a centralised return-point for all procurements over \$10,000. Consequently, the Commission does not make a recommendation on this issue.

However, as part of Recommendation 7, IWC should obtain assurance that this new measure is working as intended.

## Dummy bids

Another way to undermine a competitive procurement process is for a corrupt actor to submit, or facilitate the submission of, fake or “dummy” bids, which reduces the number of genuine competitors involved in the bidding process. These bids are generally submitted by suppliers in collusion with each other and/or with a public official to give the appearance of a competitive process, but there is no intention that work be awarded against these bids.

Mr Nguyen submitted dummy bids on behalf of contractors with which he was associated by using relevant suppliers' templates and email accounts with their permission:

[Counsel Assisting]: *And so what was the process that you would follow in relation to preparing Innocon quotes for these four projects where they were dummy bids?*

[Mr Nguyen]: *So, yes, I would just, so I had the template, obviously, from Monty 'cause*

[Q]: *So when you say you had the template – ?*

[A]: *Yeah.*

[Q]: *What kind of template are you referring to?*

[A]: *Like the soft copy where you could just, you just make your own, you know, you input to the quote. So, yeah, they have their ledger and company details. So I'd use that and then I would just, I'll obviously do a dummy bid, so put in the scope that it was supposed to be priced and put in a, a, a dummy price.*

[Q]: *So you prepared the entirety of the document?*

[A]: *That's correct.*

This greatly assisted Mr Nguyen to manipulate the bidding process and ensure that work was awarded to each of his favoured contractors in turn:

[Mr Nguyen]: *...So, so the way it works, it would have been, the three quotes would have been fixed so I would have known SDL, Constructicon and Marble Arch or JTG Services. So I would, so there were no, you know, two of them would know it's a dummy bid but they will get the next round. So, so I would just rotate the jobs, so not favouring one subcontractor for multiple jobs.*

[Counsel Assisting]: *Or the reason that Mr Nguy was content with you using*

*Constructicon in that way was his understanding that he had secured future work from council?*

[A]: *Exactly. All, all of them. That's the way it was working, yeah.*

[Q]: *So it was effectively, from your perspective, a rotation system?*

[A]: *That's correct.*

Mandating a central repository for bidder quotations is not an effective control in these circumstances because Mr Nguyen controlled all the bidding parties. In such a case, the prevention of dummy bidding relies on alternative mechanisms such as accurate budgeting of projects and adequate supplier due diligence, recommendations about which are made later in this chapter.

## Evaluation of quotations

During a procurement process, assessment of quotes by more than one party helps ensure they are sufficiently scrutinised and reduces the risk that a corrupt actor can engage a favoured supplier without justification.

IWC had a clear procedure regarding the number of individuals who should evaluate quotations. For instance, for procurements over \$10,000 but below the tender threshold, the procurement manual stated that quotes "be evaluated by at least two IWC officers in accordance with the criteria provided in the RFQ (Request for Quotation) package". The rule implies, but does not specifically state, that each evaluation should be independent of any others.

Evidence from the investigation is that often there was no independent evaluation of quotations for the relevant procurements. For instance, evaluations were on occasion undertaken:

- solely by Mr Nguyen (with just his signature provided on behalf of the "evaluation committee")
- by Mr Nguyen and a co-worker but without evidence of independent analysis by the second party (such as a separate scoring matrix)
- by Mr Nguyen and a colleague who was also his mentoree, and whose independence was therefore questionable.

Mr Nguyen has indicated he saw the process as one of "co-signing":

[Counsel Assisting]: *...you'll see the RFQ evaluation process must be conducted by at least two council officers. Was that a requirement that you were aware of?*

[Mr Nguyen]: Yes.

[Q]: And in what way did the RFQ evaluation processes that you conducted involve at least [two] council officers?

[A]: Yeah, so I think I, from memory, I would, yeah, I would involve another council member, just to co-sign what I've recommended.

This lack of thorough independent assessment enabled Mr Nguyen to continue to appoint suppliers with limited relevant experience to IWC work without detection.

## RECOMMENDATION 2

### That IWC ensures independent scrutiny of supplier bids for non-tendered procurements over a minimum threshold.

In its submissions, IWC accepted this recommendation and submitted that, for non-tendered procurements over a certain threshold:

- evaluation panel members will be required to each independently score supplier bids (including providing reasons for these scores)
- the evaluation process will be overseen by a member of the procurement team acting in an advisory capacity.

The Commission notes IWC had previously advised that a procurement team member would sit on each evaluation panel for non-tendered procurements over a certain value, not just act in an advisory capacity. The intent of the recommendation will still be met if the new advisory function assures independent scrutiny, particularly in situations, for example, where there is a manager and a subordinate from the same business area forming the evaluation panel.

Furthermore, the Commission notes that these new procedural arrangements will only be effective if there is compliance with them. To this end, as part of Recommendation 7, IWC should obtain assurance that these new measures are working as intended.

### Management review of quotations

Adequate oversight of procurement decision-making, including diligent review by more senior officials, can help prevent a single public official from exercising end-to-end control over procurement processes and outcomes.

The procurement framework required that procurements be approved in accordance with the delegations register.

Further, IWC officers were required to "...exercise a reasonable degree of care and diligence in carrying out your functions under the Local Government Act or any other Act".

However, delegated approval for Mr Nguyen's projects was largely a "rubber stamp" review, where Mr Nguyen's direct manager, and those more senior, simply trusted his recommendations without reviewing them appropriately. For instance:

- Mr Nguyen stated that, early in his tenure at IWC, he would discuss his recommendations with his manager, but that trust developed and over time his recommendations were not queried.
- Mr Nguyen's manager stated that he could not recall ever rejecting a recommendation made by Mr Nguyen.
- When seeking approval for procurements, Mr Nguyen would often only include a summary of bidders' submissions (such as just the cost breakdown) and approvers appeared to sign-off based on this limited information.
- For the April 2018 War Memorial Park toilet block upgrade project, Marble Arch was rated by Mr Nguyen at 90 per cent with respect to "capacity and experience" and 80 per cent for "quality based on previous work for IWC". These ratings were not challenged by the delegated approvers, even though:
  - the company had not completed any local council work in NSW
  - there was no material to support these claims.
- During the public inquiry, Mr Nguyen confirmed that, although he had more than one manager throughout the period of his corrupt conduct, he did not feel that it was necessary to adjust his scheme. This suggests the issue of rubber stamping was not just related to a particular manager.

IWC has advised that it has provided relevant training across the organisation to ensure that all staff understand their obligations in undertaking their work for IWC and are aware of relevant corruption risks. This includes code of conduct training for all staff, and fraud and corruption awareness training for those involved in procurement. This should help to ensure any duties with respect to making and reviewing procurement decisions are clear to relevant staff. Consequently, the Commission makes no recommendation on this issue.

## Supplier due diligence

The Commission's 2020 publication, *Supplier due diligence: a guide for NSW public sector agencies*, notes that many of its investigations identify poor supplier due diligence as a contributory factor to corrupt conduct. In this investigation, poor due diligence facilitated Mr Nguyen's corrupt scheme because he could easily engage contractor businesses with limited experience and whose personnel had undisclosed associations.

While IWC had some processes in place to verify the suitability of new suppliers, these were insufficient to detect questionable company bona fides, fake insurance documents or the conflicts of interest that existed between Mr Nguyen and certain supplier personnel.

### New suppliers

At IWC, vendors were added to the master file without adequate checks to ensure they were suitable. For instance, Marble Arch was added to the payment system despite:

- the company only being registered with ASIC on 19 February 2018, two months prior to it submitting its first quotation to IWC; this suggests limited previous experience and is a red flag for the company being set up for an improper purpose
- its business website not detailing any previous experience
- neither referee nor financial checks having been conducted.

While an external check was mandatory at this point, it was basic, consisting of an ABN verification of the business itself and confirmation of banking details.

In addition, to enable a new vendor to be added to the master file, the relevant IWC officer was required to complete a "new creditor application form". However, this form only required basic information about the company. Furthermore, prior to November 2019, the officer could send this form directly to the procurement team without managerial approval.

The process only required a simple conflict of interest attestation from the supplier and the IWC officer submitting the application. Of course, in the case of Marble Arch, both parties failed to declare a conflict. This topic is discussed in more detail in the "Conflicts of interest with suppliers" section below.

Managerial approval of the new creditor application form is now required at IWC. However, given issues with managerial oversight of procurement processes (as discussed earlier in this chapter), by itself this enhancement would have been unlikely to prevent Marble Arch being added to the payment system. Consequently,

the Commission believes that additional enhancements are required and these form part of Recommendation 3 below.

### Verification of contractor information

This investigation found that IWC conducted only limited independent verification of information provided by bidders about their business' bona fides. Moreover, the limited due diligence activities were largely performed by Mr Nguyen, rendering them ineffective and resulting in deceptive practices remaining undetected.

While it may not be manageable or advisable to independently verify every aspect of the information submitted by a company, more thorough due diligence would likely have detected the red flags with Marble Arch described above.

The investigation has also provided evidence that contractors can continue to provide false information after they have been engaged. At the public inquiry, Mr Nguyen admitted that he produced fake insurance papers for Mr Cox of Marble Arch to use when seeking progress payments. IWC did not detect that the papers were not genuine.

It is important to note that Mr Nguyen obviously had no incentive to act on any red flags regarding Marble Arch as this could have undermined his scheme. This illustrates that verification of bona fides should be completed independently (that is, outside the procuring business area where possible). This helps ensure red flags are both detected and pursued.

The Commission has been advised that IWC is planning to improve the suite of checks it performs on new suppliers, as well as strengthen procedures for verifying certain documents prior to managerial sign-off, which will assist supplier due diligence. However, the Commission makes the following recommendation to ensure that IWC prioritises reform in this area.

## RECOMMENDATION 3

**That IWC introduces a risk-based framework in relation to supplier due diligence and verification of supplier claims.**

In its submissions, IWC did not formally accept or reject this recommendation, but did refer to new supplier checks that will be required for all procurements over \$10,000 and certain enhancements to IWC's existing onboarding process. While useful, these measures will likely not implement the recommendation in its entirety, particularly with respect to the verification of supplier claims.

Furthermore, the Commission notes that any new procedural arrangements will only be effective if compliance is considered as part of implementation.



To this end, as part of Recommendation 7, IWC should obtain assurance that these new measures are working as intended.

### Conflicts of interest with suppliers

The supplier due-diligence procedures in place at IWC failed to detect that Mr Nguyen had associations with suppliers, as set out in chapter 4. For example, Mr Cox of Marble Arch owned 50 per cent of the shares in a business of which Mr Nguyen was a director.

Such interests might have been detected had the relevant checks in place at IWC been broader with respect to suppliers and/or had they been targeted at IWC officers.

As above, all new suppliers were subject to basic due diligence checks that were conducted by an external provider. This consisted of an ABN check to verify the business itself and other checks to verify banking details. However, checks on directorships or any other feature of the business were not conducted as part of this process.

More extensive external “financial assessment” checks on supplier businesses were undertaken by IWC for some procurements. However, these were limited to high-value contracts and were not mandated until 2022. Critically, any checks regarding directorships were solely focused on suppliers and did not consider the possibility of IWC staff holding such positions.

IWC may have detected Mr Nguyen’s undeclared directorships if it had conducted suitable checks upon him. Such checks can be useful to identify hidden associations for any high-risk staff members, such as those with significant financial delegation.

## RECOMMENDATION 4

**That IWC introduces, on a risk basis, screening of employees for directorships of external businesses, including potential associations with suppliers or other stakeholders.**

IWC has submitted that it is taking steps to implement this recommendation.

### Contract variations

Once project work commences, variations to scope or costs may legitimately arise. However, large variations and/or a large number of variations may be a red flag for corrupt conduct, or at least suggest a need to reassess the overall project scope to ensure fairness and value.

The IWC procurement manual did not refer to variations. However, the risks associated with variations were recognised in IWC’s procurement policy, which stated that:

*variations must be avoided in the following specific circumstances:*

- *when increasing the value of a successful lowest competitive bid*
- *as means to avoid the application of threshold value for tendering or a competitive procurement process*
- *when significant changes are proposed to the original scope.*

The policy also stated that it was “preferable” that variations did not exceed 25 per cent of the original contract value.

A review of Mr Nguyen’s projects shows that many were completed with approved variations. Examples of projects with proportionally high variations are presented in Table 6.

It is worth noting that, in the Mervyn Fletcher Hall example below, the total value of the final project, including 12 variations, exceeded the tender threshold, but a tender was not undertaken because the initial estimate of the procurement’s value was below the threshold. This illustrates the risk that “planned variations” can be used to avoid procurement process requirements in a similar manner to order splitting.

**Table 6: Project variations**

Date	Project	Contract Value	Variations	
			Value	Per cent
January 2018	Pioneers Memorial Park rotunda	\$145,882	\$44,308	30%
April 2018	May Murray Childcare Centre external renewal works	\$52,687	\$12,622	24%
May 2018	Lambert Park toilet block upgrade	\$144,278	\$61,258	42%
July 2019	Mervyn Fletcher Hall refurbishment	\$147,334	\$44,994	31%

Had more scrutiny been applied to the costs of each variation and their value against the original project scope, this aspect of Mr Nguyen's scheme may have been curtailed.

## RECOMMENDATION 5

**That IWC ensures appropriate scrutiny of variation requests to ensure they do not undermine procurement or project outcomes or processes.**

In its submissions, IWC accepted this recommendation and advised that it is improving its oversight of variations in various ways through its new procurement procedure. The Commission notes that these measures will only be effective if compliance is considered as part of implementation. To this end, as part of Recommendation 7, IWC should obtain assurance that this new measure is working as intended.

## Overseeing building projects

Weaknesses in the way building projects were costed, budgeted, and overseen assisted Mr Nguyen's corrupt scheme.

### Budgeting and cost estimation

Poor cost estimation and budgeting processes can create excess funds, for instance, through inflated project budgets, that can be corruptly obtained. The investigation has shown that, despite Mr Nguyen colluding with suppliers to inflate prices, the relevant projects remained within budget. This suggests the budget was itself too generous.

Project budgeting was done poorly for building projects. For instance, Mr Nguyen's manager has stated that, at IWC, budgeting was typically done prior to any scoping works being completed.

In addition, IWC had limited information about the market rates for Mr Nguyen's projects with which to inform cost estimation. This was, in part, owing to the use of suppliers that were not on approved panels and that had not been subject to any prior analysis (as previously discussed). Poor market analysis was not restricted to Mr Nguyen's projects. For instance, an August 2019 audit conducted by an audit firm on behalf of IWC observed a lack of robust processes at IWC regarding the procurement of a design for the Lilyfield Road Cycleway:

*There is no formalised process for Procurement Services to periodically assess the capacity, capability and rates of suppliers in the market for core services (which are not procured from the Vendor Panel).*

*We acknowledge that IWC relies heavily on the Vendor Panel to source and vet its suppliers, however market analysis should be performed for key services that are not included within Vendor Panel.*

Mr Nguyen's manager stated he attempted to establish a more robust cost-estimation process before taking projects to tender "so we knew whether we had value for money or close to". This appears to be an acknowledgement that cost-estimation processes at IWC required improvement.

This risk that bids are inflated can be reduced by:

- estimating the cost of each project accurately, including having knowledge of expected market rates for the procurement-related items being proposed
- allocating budgets in line with these cost estimates.

## RECOMMENDATION 6

**That IWC revises its cost-estimation and budgeting processes for projects to ensure that:**

- **robust cost estimates are developed prior to procurement processes commencing**
- **adequate market analysis is conducted where suppliers that are not on approved panels are being considered.**

IWC submitted that the new procurement procedure will include a comprehensive section on procurement planning, including with respect to scope, budget and pricing. IWC further submitted that understanding of these aspects of procurement planning will be reinforced to all staff through a training program. The Commission notes that the new procedural arrangements will only be effective if IWC ensures compliance. To this end, as part of Recommendation 7, IWC should obtain assurance that this new measure is working as intended.

## Oversight of projects

Poor oversight of the projects that Mr Nguyen managed allowed him unwarranted control over how they were delivered, which assisted in allowing his corrupt dealings with contractors to go undetected.

Evidence of inadequate oversight of construction projects at IWC was provided by Mr Nguyen's manager, who stated that:

- the building projects that Mr Nguyen managed were selected and prioritised in an ad hoc manner
- there was no formal asset-management framework

- there was no central project-oversight body
- project-management maturity was low, with no established project management methodology.

While his projects generally delivered their scope with reasonable quality, Mr Nguyen was frequently absent from site without authority and, as discussed above, multiple project variations were approved with little scrutiny. Undetected order splitting also points to shortcomings in oversight.

IWC has advised the Commission that it has introduced a formal project-management methodology and made additional improvements to the way projects are governed. Consequently, the Commission makes no recommendation on this issue. However, as part of Recommendation 7, IWC should obtain assurance that this new measure is working as intended.

## Line management

Mr Nguyen was able to engage in a range of improper behaviours while undertaking his duties without being detected. For instance, he:

- was able to manipulate procurement processes
- attended to his undeclared secondary employment and personal matters during work time
- stole tools from a work site.

This invites the question of how Mr Nguyen's performance was overseen, and evidence obtained in this investigation reveals that he was subject to inadequate line management. For instance:

- Mr Laphai of SDL indicated that Mr Nguyen was his most senior contact point at IWC and stated that, on at least one occasion, he did not hear back from a more senior representative when escalating an issue.
- Both Mr Nguyen and his manager indicated that the managerial relationship between them was very trusting, with the manager adding that this was necessitated by his large span of control (seven-eight direct reports).
- IWC did not appear to have had a functioning performance-management regime in place at the time. Mr Nguyen's manager said that performance management was "not really embedded" and "the last thing on my task list", and he only introduced regular one-on-one meetings with his direct reports toward the end of his tenure at IWC.

IWC has advised the Commission that performance-management plans are now mandated and steps are being taken to move to a "trust and check" approach with respect to staff management. Consequently, the Commission does not make a recommendation on this issue. However, as part of Recommendation 7, IWC should obtain assurance that this new measure is working as intended.

## Conflicts of interest

As discussed in the "Supplier due diligence" and "Conflicts of interest with suppliers" sections in this chapter, weaknesses in the way IWC approached conflicts of interest enabled Mr Nguyen's scheme by allowing relevant associations to remain concealed. Additionally, the Commission has observed more general weaknesses with IWC's management of conflicts of interest, namely:

- limited central oversight
- reliance on requirements to self-declare conflicts of interest without sufficiently considering potential non-compliance.

## Central oversight

Within a public authority, a centralised conflicts of interest register allows oversight of any declarations of conflicts of interest that have been made. By contrast, not having a register can signal to managers and other staff that declaring and managing conflicts of interest is not important.

IWC did not have a conflicts of interest register until at least August 2021. Additionally, the responsibility for oversight of conflicts of interest policy and procedures was unclear, as it had moved around IWC following various restructures.

The Commission understands that secondary employment, conflicts of interest, and gifts, benefits and hospitality registers have subsequently been developed or refined, and that responsibility for managing these registers now sits within the governance and risk team. Furthermore, IWC has advised it has provided relevant training across the organisation to ensure that all staff understand their code of conduct obligations pertaining to conflicts of interest.

In light of these changes, the Commission makes no recommendation regarding central oversight of conflicts of interest. However, as part of Recommendation 7, the IWC should obtain assurance that these new measures are working as intended.

## Declarations of conflicts of interest

One important corruption prevention control is to require public officials and suppliers to sign conflicts of interest declarations and/or acknowledge their ethical obligations. These declarations have corruption prevention value in that they:

- ensure all parties are made aware of relevant ethical obligations and are provided with an opportunity to make any relevant declarations
- ensure all parties can be more easily held accountable if there is a breach
- force dishonest persons to be openly dishonest.

IWC officers were required to make specific declarations when joining a tender panel and suppliers were required to make them when submitting a quote. There are several examples of suppliers (including Mr Laphai, Mr Cox and Mr Nguy) making signed declarations that they had no relevant conflicts of interest and/or would not be involved in collusive tendering. Similarly, Mr Nguyen made a signed declaration that he had no conflict of interest with Marble Arch when the business was added to the IWC payment system.

Obviously, declarations can be a weak tool to detect corrupt conduct because they rely on people acting honestly. Consideration must be given to the fact that a person with a reason to conceal a conflict is unlikely to declare it. Critically, IWC did not consider the possibility of non-compliance and did not have sufficient measures in place to detect undeclared conflicts of interest held by staff and suppliers.

IWC employees also had an ongoing requirement under the code of conduct and relevant legislation to declare both conflicts of interest and secondary employment. Mr Nguyen had his own business (RJS Infrastructure), but he did not make any declarations of secondary employment. There was no evidence he was encouraged or otherwise incentivised to do so, such as through an annual reminder to make such declarations. Until his corrupt conduct was alleged, IWC never detected that he engaged in other work, had other sources of income, or had any relevant conflicts of interest.

Clearly, declaration requirements, both specific and ongoing, cannot be relied on as a detection mechanism and other measures need to be in place to ensure relationships between employees and suppliers are transparent. Recommendation 3 (above) will assist IWC in detecting undeclared conflicts of interest. Consequently, the Commission makes no recommendation specifically on this issue.

## Repeated organisational change

Substantial organisational change can weaken the control environment. This can result in:

- increased opportunities for corrupt conduct if preventative controls are weakened
- reduced likelihood that corrupt conduct is discovered if detective controls are weakened.

IWC was formed in May 2016 via the amalgamation of the former councils of Leichhardt, Ashfield and Marrickville. The control systems that had operated at these legacy councils were weakened when this amalgamation occurred. For instance, the Commission obtained evidence that:

- the period of amalgamation was chaotic and uncertain, and considerable time was spent trying to merge different organisational systems used by the legacy councils
- it took some time to establish the IWC procurement function following the amalgamation
- there were complications with respect to human-resources systems that were caused by the amalgamation. For example, four different salary systems were in place simultaneously – three legacy systems from the old councils and one new system
- while legacy councils may have had excellent systems in a particular area, personnel changes meant these systems did not always move seamlessly to IWC
- as noted previously, there was repeated change regarding who owned the conflicts of interest policy and related controls.

Following amalgamation, IWC experienced a period of ongoing change that made it very difficult to establish effective organisational systems. From May 2016 to March 2023, IWC had:

- seven general managers (including interim appointments and administrators)
- at least five changes to organisational structures impacting on the governance and/or risk functions within IWC.

This ongoing change made it difficult to establish robust systems and processes in areas such as procurement, project governance and staff management, which contributed to the control deficiencies outlined earlier in this chapter.

While the Commission does not make a recommendation regarding this issue, this investigation illustrates that there is an increased risk of corrupt conduct during periods of organisational change. This has both:

- specific relevance to IWC, which the Commission understands has been considering de-amalgamating to its predecessor councils
- general relevance to NSW state and local government, given the likelihood of organisational change occurring in at least some public authorities in the short-to-medium term.

## Enhancements to IWC systems

As a result of the conduct uncovered in this investigation, and as discussed throughout this chapter, IWC has already made several enhancements to its systems and processes that aim to reduce the likelihood of future corrupt conduct.

While the Commission notes these efforts, there is always a need to ensure that changes to systems and processes are, in fact, achieving their desired aims. Consequently, there is value in IWC obtaining assurance that these changes have been successfully implemented. Similarly, there is also value in IWC obtaining assurance regarding the successful implementation of the recommendations made by the Commission in this report.

### RECOMMENDATION 7

**That IWC conducts an audit(s) into changes made in response to this investigation to obtain assurance that these changes have appropriately enhanced IWC's ability to control corruption risks. This should include both changes that IWC has proactively made and changes made in response to the Commission's recommendations.**

In its submissions, IWC agreed with the recommendation and stated that it would provide a copy of the audit report to the Commission.

## Chapter 14: Corruption prevention – Transport for NSW

The TfNSW projects relevant to this investigation were of a different type from the relevant IWC projects. While the IWC projects involved engaging companies to perform given work, the TfNSW projects involved engaging a head contractor to, *inter alia*, engage subcontractors to perform work. As a result, the corruption prevention issues that applied to TfNSW are different from those at IWC.

As set out in chapter 1, the TfNSW projects relevant to this investigation were performed by Downer under the managing contractor (MC) framework. Most of them were part of the TAP but some were part of the NIF program.

TfNSW used the MC framework for these projects, instead of more traditional design and construct (D&C) contracts, because of their complexity and the associated risk. A former director procurement at TfNSW advised the Commission that the MC framework was “normally utilised when a lot of the project risks simply can’t be defined” and the market consequently would not take on the risks of a D&C contract.

Projects conducted under the MC framework comprised two phases. During the design development phase, *some* of the project design work was performed. During the construction phase, the project design work was completed and the construction work performed. Usually, the company that performed the design and development phase work was awarded the construction phase work.

The TAP projects were bundled into packages of several stations, known as tranches. This was done to attract experienced, capable suppliers, as tier 1 suppliers were generally not interested in contracts of less than \$80 million or \$90 million.

### Overview of corruption prevention issues

There do not appear to be fundamental issues with the MC framework itself. For instance, TfNSW staff who

criticised both Downer’s work on the relevant projects and TfNSW’s response to their concerns still supported using the MC framework as intended. Instead, the way that TfNSW implemented the MC framework may have encouraged corrupt conduct.

This investigation has identified three specific weaknesses regarding the MC framework implementation:

- TBEs of relevant projects were overestimated.
- Confidential procurement-related information was inadequately controlled.
- TfNSW did not enforce contractual subcontracting requirements.

These specific issues arose from five broad project-oversight weaknesses:

- Corruption risks were inadequately captured on relevant risk registers.
- TfNSW and Downer staff underestimated the potential for corrupt conduct.
- TfNSW staff lacked a sufficient understanding of the contracting model.
- Insufficient project-assurance activities were conducted.
- Information flow to governance bodies was inadequate.

An additional corruption prevention issue was that TfNSW failed to adequately respond to false information contained in employment applications.

### Specific issues with the MC framework implementation

The corrupt conduct found in this investigation was directly facilitated by three systemic weaknesses.

First, surplus funds were made available by overestimated TBEs. This essentially left money on the table that could be used as part of a corrupt scheme.

Secondly, poor information security allowed confidential procurement information to be improperly provided to favoured bidders. This increased the likelihood that they would be awarded relevant work.

Thirdly, TfNSW failed to ensure that Downer complied with contractual subcontracting requirements. This made it easier to award work to these subcontractors, as it reduced the scrutiny involved when awarding the relevant work.

### Target budget estimate

During the design development phase of the MC framework, the TBE was developed as an estimate of how much a given project should cost. While Downer prepared the TBE, TfNSW was required to accept it before the construction phase could begin.

The accuracy of this estimate had a financial impact on Downer and TfNSW. A 75 per cent/25 per cent painshare/gainshare arrangement covered the difference between actual costs and the TBE. If the actual cost was less than the TBE, Downer would receive 25 per cent of the underspend and TfNSW would retain the remaining 75 per cent benefit. Should the actual cost be greater than the TBE, Downer would pay 25 per cent of the overspend and TfNSW would fund the remaining 75 per cent overspend.

For instance, if a given tranche had a combined TBE of \$100 million, the financial impact for outcomes that are under, on or over budget would be as follows in Table 7, below.

Consequently, an overestimated TBE is a key risk in the MC framework, as it may result in TfNSW paying more for given work than it should. The Commission notes that the risk of overestimation can be intentional or inadvertent, and it may not be known that a TBE is overestimated when it is agreed.

Any elevated budgetary estimate creates corruption opportunities. Because an overestimated TBE can allow an MC contractor to ensure gainshare with relatively little effort, it creates the risk that the company does not rigorously control its costs (since this is no longer necessary to create acceptable profits). This means that it leaves extra money on the table, which could be misappropriated by its employees – for instance, by making side deals with suppliers.

While a large gainshare indicates an overestimated TBE, it is important to note that a small gainshare may not, especially given that the MC framework is used when it is difficult to quantify risk. TfNSW considered it likely that a small amount was a positive outcome but a large amount of gainshare was problematic. For instance, TfNSW's head of rail delivery, Peter Church, stated that:

*It's always, when you look back on things in hindsight, we always go "That job came in at 20 million and*

**Table 7: Financial impact of actual cost compared to the TBE**

TBE	Actual cost	Outcome	Financial impact to TfNSW	Financial impact to Downer
\$100 million	\$90 million	Under TBE	+\$7.5 million gainshare	+\$2.5 million gainshare
\$100 million	\$100 million	On TBE	\$0	\$0
\$100 million	\$110 million	Over TBE	-\$7.5 million painshare	-\$2.5 million painshare

*we thought it was a 30 million job, that's way out of kilter." But if it came in at 20 million verses [sic] a project budget of 21 or 22, you're actually going maybe that was good management and good delivery practice that got us there.*

Consistent with Mr Church's position, the TBE was calculated in a way such that Downer could make an acceptable profit with little or no gainshare needed. Profit margin and administrative costs were included within the TBE, as were contingencies for risk. Additionally, separately to this built-in profit margin (and any gainshare arrangements), an additional percentage of the TBE was payable to Downer as performance and incentive payments subject to qualitative assessment of specified performance criteria.

The risk that TBEs for the relevant projects were overestimated was realised for at least some of the projects relevant to this investigation.

A major gainshare was achieved from all tranches, despite the impact of the relevant conduct set out in this report in decreasing that gainshare. For instance, in relation to two tranches of the TAP 3 projects, the gainshare was very close to \$9 million in each case.

Two senior project managers from TfNSW stated that they believed Downer presented TfNSW with inflated TBEs. While the Commission has not found that Downer staff intentionally inflated TBEs, the situation contributed to the preconditions for corrupt conduct. The investigation identified that some of the individuals engaged in corrupt conduct discussed the excess funds available in relation to specific projects. For instance, in a conversation with Mr Cox on 20 August 2020, a former Downer project manager, Mr Vardanega, said:

*And there's—there's a lot of juice there in that, um, platform FRP package. There's so much in [sic] cream in that.*

Mr Abdi told the Commission about the importance of having inside knowledge:

*[Counsel Assisting]: You say in the middle there, "If we cut Vlad in we can, like, quadruple what we made." Do you see?*

*[Mr Abdi]: Yeah.*

*[Q]: So, what, you needed someone on the inside to be able to inflate costs so you could make decent money out of these contracts. Is that what you're telling Mr Nguyen?*

*[A]: That's what I'm, like, saying there.*

TBEs are based on market prices for various packages of work that are required to deliver a project. Pricing from market approaches in the past can influence the "benchmark" rates that determine whether current pricing for a given package of work is reasonable. The evidence before the Commission included confirmation from several witnesses that quotes from some suppliers were inflated. For example, Mr Aziz told the Commission, "look, my personal view is that a lot of them are inflated". Mr Pillai told the Commission:

*I don't know to the extent of the inflation but I, my understanding was that I believed that Nima priced them higher than what they should be.*

Mr Sanber agreed with the Commission that being told the budget enabled him to inflate the price, stating, "there was one or two occasions like that, yes". Similarly, Mr Nguyen, said:

*... what I can recall is we sent in a price and then I think Kevin, from what I can recall, Kevin contacted Aidan and saying, "You can put additional X amount.*

TfNSW was aware of the risk of TBE inflation. For instance, a TfNSW project director ("project director A") said that, because the bottom-line culture of Downer was to maximise profit, the main risk was overinflation of the TBE and that TfNSW was very vigilant to ensure that the TBE "didn't have a lot of fat in it, wasn't over inflated".

Despite project director A's comments, in practice, TfNSW adopted insufficient controls to manage the risk of TBE inflation.

The key control for managing the risk of TBE inflation was the independent estimator's review. For instance, TfNSW's commercial manager for the TAP commented that, while the commercial unit reviewed the TBE proposed by the managing contractor, it relied on an independent estimator as the expert. This reliance was to the extent that the managing contract:

*...is mainly based on the independent estimator's review, so that is the only documented process that ensuring [sic] the value for money. Other than that, there is no real mechanism to check that value for money proposal.*

However, there were four key issues with how the independent estimator's review was implemented in practice:

1. Downer was, according to one TfNSW manager, tardy in providing pricing information to the independent estimator, which prevented TfNSW from having enough time to properly assess the proposed TBEs.



2. When potential risks were being analysed to develop the TBE, corrupt conduct was neither considered as a risk nor as a contributor to financial risks.
3. While TfNSW compared actual costs from previous projects to inform the TBE, it did not routinely compare actual costs from previous projects with the TBEs of those projects. Such a comparison would likely have flagged that TBEs were repeatedly being overestimated.
4. A TfNSW senior project manager told the Commission that a lot of negotiation was required to reduce a TBE once it had been proposed. They said that often escalation was required because the market was telling them one thing on price, but the managing contractor was telling them something different.

Additionally, the Commission's investigation identified occasions when contract variations were made after the independent estimate. For example, variations resulted in the TBEs across two of the TAP 3 tranches being collectively increased by almost \$4 million without being re-reviewed by the independent estimator. Consequently, the independent estimator's review did little to control the risk of an overestimated TBE.

It should also be noted that, while specific TfNSW staff diligently tried to manage the risk of TBE inflation, there were factors that encouraged them to tolerate an overestimated TBE. As discussed in more detail later in this chapter, project assurance was focused on remaining within budget and timeliness. In such an environment, having a high TBE would make it easier for a project to be "successfully delivered" while a lower TBE would increase the risk of "project failure".

TBE inflation is a critical risk to control under the MC framework. Managing it adequately would not only manage relevant corruption risks but give TfNSW some assurance that managing contractors are not making unreasonable profits.

## RECOMMENDATION 8:

**That TfNSW revises its processes for reviewing package breakdowns and price verification for projects conducted under the managing contractor framework, to ensure that the risk of inflated TBEs is adequately managed. This should include consideration of:**

- the robustness of estimation processes
- the management of relevant risks associated with project variations.

TfNSW submitted that it "accepts and supports" this recommendation. TfNSW's submissions also stated that it:

- had taken actions to improve its cost-estimation process, including the use of benchmarking and improving the quality of the independent estimator's review
- would re-assess its price-review processes to identify TBE inflation.

Downer submitted several arguments designed to support its claim that there was no evidence of TBE inflation and it only made a reasonable profit.

Downer also submitted that, even if the TBE was inflated, it was a "leap" to suggest that such inflation created corruption opportunities. However, it is a basic corruption control principle that having excess funds available creates a corruption risk that these funds are taken. This principle has, for instance, been discussed in numerous Commission corruption prevention workshops for more than a decade.

Finally, Downer submitted that it was a "serious allegation against Downer" that it failed to control its costs and "left money on the table". The Commission does not accept this argument, primarily because its observations inform corruption prevention recommendations and are not adverse findings.

Downer's submissions stated that it "did not agree" with this recommendation because of its arguments described above. Downer did, however, acknowledge the criticality of the "integrity of the [TBE]".

## Confidential information

The Commission's investigation had identified occasions when subcontractors were provided with their competitors' confidential bid information, increasing the likelihood they would be awarded work. They also sometimes received budget information that had been prepared by Downer or TfNSW, which allowed them to increase their prices depending on what money was available in the budget.

TfNSW stored confidential information related to the relevant projects in an electronic system called TeamBinder. Downer employees who worked on TfNSW projects also had access to this system.

Security concerns with TeamBinder were identified by Mr Wakim. He discovered that TfNSW did not have a process for removing the access of ex-Downer employees, which allowed them to continue accessing confidential information after they were no longer authorised to do so.

Additionally, TeamBinder was not always used as mandated. For instance, queries relating to progress claims were usually put directly to the commercial team in

Downer via email instead of being raised via TeamBinder. Indeed, when Mr Wakim raised the security issue with TeamBinder he had identified, he was told to use password-protected emails for commercially sensitive TBE submissions instead of TeamBinder.

This uncoordinated approach is concerning, given that TeamBinder had been mandated to avoid information-security risks associated with email usage. Moreover, even if password-protected emails were secure, it is better to have a document-management system that can handle the need for particularly sensitive documents, rather than have a workaround for such documents because the system cannot handle their additional need for confidentiality.

While managing the risk of the misuse of confidential information can be challenging, having robust information-security controls can markedly aid this effort. It is currently unclear how robust TfNSW's information security is in relation to MC framework projects. Moreover, there appear to be divergent opinions within TfNSW regarding how information security should be managed in relation to such projects.

## RECOMMENDATION 9

**That TfNSW conducts a detailed risk assessment regarding information security related to projects utilising the managing contractor framework, and identifies and implements controls to enhance the security of project information.**

TfNSW submitted that it “accepts and supports” this recommendation. TfNSW's submissions also stated that it:

- has adopted measures to limit access to TeamBinder and delivered records-management training to staff from its infrastructure and place division (“I&P”)
- would deliver refresher training to rail delivery project staff and develop an audit schedule to monitor compliance with record-keeping requirements.

Downer submitted that it “concur[s]” with this recommendation, which, it stated, has “the potential to indirectly affect contractors such as Downer”.

### Contractual compliance

To manage corruption and other risks, the MC framework placed a broad range of ethical and procurement-related contractual requirements upon Downer. Downer was also required to impose equivalent obligations on the subcontractors it engaged.

Among these were requirements regarding how Downer engaged subcontractors. It was required to warrant that it would “exercise a duty of the utmost good faith” to TfNSW regarding the end-to-end process of sourcing and managing subcontractors. Specific requirements regarding subcontractor engagement included:

- preparing a procurement plan that included all intended subcontracts, and the estimated contract value and tendering method for each subcontract
- submitting the procurement method, list of proposed tenderers and selection methodology for a given package of work to TfNSW for approval prior to approaching the market
- submitting the tender-evaluation documentation and a subcontractor recommendation to TfNSW for approval prior to awarding a subcontract
- submitting documentation to support a subcontract variation to TfNSW for approval prior to executing that variation.

TfNSW did not always enforce contractual requirements regarding Downer's engagement of subcontractors. There were at least five different requirements with which Downer sometimes did not comply.

First, TfNSW was not always informed that work was to be subcontracted. For several of the subcontracting arrangements being investigated, the Commission has been unable to find evidence of approval by TfNSW.

Secondly, there was inconsistent compliance with Schedule 28 of the MCC, which set out the suppliers that Downer would approach. For instance, some TAP projects involved unauthorised departure from the list of suppliers in Schedule 28 and Schedule 28 was not even completed in some latter TAP projects.

Thirdly, Downer sometimes failed to follow requirements to go to the open market for subcontracts above \$250,000. For instance, Sanber Group was paid a total of \$1,922,951.57 by Downer for work related to Victoria Street Station (although the original contract was only \$789,804.60, with \$1,023,225.80 of variations) despite:

- no competitive process having been undertaken
- it not being included in the list of potential subcontractors under Schedule 28.

Fourthly, subcontracted work was sometimes split into multiple contracts after the procurement process had been completed. For instance, in relation to Banksia Station, the construction work, and roofing and hoarding work, were split into two separate packages post-tender and awarded to different companies.

Fifthly, Downer did not always apply for TfNSW approval of subcontractor variations. For instance, a contractor submitted variations for work at Glenbrook Station where the original subcontract sum was \$111,250, with variations issued totalling an additional \$106,496.75. No evidence has been located that TfNSW approved the original subcontract, let alone the variations.

Despite the importance of these contractual requirements, there is no evidence that TfNSW routinely escalated Downer's non-compliance, either internally or with Downer. Indeed, as discussed in the "Understanding of MC framework" section of this chapter, Mr Wakim was criticised by management for attempting to exercise TfNSW's contractual right to approve subcontractors.

TfNSW puts itself at considerable risk if it does not enforce the terms of its contractual engagements. In addition to corruption risks, failure to enforce procurement-methodology requirements creates risks such as using subcontractors who lack sufficient knowledge and experience to perform their work safely, effectively and efficiently.

For instance, because of heritage considerations, there was a contractual requirement to use specialist tradespeople to perform work at Central Station, and an email from Downer acknowledged that this meant that "care should be taken when choosing the subbies".

Despite this requirement, this work was awarded to RJS Infrastructure, which had never completed a job before and was not a heritage specialist. Furthermore, RJS Infrastructure subcontracted this work to SDL and BH Civil, neither of which were heritage specialists. Consequently, TfNSW can have no confidence that a condition of the approval under the *Heritage Act 1977*, identified by Downer's heritage officer, had been met. Namely, that the work was done by "suitably qualified tradespersons with practical experience in the conservation and restoration of similar heritage structures".

## RECOMMENDATION 10

**That TfNSW ensures that suppliers engaged under the managing contractor framework abide by procurement-related contractual clauses by:**

- **assigning responsibilities and accountabilities**
- **adopting appropriate assurance mechanisms**
- **proportionately responding to compliance failures.**

TfNSW submitted that it "accepts and supports" this recommendation. TfNSW's submissions also stated that it:

- had already taken actions relevant to this recommendation, such as conducting improved assurance activities and developing training modules for staff involved in administering the MC framework
- planned to take additional steps, such as developing a role and responsibilities matrix, developing an audit schedule of managing contractors and developing a framework for escalating non-compliance by managing contractors.

Downer submitted that it "concur[s]" with this recommendation, which it stated has "the potential to indirectly affect contractors such as Downer".

## Project oversight

Stemming from the matters raised above, this investigation has identified five broad project oversight issues:

1. Corruption risks were not identified on risk registers, meaning that they were not formally managed.
2. Relevant TfNSW and Downer staff erroneously perceived that the complexity of the arrangements meant that corrupt conduct was unlikely.
3. Relevant TfNSW staff failed to exercise contractual rights because they lacked a sufficient understanding of the MC framework.
4. Control failures were not identified because insufficient assurance activities were conducted.
5. Information did not adequately flow to governance bodies, meaning that they were not informed of control and assurance issues.

## Corruption risk identification

The types of corruption risks that manifested in this investigation were understood by TfNSW senior management. For instance, on 13 April 2016, the deputy secretary of the infrastructure and services division ("I&S"), which was the predecessor to I&P, wrote to all I&S staff to advise them that:

*Failure to manage potential fraud and corruption risks would seriously damage the brand and reputation of I&S and may impede the delivery of our program of works. Therefore, we need to be constantly vigilant in our business practices and regularly evaluate the effectiveness of our control environment.*

I&S conducted a detailed fraud and corruption risk assessment during 2016. The scope of this assessment covered high-risk fraud and corruption areas. It included many areas relevant to this investigation, such as major procurement, minor procurement, and contract management and monitoring. Overall, it identified 36 risks, with the eight most severe risks identified being:

- unregulated variations in scope to achieve financial advantage for a subcontractor or I&S employee
- inappropriate access or use of I&S information by consultants or subcontractors
- subcontractors invoicing for work not performed
- invoice splitting to extend contract and avoid going to market, or avoid delegated authority limits
- providing confidential information to a competitor to provide a competitive advantage over other bidders
- collusion with a subcontractor to supply goods or equipment in order to achieve a financial advantage
- deliberate manipulation of project performance in terms of completion and cost to avoid management scrutiny
- collusive tendering heightened due to the acceleration of new projects.

Mr Church accepted that many of these risks had manifested. This invites the question of what was done to respond to the findings of the risk assessment. While an action plan was completed in response to the risk assessment's recommendations in May 2017, TfNSW advised the Commission that the status of the implementation of the action plan is unclear due to organisation changes and the dissolution of I&S in 2018.

Separate to the implementation of the action plan, there is evidence that the relevant fraud and corruption risks were also known by specific business units within I&S. For instance, a risk register for the period 2018-19 extracted from the CURA system managed by the commercial business unit within TfNSW contained a range of fraud and corruption risks. Some of these risks are highly relevant to the current investigation, for instance:

- alliance integrity is challenged by fraud and corruption practices
- disclosure of sensitive information/confidential documents
- fraud and corruption during the tender/procurement process

- fraudulent and/or corrupt contract management behaviours
- practices that encourage/result in tender collusion.

Despite such risks appearing in divisional and business unit risk registers, they did not flow down to the risk registers for the projects relevant to this investigation.

The TAP risks were managed at program and project levels to ensure that the ownership of risks was assigned to personnel who could influence outcomes. Generally, all strategic risks and common risks across projects were managed at the program level with project-specific risks managed by project teams.

A TAP 3 risk management plan was issued on 17 November 2017. It was authored by a risk manager, reviewed by a project controls manager and several other officers, and approved by a program director. It contained detailed information about how risks in the TAP projects were to be identified and managed, including dedicated roles and responsibilities.

Despite this document containing a detailed approach to risk management, corruption risks were not identified as being applicable to the TAP projects at project or program levels. For instance, corruption risks were not identified:

- in the TAP risk registers
- the TAP assurance and governance plan.

The treatment of fraud and corruption risk appears to be in stark contrast with the treatment of both environmental, and health and safety, risks for the TAP and the NIF program. For instance, environmental management and zero harm management plans were respectively required in relation to these risks.

The value of identifying corruption risks at divisional and business-unit levels is limited if relevant risks are not reflected in the day-to-day management of projects.

## RECOMMENDATION 11

**That TfNSW's infrastructure and place division ensures that project risk registers reflect fraud and corruption risks, and that project risk workshops consider corruption risks.**

TfNSW submitted that it "accepts and supports" this recommendation. TfNSW's submissions also stated that it:

- has taken steps to better incorporate corruption risks in relevant risk registers and software
- is in the process of conducting risk workshops in the I&P Division that include dedicated time discussing fraud and corruption risks.

Downer submitted that it “concur[s]” with this recommendation, which it stated has “the potential to indirectly affect contractors such as Downer”.

Despite the potential for Downer to be impacted by corrupt or improper conduct, TfNSW also failed to effectively engage and collaborate with Downer to adequately identify relevant corruption risks it was expecting Downer to manage. Each of the TAP tranches was the subject of a project mandate issued by Downer, which included the following requirement:

*A comprehensive risk and opportunity register is to be developed by each Project Manager and reviewed by the Program Manager. The risk register is to be reviewed and updated by the Project team monthly. Each risk identified must be allocated to a specific “risk owner” by the Project Manager to ensure careful monitoring and accountability are maintained.*

Examination of these risk and opportunity registers shows no reference to corruption risks and hence no specification of relevant controls. For instance, the Banksia Station TAP project risk and opportunity register shows 78 risks, one of which is theft and graffiti during construction. It is difficult to understand why corruption risks were not included when relevant corruption risks were known to TfNSW and are likely to have a significantly higher impact than theft and graffiti.

Contractors are unlikely to effectively manage relevant corruption risks if they are not in their risk registers. Consequently, TfNSW needs to obtain assurance that relevant corruption risks are being appropriately managed by contractors such as Downer. However, TfNSW has advised that it would be very unusual for a contractor to be asked to supply their risk register for review, and contractors might have legitimate concerns about supplying their registers.

As an alternative, contractual requirements regarding corruption risk management could be imposed on a managing contractor. The Commission notes that the contracts applying to both the TAP and the NIF programs required Downer to comply with the TfNSW statement of business ethics. The effectiveness of such a measure is limited, however, if TfNSW does not ensure that the managing contractor does not have a good understanding of relevant corruption risks, and the contract requirements are not monitored and enforced. Given that TfNSW has a detailed knowledge of such risks, it is in a good position to advise managing contractors.

## RECOMMENDATION 12

**That TfNSW advises managing contractors of specific corruption risks that they should be managing, and updates the managing contractor framework to require:**

- **that these specific corruption risks be formally managed; this should be separate to any general requirements to manage corruption risk**
- **evidence of compliance.**

TfNSW submitted that it “accepts and supports” this recommendation. TfNSW’s submissions also stated that it is:

- having discussions with its project teams regarding which risks should be managed by the managing contractor and which risks should be managed by TfNSW
- developing an audit process to produce evidence that managing contractors are managing corruption risks.

Downer submitted that it “concur[s]” with this recommendation, which it stated has “the potential to indirectly affect contractors such as Downer”.

## Corruption risk awareness

While corruption risks were not adequately recorded in project and program risk registers, the procurement management plan for the initial tranche of the TAP projects performed under the MC framework stated that:

*Procurement is an activity that is vulnerable to any real or perceived corruption or maladministration when a proper process is not maintained. It is recognised that the NSW government:*

*“has an obligation to ensure its procurement conduct is at all times fair, ethical, transparent and probity rich. Clear, visible and meaningful commitments to fairness encourage suppliers to want to do business with government”.*

Despite this obligation, at least some TfNSW and Downer staff involved in managing and/or governing the TAP and the NIF projects did not perceive a vulnerability to corrupt conduct.

Examples of TfNSW staff who underestimated the likelihood of corrupt conduct occurring include:

- Project director A, who said that they struggled to think where and how corrupt conduct would occur or how somebody would benefit, noting that, “there were so many, so many layers of checking”

- the commercial manager for the TAP, who expressed puzzlement as to how corrupt conduct could occur given the number of people involved, and the policies and procedures that had to be followed; they also noted that they had never seen corruption risk discussed in project-risk workshops.

Similar perceptions could be found among Downer staff. For instance, Downer's commercial manager stated that they believed the risk of corrupt conduct was low because of the process involved in sourcing contractors and the number of people involved.

These perceptions indicate a general misunderstanding regarding the nature of corruption risk. Complex processes do not necessarily reduce corruption risk. Indeed, having many people and processes can sometimes increase corruption risk because it is easy for something to fall through the cracks with so many moving parts. More generally, it is easier to control a process that has fewer steps.

For TfNSW to successfully manage corruption risks related to construction projects, its project staff need to understand corruption risk, both generally and in terms of specific risks that apply to their projects. As evidenced by the detailed I&P and commercial business unit risk registers, this understanding exists in some parts of TfNSW but not others.

### RECOMMENDATION 13

**That TfNSW's infrastructure and place division develops a tailored corruption awareness course for its staff that addresses corruption risks in its projects. This course should:**

- **consist of tailored training to be undertaken by anyone making, or with oversight of, project commercial decisions**
- **use this investigation, Operation Hector, as an example**
- **include material that creates awareness of corruption risks and myths**
- **discuss the reporting obligations that apply to these staff.**

TfNSW submitted that it "accepts and supports" this recommendation. TfNSW's submissions also stated that it:

- has developed a presentation that incorporates the lessons learnt from both this investigation and two other recent ICAC investigations
- enhanced and expanded the corruption prevention training it provides to staff.

### Understanding of the MC framework

The MC framework was designed to encourage cooperation between the managing contractor and TfNSW. For instance, the TAP parties were required to work transparently and collaboratively; and to promote, monitor and enforce specified behaviours.

A project director told the Commission about their concerns relating to some TfNSW staff that:

*... a lot of people don't necessarily understand how the managing contract works, the framework itself but also the individual contracts. So, and, and the reason behind that is that a lot of our people are used to the designing construct [sic], D and C, just type and not necessarily understand that in the collaborative contract we do need to have a say on a number of things. We do need to go and check certain things ...*

This lack of understanding of the collaborative nature of the MC framework identified by the project director was confirmed by the commercial manager at Downer. It adversely affected TfNSW's ability to manage *inter alia* corruption risks related to the TAP and the NIF projects. A good example is provided by how Mr Wakim was treated when he legitimately acted in TfNSW's interests.

Mr Wakim identified major concerns about a subcontractor, RJS Infrastructure, that Downer had recommended to perform work at Wollstonecraft Station. These concerns included that he:

- was given the subcontractor's name only 12 hours before a site possession was due to take place; which should not have occurred given that Downer had access to annually publicised information about when track possessions would occur
- had never heard of the subcontractor
- could not find a website for the subcontractor
- conducted an ABN search and found that the subcontractor's business address was a residential house.

Based on this due diligence, Mr Wakim was concerned that this company might be "pyramid contracting" – that is, only obtaining the work to further subcontract it to another company. Such pyramid contracting raises several risks for TfNSW, including facilitating or hiding corrupt favouritism, or having an inadequately skilled or experienced company performing the work.

Mr Wakim then raised the issues with his counterpart at Downer, who was "quite angry" and "incredulous" that he would be questioning their choice of subcontractors. Following this, Mr Wakim received feedback from his

then manager, another project director, that he had “trust issues” and needed to work on developing trust with Downer. This need to build trust was reinforced by the project director at a site barbecue a couple of weeks later.

The project director’s response reflects a misunderstanding of the MC framework, as TfNSW had the right to approve subcontractors. Mr Wakim was exercising this right and had identified a concern with a subcontractor, conducted some due diligence and raised some red flags. He was thus appropriately asserting TfNSW’s powers under the MC framework and defending its interests. To say that Mr Wakim’s actions demonstrate he had trust issues:

- misunderstands TfNSW’s position under the MC framework
- meant that Mr Wakim was unfairly criticised for proactively and properly acting in TfNSW’s interests.

While the goal of collaboration embedded in the MC framework is unproblematic, blind trust in a business partner always exposes an agency to unnecessary corruption and other risks, regardless of how collaborative the relationship is. Agency staff who know and enforce the “guard rails” around collaborative relationships can help ensure that such risks are properly managed.

## RECOMMENDATION 14

**That, as part of program planning, TfNSW develops guidance for project teams and individuals involved in managing construction projects that:**

- **identifies key corruption risks and controls related to the adopted contracting model(s)**
- **identifies non-negotiable and other important corruption control requirements to be met**
- **requires responsibilities and accountabilities associated with these corruption control requirements be assigned.**

TfNSW submitted that it “accepts and supports” this recommendation and would implement it via revisions to its MC framework manual.

## Assurance

This investigation has identified three assurance-related issues:

- Assurance roles were inappropriately assigned.
- There was insufficient quality assurance.
- Right-to-audit provisions were not sufficiently utilised and enforced.

In terms of project management, each of the TAP and the NIF projects were led by a TfNSW senior project manager, who managed a project team and reported to a project director. Each project director was responsible for a tranche of projects and reported to an executive director, who in turn reported to Mr Church, head of rail delivery for TfNSW.

Separate to this structure was the projects control unit that essentially was a project management office (PMO). PMOs are usually tasked with monitoring projects so that senior management is able to obtain assurance that controls are working effectively and outcomes are not threatened. Ordinarily, they act as a check upon the project team’s management of the project.

However, it does not appear that the project controls unit had such a monitoring function. Indeed, the program director stated that it was the project team who had accountability for obtaining assurance that project controls were working appropriately, with the project director being accountable for managing risk. The Commission comments that such an arrangement cannot provide independent assurance. This is because such an arrangement makes individuals responsible for both managing corruption risks and obtaining assurance that this has been done adequately.

More broadly, the project controls unit was not set up to perform a comprehensive assurance function. In the words of the project director, the unit was a “support function”, mainly in the areas of cost, time, risk and reporting, which made sure that project teams followed policies, processes and procedures. Consistent with this:

- The program director did not report to or liaise with any governance committees or boards, and the unit did not otherwise fit into other governance arrangements.
- While the unit would begin its involvement as project controls were being established, it did not have regard to the MC framework when setting up project controls.
- While the unit coordinated risk workshops, the input provided in each workshop solely came from the project team.

In addition, TfNSW did not conduct adequate assurance activities surrounding the quality of work conducted under the MC framework. TfNSW senior project managers stated that quality has become a reduced focus for TfNSW over time. They commented that TfNSW’s capacity for quality assurance had deteriorated, as it now has fewer quality managers and conducted fewer audits. Mr Wakim added that:

*...the actual quality of what you’re handing over is not great but it’s a harder metric to measure and we seem to be spending less focus on that these days.*

This inadequate quality assurance contributed to TfNSW allowing companies with insufficient experience to perform work on railway stations, such as:

- Sanber Group trading as RJS Civil being awarded work on Victoria Street Station, despite having no employees and no experience working on railway infrastructure
- RJS Infrastructure being awarded work on Central Station despite having no experience, relevant or otherwise, and no employees.

The relative lack of quality-assurance mechanisms did not arise from the MCC itself, which allowed for “auditing, surveillance, monitoring, testing, review, examination and measuring” to occur at any time and required the MC contractor to cooperate with these activities.

TfNSW decided that MC framework auditing should happen at an organisational level rather than a project level. It did not audit Downer’s procurement processes during the TAP tranches 1 and 2, but commissioned the Paxon Group (“Paxon”) to audit five of the TAP tranche 3 projects that had been allocated to Downer. Paxon’s report was completed in January 2022 and noted several areas of contractual non-compliance. Some of these were relevant to the issues discussed above, such as:

- subcontractors being appointed prior to TfNSW approval
- procurement risk assessments not being documented
- no tender probity plan existing
- annual procurement review not being performed.

Additionally, Paxon’s report expressed concern regarding Downer’s cooperation with its audit activities. It stated:

*There are a number of areas within the MC and MCC that refer to the right to audit.*

*Although cooperation has been received by Paxon from DEDI [Downer] it has not been in line with the timeframes set out below, which has resulted in an extended timeframe for delivery of this review and was not open book as the request for timesheet information request was declined by DEDI and no formally documented reason was provided as to why.*

*Consideration should be given to making audit related clauses more specific in terms of the information that may be requested e.g. timesheets. This may result in full compliance in relation to the execution of right to audit clauses.*

A broader assurance and governance recommendation is proposed at the end of the governance section.

## Governance

The failure of project controls, combined with weaknesses in assurance mechanisms designed to prevent or detect them, calls into question the governance arrangements surrounding the projects relevant to this investigation.

TfNSW appears to have set up a sensible collection of governance bodies to oversee the TAP and the NIF programs. The TAP and the NIF programs were based in the rail delivery unit within I&S and the most senior governance body in rail delivery was the rail development and delivery committee. Beneath this committee were program control groups, such as the infrastructure and project delivery program control group, which oversaw the TAP and other programs, and the rolling stock delivery program control group, which oversaw the NIF and other programs. Below these control groups were ad hoc working groups that were designed to progress specific issues, such as the NIF change assessment working group. Rail delivery’s governance structure indicated that all these groups were separate to “day-to-day project and program governance”.

Such bodies can only be effective if they receive reliable, accurate and timely information about the operation of the programs they oversee. However, there were issues with information flowing from the frontline to rail delivery’s governance bodies, such as:

- the commercial unit not reporting to any governance body
- a senior project manager not reporting to, or providing reports to, any governance bodies
- the project performance unit not liaising with any governance body.

These information flow issues prevented TfNSW senior management from learning about relevant systemic issues. For instance, prior to the Commission’s investigation, Mr Church was not aware of issues previously identified in this chapter such as:

- security issues with TeamBinder
- Downer not providing enough time for nominated subcontractors to be adequately reviewed by TfNSW.

Assurance and governance arrangements are not one-size-fits-all. For instance, where an organisation chooses to place certain responsibilities and accountabilities should impact how others are assigned. Consequently, it would likely be counterproductive for the Commission to make very specific recommendations regarding TfNSW’s assurance and governance arrangements without an in-depth understanding.



Nevertheless, this investigation has identified a number of assurance- and governance-related issues, which appear to be caused by organisational design and performance priorities. The recommendation below should be viewed with these issues and priorities in mind.

## RECOMMENDATION 15

**That TfNSW enhances its governance and assurance processes surrounding the managing contractor framework to ensure that:**

- **an appropriately diverse suite of assurance activities is conducted**
- **governance committees are informed of issues identified by frontline staff and/or assurance activities.**

TfNSW submitted that it “accepts and supports” this recommendation. TfNSW’s submissions also stated that it:

- has engaged an auditor to review how managing contractor performance is managed against the MC framework
- will implement an audit schedule across “the Rail Delivery portfolio and its managing contractors” and develop a procedure to escalate any issues consequently identified.

In relation to the latter point, TfNSW may wish to consider whether the audit schedule and escalation protocol have broader applicability. For instance, other parts of I&P may use the MC framework or similar contracting modules.

## Response to false employment applications

Chapter 5 describes a number of falsehoods in Mr Aziz’s résumé, which was submitted to Downer. It falsely stated that Mr Aziz had a Master of Engineering Management degree and experience on projects that, in fact, he had not worked on. The Commission also found that Mr Abdi provided a glowing but entirely false reference for Mr Aziz. In addition, chapter 3 made findings that false aliases, including “Anthony Lee”, “Nick Sandrusi” and “Roger Smith” were invented to create the impression that subcontractors were operating companies comprised of more than one person.

Further to those matters, the Commission identified circumstances where TfNSW staff included false information in job applications for employment elsewhere within the transport cluster. In particular, two individuals listed each other as a referee, falsely stating that the other was their manager. In fact, they were merely colleagues.

This deception was identified by TfNSW but, unfortunately, it does not appear that any sanctions were taken against either individual or that any other remedial action occurred. Additionally, information about the deceptive job applications was not placed on either individual’s personnel file and TfNSW did not report their actions to the Commission.

Shortly thereafter, one of the individuals obtained employment on the TAP and engaged in corrupt conduct. Consequently, better management could have prevented this individual from ever holding a position on the TAP.

It is unclear whether TfNSW has sufficient controls in place to manage the risk of résumé fraud. Robust management of résumé fraud involves actions such as:

- documenting the risk of résumé fraud in a risk register
- using specific approaches to detect résumé fraud, for example, data analysis, and résumé and reference verification
- imposing sanctions when résumé fraud is detected.

## RECOMMENDATION 16

**That TfNSW reviews its mechanisms to prevent, detect and respond to false employment applications and résumé fraud to ensure that they adequately manage these risks.**

The Commission notes that TfNSW’s submissions stated that it “accepts and supports” this recommendation. The Commission also notes that TfNSW’s submissions indicated that:

- it had adopted mechanisms such as résumé vetting and reference checking to help manage the risk of résumé fraud
- these mechanisms have recently identified instances of résumé fraud, each of which has been reported to the Commission.

## Supplier debarment

This investigation has found that certain suppliers were corruptly awarded work. The Commission contends that public authorities should be cautious about engaging such suppliers.

In NSW, Procurement Board Direction 2017-07, Conduct by suppliers, states that agencies are required:

*To use their best endeavours to ensure that they are aware of any adverse findings against a supplier with whom they have an existing relationship, and report such findings to the Board when such findings become*

*known to the agency. Findings of dishonest, unfair, unconscionable, corrupt or illegal conduct can have a range of consequences for individual suppliers, including as serious as exclusion from contracting opportunities with the Government.*

It is not clear whether agencies comply with the requirement to repost adverse findings to the Procurement Board or whether any supplier has been excluded from contracting opportunities.

More broadly, the Commission notes that, even when a public authority undertakes due diligence checks on a potential supplier and its key personnel, there may be limitations to how easily pertinent information can be found. For example, there is currently no single repository in NSW from which an interested party can obtain information about a supplier, such as:

- findings of corrupt conduct (by the Commission or by similar bodies in other jurisdictions)
- criminal activity, such as theft and bribery
- non-compliance with workplace health and safety (WHS) or other industrial requirements
- non-compliance with environmental or other regulatory requirements.

By contrast, in Western Australia, there is a legislated scheme that enables the Western Australian finance minister to “debar” supplier companies, and/or their owners and directors, because of *inter alia* corrupt conduct findings being made against them.

The scheme prohibits debarred suppliers from seeking government contracts and places debarred suppliers on a public list that can be easily checked as part of supplier due-diligence processes. However, while the scheme has been operating for 18 months, there are currently no debarred companies on it. The Commission does, however, note that the scheme also establishes grounds, process and governance that allows the Western Australia Department of Finance to work with suppliers to improve business practices to avoid debarment.

The Commission sees potential in a well-designed supplier debarment scheme aiding supplier due-diligence efforts in NSW. It also notes that similar debarment schemes operate in jurisdictions outside Australia, such as the United States, Canada and South Africa. The United Nations and World Bank also operate debarment schemes. In addition, the relatively new UK *Procurement Act 2023* contains detailed provisions for debarring suppliers under a variety of circumstances.

## RECOMMENDATION 17

**That the NSW Government considers a debarment scheme to assist public authorities to identify suppliers that have had previous issues with misconduct or breaches of relevant requirements.**

TfNSW did not respond to this recommendation, stating that a “whole of government response” would be more appropriate. The Cabinet Office chose not to provide a response.

Downer submitted that, while it supported a debarment scheme in theory, it had two specific concerns about its implementation. The first was whether there are enough investigations such as Operation Hector to sustain such a scheme. The Commission comments that such a scheme might also allow for debarment because of other malfeasance (for example, WHS violations). The second was whether such a scheme should be focused on individuals rather than companies, given that individuals can control companies without “any apparent ties”. The Commission notes the importance of considering whether and how individuals can be captured in a scheme, and comments that it is also relevant because of issues such as illegal phoenix activity.<sup>1</sup>

This recommendation was also submitted to IWC, which indicated its support. IWC added that there needed to be transparency surrounding debarment criteria, and that procedural fairness needed to be afforded prior to debarment, to avoid “legal challenges” and “subsequent economic loss”. The Commission agrees that transparency and procedural fairness are important considerations when designing a debarment scheme.

These recommendations are made pursuant to s 13(3)(b) of the ICAC Act and, as required by s 111E of the ICAC Act, will be furnished to IWC, TfNSW, the minister for domestic manufacturing and government procurement and the other responsible ministers.

As required by s 111E(2) of the ICAC Act, IWC, TfNSW and the minister for domestic manufacturing and government procurement must inform the Commission in writing within three months (or such longer period as the Commission may agree to in writing) after receiving the recommendations whether they propose to implement any plan of action in response to the recommendations and, if so, details of the proposed plan of action.

In the event a plan of action is prepared, IWC, TfNSW and the minister for domestic manufacturing and

<sup>1</sup> Illegal phoenix activity is when a company is liquidated, wound up or abandoned to avoid paying its debts. A new company is then started to continue the same business activities without the debt. [www.ato.gov.au](http://www.ato.gov.au) Accessed on 3 April 2024.

government procurement are required to provide a written report to the Commission of their progress in implementing the plan 12 months after informing the Commission of the plan. If the plan has not been fully implemented by then, a further written report must be provided 12 months after the first report.

The Commission will publish the responses to its recommendations, any plan/s of action and progress reports on its/their implementation on the Commission's website at [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au).

## Appendix 1: The role of the Commission

The Commission was created in response to community and Parliamentary concerns about corruption that had been revealed in, inter alia, various parts of the public sector, causing a consequent downturn in community confidence in the integrity of the public sector. It is recognised that corruption in the public sector not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The Commission's functions are set out in s 13, s 13A and s 14 of the ICAC Act. One of the Commission's principal functions is to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

- i. corrupt conduct (as defined by the ICAC Act), or
- ii. conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
- iii. conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur.

The Commission may also investigate conduct that may possibly involve certain criminal offences under the *Electoral Act 2017*, the *Electoral Funding Act 2018* or the *Lobbying of Government Officials Act 2011*, where such conduct has been referred by the NSW Electoral Commission to the Commission for investigation.

The Commission may report on its investigations and, where appropriate, make recommendations as to any action it believes should be taken or considered.

The Commission may make findings of fact and form opinions based on those facts as to whether any particular person has engaged in serious corrupt conduct.

The role of the Commission is to act as an agent for changing the situation that has been revealed. Through its work, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

The Commission may form and express an opinion as to whether consideration should or should not be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of a person for a specified criminal offence. It may also state whether it is of the opinion that consideration should be given to the taking of action against a person for a specified disciplinary offence or the taking of action against a public official on specified grounds with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

## Appendix 2: Making corrupt conduct findings

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in s 8 of the ICAC Act and which is not excluded by s 9 of the ICAC Act.

### Determining corrupt conduct

Section 8 defines the general nature of corrupt conduct. Subsection 8(1) provides that corrupt conduct is:

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
- (b) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
- (b) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Subsection 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific matters which are set out in that subsection.

Subsection 8(2A) provides that corrupt conduct is also any conduct of any person (whether or not a

public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

- (a) collusive tendering,
- (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,
- (b) dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
- (b) defrauding the public revenue,
- (b) fraudulently obtaining or retaining employment or appointment as a public official.

Subsection 9(1) provides that, despite s 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

- (a) a criminal offence, or
- (b) a disciplinary offence, or
- (b) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
- (b) in the case of conduct of a Minister of the Crown or Parliamentary Secretary or a member of a House of Parliament – a substantial breach of an applicable code of conduct.

Subsection 9(1)(d) was inserted into the ICAC Act by the *Independent Commission Against Corruption (Amendment) Act 1994*. The object of the Bill which became the Act was to amend the ICAC Act so that conduct of a minister or member of Parliament that substantially

breaches a code of conduct is capable of being classified as corrupt conduct. The subsection was again amended in 2022 to include the office of parliamentary secretary.

In *Greiner v ICAC* (1992) 28 NSWLR 125 (at 136, 143) Gleeson CJ said the following in relation to s 9:

*Reference has been made above to the conditional nature of a conclusion reached in relation to s 9(1). An accurate understanding of the operation of the word “could” in s 9 is essential to a proper performance of the task of evaluation required by that section.... However, it is of some assistance to an understanding of the way in which s 9(1) operates to consider what might be its effect in relation to a case where it is said that the conduct in question could constitute or involve a criminal offence.*

*It was common ground in these proceedings that, in determining whether conduct could constitute or involve a criminal offence, the Commissioner would be required to go through the following process of reasoning. First, he would be required to make his findings of fact. Then, he would be required to ask himself whether, if there were evidence of those facts before a properly instructed jury, such a jury could reasonably conclude that a criminal offence had been committed. (It is not necessary for present purposes to examine what happens in a case where the Commissioner’s findings depend in a significant degree upon evidence that would be inadmissible at a criminal trial.) I will return below to the significance of the approach to be taken to s 9(1).*

...

*... s 9(1) must be applied by the Commission, and by this Court, in a manner that is consistent with the purpose of the legislature, which was that the standards by which it is applied must be objective standards, established and recognised by law, and its operation cannot be made to depend upon the subjective and unexaminable opinion of the Commissioner.*

### Section 13(3A) of the ICAC Act

Section 13(3A) was inserted into the ICAC Act in 2005 by the *Independent Commission Against Corruption Amendment Act 2005*. It provides that the Commission may make a finding that a person has engaged or is engaged in corrupt conduct of a kind described in paragraphs (a), (b), (c), or (d) of s 9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

In *D’Amore v ICAC* [2012] NSW 473 at [75] McClellan CJ at CL described s 13(3A) (and s 9(5), referred to below) as creating jurisdictional facts. He held:

*In those circumstances, the jurisdictional facts created by ss 13(3A) and 9(5) will be found to exist where the Commission forms, in good faith, an evaluative judgment that the person under investigation has committed an offence or breached an identified law, provided the Commission has properly construed relevant criteria such as the elements of the offence or the requirements of the identified law.*

The application of s 13(3A) was also considered by the Court of Appeal in *D’Amore v ICAC* [2013] NSWCA 187. Basten JA said the following at [221]:

*That leaves open the question as to the matter about which the Commission must be satisfied under s 13(3A). It would clearly be inconsistent with both the function of the Commission and the structure of the Act generally to hold that the Commission must be satisfied beyond reasonable doubt that an offence has been committed. The Commission is not a criminal court and is not required to reach conclusions on the basis of material which would constitute admissible evidence in a criminal proceeding: cf s 17(1). So understood, s 13(3A) requires that the Commission be satisfied that the conduct has occurred and that it is conduct of a kind which constitutes a criminal offence. The combined purpose of ss 13(4) and 74B, is to emphasise that the Commission is not delivering a verdict on a criminal charge.*

In *Duncan v ICAC* [2016] NSWCA 143 Beazley P held, at [469]:

*Effectively, therefore, there are two requirements at play. First, pursuant to s 9(1), conduct will only constitute corrupt conduct if it could constitute or involve conduct of the kinds specified in paras (a) to (d). Second, pursuant to s 13(3A), the power of the ICAC to make a finding of corrupt conduct is conditioned on the ICAC being satisfied that the relevant conduct constitutes or involves an offence or thing of the kinds specified in paras (a) to (d) of s 9(1). Thus, whilst the provisions overlap, there is a distinction between the meaning of corrupt conduct, which engages ss 7, 8 and 9 and the subsequent conditioning of power on the relevant state of satisfaction within the meaning of s 13(3A): see Bathurst CJ at [164]-[165]; Basten JA at [598].*

Basten JA (with whom Beazley P agreed) held at [598]:

*Section 8(2) and s 9(1)(a) of the ICAC Act refer to conduct which “could constitute or involve” a criminal*

offence; s 13(3A) requires the Commission to be satisfied that a person “has engaged in ... conduct that constitutes or involves an offence”. It is clear from the legislative scheme identified above that s 13(3A) does not impose an obligation to be satisfied that an offence has in fact been committed. Rather, that as to which the Commission must be satisfied is the capacity of the facts found to constitute an offence, if proved by admissible evidence to the satisfaction of the appropriate court.

### Subsections 9(4) and (5) of the ICAC Act

Subsection 9(4) of the ICAC Act provides:

*Subject to subsection 9(5), conduct of a Minister of the Crown or Parliamentary Secretary or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.*

Subsection 9(5) of the ICAC Act provides:

*Without otherwise limiting the matters that it can under section 74A(1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.*

These subsections were inserted into the ICAC Act by the *Independent Commission Against Corruption (Amendment) Act 1994* to extend the grounds on which a finding of corrupt conduct could be made against a minister of the Crown or a member of Parliament.

At the time subsections 9(4) and (5) were inserted, s 13(3A) was not yet part of the ICAC Act. As noted above, it was inserted in 2005. Section 13(3A) does not apply to conduct characterised as corrupt by the operation of s 9(4) and s 9(5).

The application of subsections 9(4) and (5) was considered by the Commission in its June 2004 *Report on investigation into conduct of the Hon J. Richard Face*. At page 45 of that report the Commission noted the following:

*It is clear from the words in s.9(4) that the provision was intended to catch conduct which fell within the description of corrupt conduct in s.8, but which would otherwise be excluded by s.9.*

...

*As a matter of construction, s.9(4) and (5) extend the range of permissible findings of corrupt conduct beyond those already contained in s.9(1) to those which would otherwise be excluded, but which fall within s.9(4) and (5).*

...

*...it is not necessary to undertake, in the context of the present investigation, a detailed analysis of the meaning of the term “breach of a law (apart from this Act)” in s.9(5). It seems clear, however, that “breach of a law” in s.9(5) ought to be construed as meaning breach of a civil, and not a criminal, law.*

Support for this interpretation is found in the judgment of McClellan CJ at CL in *D’Amore v ICAC* [2012] NSW 473 at [22] that:

*In relation to conduct of a Minister of the Crown or a member of Parliament, s 9(4) creates a limited “carve-out” from the operation of s 9(1)... Although this “carve-out” is not subject to the limitation in s 13(3A), it is expressly subject to s 9(5)...*

His Honour identified both s 9(5) and s 13(3A) as jurisdictional facts.

Subsection 9(4) was amended in 2022 to include the office of parliamentary secretary.

Accordingly, the effect of subsections 9(4) and 9(5) is that the Commission may make a finding that a minister of the Crown, a parliamentary secretary or a member of a House of Parliament has engaged in corrupt conduct where, although that conduct does not come within s 9(1), it comes within subsections 9(4) and (5).

### Section 74BA of the ICAC Act

Section 74BA of the ICAC Act provides that the Commission is not authorised to include in a report under s 74 a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.

### The path to findings

The Commission adopts the following approach in determining findings of corrupt conduct.

First, the Commission makes findings of relevant facts on the balance of probabilities (see below).

The Commission then determines whether relevant facts as found by the Commission come within the terms of any of subsections 8(1), 8(2) and/or 8(2A) of the ICAC Act.

If they do, the Commission then considers whether the conduct comes within s 9 of the ICAC Act.

In the case of subsection 9(1)(a), the Commission considers whether, if the facts as found in relation to any of subsections 8(1), 8(2) and/or 8(2A) were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that the person has committed a particular criminal offence.

In the case of subsections 9(1)(b) and 9(1)(c), the Commission considers whether, if the facts as found in relation to any of subsections 8(1), 8(2) and/or 8(2A) were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could find that the person has engaged in conduct that constitutes or involves a matter of the kind described in those sections.

In the case of subsection 9(1)(d), the Commission considers whether, having regard to the facts as found in relation to any of subsections 8(1), 8(2) and/or 8(2A) and the provisions of the relevant applicable code of conduct, there are grounds on which it could objectively be found that a minister of the Crown or parliamentary secretary or a member of a House of Parliament has substantially breached the relevant applicable code of conduct.

If the Commission finds that the relevant conduct could constitute or involve a matter set out in s 9(1)(a) – (d) of the ICAC Act, the Commission concludes that its findings for the purposes of any of subsections 8(1), 8(2) and/or 8(2A) are not excluded by s 9.

If the Commission finds the s 8 conduct is not excluded by s 9(1) – (d), the Commission considers the requirements of s 13(3A).

In the case of subsection 9(1)(a) the Commission determines whether it is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that the person has committed a particular criminal offence.

In the case of subsections 9(1)(b) and 9(1)(c) the Commission determines whether it is satisfied that, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

In the case of subsection 9(1)(d) the Commission determines whether on the facts as found it is satisfied there are grounds on which it would objectively be found that a person has engaged in or is engaging in conduct that constitutes or involves a substantial breach of an applicable code of conduct.

In the case of subsection 9(4) the Commission considers whether the conduct of a minister of the Crown or parliamentary secretary or a member of a House of Parliament which falls within the meaning of any of subsections 8(1), 8(2) and/or 8(2A) is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

In the case of subsection 9(5) the Commission identifies the relevant civil law and determines whether, having regard to the facts as found in relation to any of subsections 8(1), 8(2) and/or 8(2A) and the provisions of the relevant civil law, it is satisfied there are grounds on which it could objectively be found that a minister of the Crown or parliamentary secretary or a member of a House of Parliament has breached that law.

If satisfied the requirements of s 13(3A) have been met, the Commission then determines whether, for the purpose of s 74BA of the ICAC Act, the conduct the subject of the Commission's finding for the purposes of any of subsections 8(1), 8(2) and/or 8(2A) is serious corrupt conduct.

The Commission then determines whether, for the purpose of s 74BA of the ICAC Act, the conduct the subject of the Commission's finding for the purpose of any of subsections 8(1), 8(2) and/or 8(2A) is serious corrupt conduct.

If the above requirements are satisfied, the Commission may make a finding of serious corrupt conduct.

## Standard of proof

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of corrupt conduct.



In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently by the Commission when making factual findings. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

*...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, to be understood:

*...as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

See also *Rejfék v McElroy* (1965) 112 CLR 517, the *Report of the Royal Commission of inquiry into matters in relation to electoral redistribution, Queensland, 1977* (McGregor J) and the *Report of the Royal Commission into An Attempt to Bribe a Member of the House of Assembly, and Other Matters* (Hon W Carter QC, Tasmania, 1991).

Findings set out in this report have been made applying the principles detailed in this Appendix.

## Appendix 3: Summary of responses to proposed findings

Section 79(A)(1) of the ICAC Act provides that the Commission is not authorised to include an adverse finding against a person in a report under s 74 unless:

- a) the Commission has first given the person a reasonable opportunity to respond to the proposed adverse finding, and
- b) the Commission includes in the report a summary of the substance of the person's response that disputes the adverse finding if the person requests the Commission to do so within the time specified by the Commission.

Counsel Assisting the Commission made written submissions setting out, *inter alia*, what adverse findings were open to the Commission to make against various parties.

These were provided to the relevant legal representatives on 24 July 2023 and submissions in reply were received. Supplementary submissions of Counsel Assisting in reply were provided to particular parties on 3 November 2023. The final submissions in reply to the supplementary submissions were received on 26 November 2023.

During the course of drafting the report, additional potential adverse findings affecting some parties were identified. Those parties were advised of the further potential adverse findings on 8 March 2024 and given an opportunity to make submissions. The last submission was received on 25 March 2024. The Commission has had regard to the submissions received in finalising the report. Where adverse findings have been made in the body of this report, submissions made in response by individual parties to that finding have been included if requested by the party.

Mr Gayed requested that a summary of his response be included in the Commission's report.

Mr Abdi requested that, in the event the Commission makes any adverse findings against him in its report, a summary of his response to all such adverse findings be included.

Mr Bedwani requested that a summary of his response be included in the report in the event that the Commission makes an adverse finding against him. As the Commission has not made any adverse findings against Mr Bedwani, a summary of his submissions has not been included in the report.

Mr Cox requested that a summary of his response to any adverse findings made in relation to the awarding of the Macdonaldtown Station project to RJS Infrastructure be included.

The Commission notes that a number of other submissions have been addressed in the body of this report.

### Mr Gayed's submissions

Mr Gayed provided a brief submission in reply to Counsel Assistings' submissions on 10 August 2023. The Commission notes that Mr Gayed's submission relates solely to Counsel Assistings' recommendation in respect of the matters discussed in chapter 11 of this report in relation to the AVCO invoice submitted to Downer in October 2020 for the hire of lighting towers on the Wollstonecraft Station project.

In respect of Counsel Assistings' reference to the statements of Ms Curtis and Ms Huang, in relation to possible advice from the DPP concerning specified criminal offences, Mr Gayed's submission notes that both statements were tendered in chambers and, as such, neither Ms Curtis nor Ms Huang were made available for examination at the public inquiry.

It was submitted that the Commission ought to be cautious when handling evidence that was not tested at

the public inquiry, especially where it is urged that such evidence can be used as proof to establish a *prima facie* case against Mr Gayed where it is inconsistent with his sworn evidence.

Mr Gayed's submission disputed that there is sufficient evidence that he engaged in fraudulent conduct such that an offence under s 192E of the Crimes Act may have been committed, or that an offence under s 87(1) of the ICAC Act may have been committed, in relation to his evidence concerning the newsagency. It was submitted that the Commission would not, in all the circumstances, form the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution for those criminal offences.

The Commission has addressed Mr Gayed's submission in chapter 11 of this report. It suffices to note here that the Commission does not accept the submission that there is insufficient evidence upon which the Commission might form an opinion as to consideration being given to obtaining the advice of the DPP.

### Mr Cox's submissions

Mr Cox provided a submission on 25 March 2024. The Commission notes that Mr Cox's submission relates solely to any adverse findings of corrupt conduct that may result from the proposed findings in Counsel Assistings' submission of 24 July 2023, namely, Mr Cox's conduct in relation to the payment of Mr Vardanega of a \$25,000 "finders fee" relating to the awarding of works on the Macdonaldtown Station project to RJS Infrastructure.

Submissions on behalf of Mr Cox contended that a corrupt conduct finding pursuant to s 8(1)(a) should not be made for Mr Cox in respect of his conduct on the Macdonaldtown Station project because he was acting at the direction of Mr Nguyen; his conduct was not capable of adversely affecting the honest or impartial exercise of

Mr Vardanega's official functions as a public official; and Mr Cox's conduct was not serious corrupt conduct.

The Commission has addressed Mr Cox's submission in chapter 10 of this report. The Commission does not accept that submission.

### Mr Abdi's submissions

Mr Abdi provided three sets of submissions, dated 4 September 2023, 21 November 2023 and 22 March 2024.

#### Glenfield Transport Interchange multi-storey car park rectification works (chapter 3)

Mr Abdi submitted that the fact Counsel Assisting submitted that the Commission should not be of the opinion that consideration should be given to obtaining the advice of the DPP with respect to his prosecution for his conduct in relation to the Glenfield Transport Interchange car park (as described in chapter 3) suggests that there is insufficient evidence to connect him to this conduct.

The Commission does not accept the logic of this submission. The standard of proof for making a corruption finding is set out in Appendix 2.

Mr Abdi questioned Mr Nguyen's credibility and submitted that the Commission should give limited weight to Mr Nguyen's evidence regarding Mr Abdi providing him TfNSW budget information to price ASN Contractors' bid.

While Mr Nguyen's evidence was, at times, imprecise, the Commission found him to be a forthright witness open to making substantial admissions against self-interest. The Commission tends to consider his evidence reliable but, in any case, did not rely on Mr Nguyen's evidence in its corruption findings against Mr Abdi in relation to the Glenfield Transport Interchange car park.

Mr Abdi also submitted that the scoring of the ASN Contractors tender was done by consensus and that he was not present at the meeting at which ASN Contractors was formally accepted as the preferred tenderer. The Commission accepts this submission as factually true but inconsequential. It was a recommendation of the project procurement tender assessment committee report that ASN Contractors was the preferred tenderer and Mr Abdi acknowledged he had input in the scoring in the report. He also accepted that he made false representations when signing off on the report.

### Victoria Street Station (chapter 5)

Mr Abdi submitted that Counsel Assisting provided no evidence that Mr Abdi was aware that Mr Aziz's résumé contained false statements. This, along with Mr Abdi's related correspondence of 24 February 2017, is addressed in the body of the chapter.

Mr Abdi also submitted that there is no evidence that there was any impropriety in his adding Dabcorp to the list of tenderers for the Victoria Street Station works. His conduct relating to Dabcorp is addressed in the body of the chapter.

Regarding how the work was ultimately awarded to the Sanber Group, Mr Abdi submitted that he had no influence in the decision, and the decision was appropriate. In particular, Mr Abdi disputed the implications of an email from Mr Aziz to fellow Downer employees, dated 13 July 2017, that recorded his involvement. Mr Abdi's submissions on this subject are addressed in the body of the chapter.

### Central Station (chapter 6)

Submissions on behalf of Mr Abdi contended that a corrupt conduct finding pursuant to s 8(2A)(c) was not available due to a lack of evidence showing Mr Abdi's dishonest intent in receiving his share of the profits from the Central Station project. It is unnecessary to address this issue as the Commission has determined that no corrupt conduct findings are available, as outlined in chapter 5 of the report.

Submissions received on behalf of Mr Abdi, on 21 November 2023, contend that the Commission should consider whether it is appropriate to form the opinion that consideration be given to obtaining the advice of the DPP with respect to his prosecution for an offence of corruptly giving a benefit to Mr Aziz for Mr Aziz showing favour to RJS Infrastructure in relation to Downer's allocation of a Central Station subcontract on the TfNSW TAP project, in contravention of s 249B(2)(a) of the Crimes Act because:

- an evidential *lacuna* exists as to evidence that is capable of giving the primary records corrupt conduct
- Mr Aziz and Mr Nguyen would need to give evidence in criminal proceedings against Mr Abdi. They may not be compellable witnesses because their evidence would be self-incriminating
- the primary materials are of limited value in establishing Mr Abdi corruptly provided a benefit to Mr Aziz
- Mr Aziz and Mr Nguyen's evidence lacks specific knowledge of Mr Abdi's corrupt conduct and lacks credibility.

The Commission has addressed Mr Abdi's submission in chapter 6 of this report. The Commission does not accept the submission that there is insufficient evidence upon which the Commission might form an opinion as to consideration being given to obtaining the advice of the DPP.

### Lithgow Station (chapter 7)

Submissions received on behalf of Mr Abdi on 4 September 2023 contend that the Commission would find, contrary to Counsel Assisting's submission, that there is insufficient admissible evidence upon which the Commission would form the opinion that consideration should be given to obtaining the advice of the DPP with respect to his prosecution for any offence under s 249B(2) of the Crimes Act for payments made by him to Mr Aziz.

The Commission has addressed Mr Abdi's submission in chapter 7 of this report. The Commission does not accept that submission.

### Kingswood Station (chapter 8)

Submissions received on behalf of Mr Abdi on 4 September 2023 contend that the Commission would find, contrary to Counsel Assisting's submission, that there is insufficient admissible evidence upon which the Commission would form the opinion that consideration should be given to obtaining the advice of the DPP with respect to his prosecution for any offence under s 249B(1) of the Crimes Act for payments made by RJS Infrastructure to JTG Services and a s 249B(2) offence for payments made by Mr Abdi to Mr Pilli.

The Commission has addressed Mr Abdi's submission in chapter 8 of this report. The Commission does not accept those submissions.

## Chandler Macleod and JTG Services invoices (chapter 12)

In relation to the Chandler Macleod payments to Ms Tosh and Mr Panagakis detailed in chapter 12 of this report, Counsel Assisting submitted that the Commission would be of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Abdi (and others) for the following specified criminal offence(s):

- An offence(s) under s 156 (larceny by clerks/servants) and/or 192E (fraud) of the Crimes Act (by way of joint criminal enterprise with Mr Aziz, who is Downer's "servant" for the purposes of s 156, and Mr Panagakis) in relation to the payments by Chandler Macleod to Ms Tosh and Mr Panagakis for work that was never performed.

It was submitted on behalf of Mr Abdi, essentially, that the Commission would find that s 156 is an inappropriate provision for consideration due to the lack of a required physical element of the offence, namely, the act of taking and carrying away of the property the subject of the putative offence.

As noted in chapter 12, the Commission accepts that submission.

In relation to an s 192E offence, Mr Abdi submitted that the Commission would find that there is insufficient admissible evidence upon which the Commission would form the opinion that consideration should be given to obtaining the advice of the DPP with respect to his prosecution.

As detailed in chapter 12, the Commission does not accept the submission that there is insufficient evidence upon which the Commission might form such an opinion.

In relation to the three false JTG Services invoices issued to, and paid by, Downer in respect of which no work was done, Mr Abdi submitted that the Commission would find, contrary to Counsel Assistings' submission otherwise, that there is insufficient admissible evidence upon which the Commission would form the opinion that consideration should be given to obtaining the advice of the DPP with respect to his prosecution for an offence under s 192E (fraud) of the Crimes Act.

As detailed in chapter 12, the Commission does not accept that submission.

The Commission does, however, accept Mr Abdi's submission that there is an insufficient evidentiary basis upon which consideration might be given to obtaining the advice of the DPP in relation to his prosecution for an offence under s 156 of the Crimes Act.







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